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## The European Community's Environmental Policy: A Case-Study in Federalism

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Auke Haagsma

## **Abstract**

This article will examine the European Community's environmental policy and how spill-over effects in that area led to a transfer of powers from the Member-State to the Community level. It will also examine the manner in which governmental functions in this area are distributed between the two levels and, thus, whether the characteristics of a federal structure can be discerned.

# THE EUROPEAN COMMUNITY'S ENVIRONMENTAL POLICY: A CASE-STUDY IN FEDERALISM

*Auke Haagsma\**

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### INTRODUCTION

Recently, there has been a sudden surge in interest in the European Community. Most of this interest has been caused by publicity surrounding the program to complete the European Community's single market, a process commonly referred to as the "1992 program." As this is essentially an economic process, most of the emphasis is on the economic aspects of this program. However, when the process of European integration was started in the early 1950s, economic cooperation was not seen as an end in itself but rather as a means to achieve political unity.

When the late French Foreign Minister Robert Schuman launched the idea of creating what would become the European Coal and Steel Community, he stated that in order to create a real chance for peace, a united Europe had to be created.<sup>1</sup> The idea was that as economic integration developed, there would be spill-over effects into other areas, which finally would lead to a "European Union."<sup>2</sup> Schuman even indicated the form of government such a union should have when he stated that his proposals would "build the first concrete foundation of the European Federation . . . ."<sup>3</sup>

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1. R. Schuman, The Schuman Plan Declaration (May 9, 1950) (regarding the creation of the European Coal and Steel Community), *reprinted in* European Community Information Service, Press Release of May 9, 1970, at 1-2 (available from the European Community's Washington Delegation).

2. The preamble of the EEC Treaty refers explicitly to the creation of "an ever closer union . . . ." Treaty Establishing the European Economic Community, Mar. 25, 1957, preamble, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) at 1 (official English version), 298 U.N.T.S. 11, 14 (1958) (unofficial English trans.) [hereinafter EEC Treaty].

3. Schuman, *supra* note 1, at 2.

British Prime Minister Margaret Thatcher recently started a new round of debates in the discussion over the degree of European integration and the form such integration should take. She declared that "willing and active cooperation between *independent sovereign states* is the best way to build a successful European Community."<sup>4</sup> In her mind such cooperation "does not require power to be centralised in Brussels or decisions to be taken by an appointed bureaucracy."<sup>5</sup>

This Article will examine the European Community's environmental policy and how spill-over effects in that area led to a transfer of powers from the Member-State to the Community level. It will also examine the manner in which governmental functions in this area are distributed between the two levels and, thus, whether the characteristics of a federal structure can be discerned.

### I. THE FEDERAL SYSTEM OF THE EUROPEAN COMMUNITY

In its famous judgment in the *Costa v. ENEL* case,<sup>6</sup> the Court of Justice found that there was a difference between traditional international treaties and those upon which the European Communities (the "Treaties")<sup>7</sup> were founded:

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields . . .<sup>8</sup>

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4. M. Thatcher, Speech by the Prime Minister on Britain's Policies Towards Europe, Trade and Defence 4, given at the College of Europe in Bruges, Belgium (Sept. 20, 1988) (available at the *Fordham International Law Journal* office) (emphasis added).

5. *Id.*

6. *Costa v. ENEL*, Case 6/64, 1964 E.C.R. 585, Common Mkt. Rep. (CCH) ¶ 8023.

7. EEC Treaty, *supra* note 2; Treaty Establishing the European Atomic Energy Community (Euratom), Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179 II) at 1, (official English version), 295 U.N.T.S. 259 (unofficial English trans.); Treaty Establishing the European Coal and Steel Community (ECSC), Apr. 18, 1951, 1973 Gr. Brit. T.S. No. 2 (Cmd. 5189) at 1 (official English version), 261 U.N.T.S. 140 (unofficial English trans.).

8. *Costa*, 1964 E.C.R. at 593, Common Mkt. Rep. (CCH) ¶ 8023, at 7390.

In another paragraph of the same judgment the Court held that "[t]he transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights . . . ."<sup>9</sup>

Thus, unlike a traditional international organization, the Community does have its own "sovereign" rights, which have been transferred to it by its Member States. By using the term "transfer" and by indicating that the powers of the Community stem from a limitation of the sovereign rights of the Member States, the Court clearly indicated that the relation between the Community and its Member States is based on a *distribution* of powers ("rights and duties"). In other words, the acquisition of powers by the Community results in a loss by the Member States of their law-making capacity with regard to the subject matter at issue.<sup>10</sup>

In his study on federalism and supranational organizations, Peter Hay defined the "federal principle" as being present, *inter alia*,

whenever . . . there is a process involving the transfer of a substantial portion of the power and authority to govern free from interference to a central authority, established for some specific purpose or purposes, by two or more groups which are fairly homogeneous in themselves but differ from each other in some significant respect(s) as a result of which they desire to retain a substantial portion of the power and authority to govern themselves free from interference from either the other group or groups or from the central authority . . . and . . . when there is freedom to exercise without interference the power which was transferred or retained.<sup>11</sup>

In examining whether the European Communities can be said to have a federal character, the question, therefore, partly seems to be the manner in which governmental powers are distributed between the Community and the Member-State levels and whether these powers can be exercised free from interfer-

9. *Id.* at 594, Common Mkt. Rep. (CCH) ¶ 8023, at 7391.

10. See P. HAY, *FEDERALISM AND SUPRANATIONAL ORGANIZATIONS* 183 (1966) (citing Ophüls, *Quellen und Aufbau des Europäischen Gemeinschaftsrechts*, 16 *NEUE JURISTISCHE WOCHENSCHRIFT* 1697, 1699 n.10, 1751 (1963)). This does not exclude law-making by the Member States in implementation of a Community Directive.

11. *Id.* at 98 (footnote omitted) (emphasis in original).

ence. The answer to these questions is to be found in the laws governing the Communities and not in the laws of its Member States. In its well-known case law on the supremacy of Community law, the Court has consistently held that no limits can be imposed on the powers of the Community by the law of its Member States, not even by their Constitutions.<sup>12</sup>

The Treaties do not contain lists of the subjects falling within the Communities' jurisdiction. This does not mean, however, that the Communities have unlimited jurisdiction. Like other international organizations, they have to act within the framework of the Treaties that created them.<sup>13</sup> Because they can only become active when a Treaty provision specifically gives ("attributes") them the powers to do so, the Treaties are often referred to as giving "compétence d'attribution."<sup>14</sup>

In the EEC Treaty this attribution of power is created, in a general manner, by Article 2, which lays down the tasks of the Community,<sup>15</sup> and by Article 3, which enumerates the various activities that it shall perform.<sup>16</sup> In addition, the Community institutions do need, however, a specific provision giving them the power to act. We will examine how in the environmental field the Treaties provide the Community with the necessary powers.

## II. ENVIRONMENTAL POLICY UNDER THE ORIGINAL TREATIES

### A. *Absence of Specific Treaty Provisions*

Originally, none of the three Treaties creating the Community contained provisions specifically "attributing" the power to act in the area of environmental policy. Indeed, the word "environment" was not even mentioned in any of the three Treaties. The absence of specific powers apparently meant that the Community could not become active in this

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12. See *Costa*, 1964 E.C.R. at 585, Common Mkt. Rep. (CCH) ¶ 8023.

13. See Tizzano, *The Powers of the Community*, in THIRTY YEARS OF COMMUNITY LAW 43 (1981).

14. *Id.*

15. See EEC Treaty, *supra* note 2, art. 2, 1973 Gr. Brit. T.S. No. 1, at 3, 298 U.N.T.S. at 15.

16. See *id.* art. 3, 1973 Gr. Brit. T.S. No. 1, at 3-4, 298 U.N.T.S. at 15-16.

field and, therefore, that the Member States were still responsible for implementing environmental policy.

However, in the early 1970s, the Community adopted measures that at least partly had the aim of protecting the environment.<sup>17</sup> In March 1970, for example, the Council adopted a directive on measures against air pollution caused by motor vehicles.<sup>18</sup> This directive and others, on issues such as the biodegradability of detergents<sup>19</sup> and the sulphur content of certain fuel-oils,<sup>20</sup> were adopted pursuant to the so-called "General Program for the elimination of technical barriers to trade within the Community."<sup>21</sup> In these three instances, the Community directives laid down Community-wide standards, which, to some extent, replaced differing national standards.<sup>22</sup> Goods produced and marketed in accordance with those "harmonized" standards could then be sold throughout the Community. Obviously, differences between national standards can create technical barriers to trade, regardless of the purpose served by those standards.

The Community standard, however, will necessarily have the same objective as the national standards it seeks to harmonize. In the case of the first directive mentioned above, the national standards involved sought to limit air pollution caused by exhaust gases from motor vehicle engines. Consequently, the Community directive had the same aim, i.e., to protect the environment.<sup>23</sup>

The facilitation of intra-Community trade was not the only

17. One directive was adopted even earlier. Council Directive No. 67/548, 10 J.O. L 196/1 (1967), O.J. Eng. Spec. Ed. 1967-68, at 234, Common Mkt. Rep. (CCH) ¶ 3451, was aimed at protecting the population against dangerous substances and preparations and could thus be considered to have, at least to some degree, an "environmental objective."

18. Council Directive No. 70/220, 13 J.O. L 76/1 (1970), O.J. Eng. Spec. Ed. 1970, at 171, Common Mkt. Rep. (CCH) ¶ 10,917 [hereinafter Directive 70/220].

19. Council Directive No. 73/404, O.J. L 347/51 (1973).

20. Council Directive No. 75/716, O.J. L 307/22 (1975).

21. Council Resolution of May 28, 1969, 12 J.O. C 76/1 (1969).

22. In some cases, the Community standard becomes the only applicable standard, thus replacing existing national standards or creating a standard where none previously existed. This is normally referred to as "total harmonization." In other cases, the Community standard applies throughout the Community, but Member States have the option to allow the marketing of other products. This is called "optional harmonization."

23. See Directive 70/220, *supra* note 18.



reason why the Community institutions wanted to become active in the environmental field. A number of disasters, having a dramatic environmental impact, occurred in Europe. The *Torrey Canyon*<sup>24</sup> and *Amoco Cadiz*<sup>25</sup> disasters, which resulted in huge oil leakages polluting long stretches of beach and killing many animals and other forms of life, made many people realize not only the extent of the hazards presented to the environment by modern day economic activities, but also that international cooperation was required to effectively combat these dangers.

These realizations were recognized by the heads of state and government of the Member States of the Community when, at their "summit meeting" in Paris in October 1972, they decided to establish an EC environmental policy. In the declaration published at the end of their two-day meeting (the "summit declaration"), this concern was expressed in just two sentences: "The Heads of State and Government stressed the value of a Community environment policy. They are therefore requesting the Community Institutions to draw up an action programme with a precise schedule before 31 July 1973."<sup>26</sup> As a follow-up to this summit declaration, the Commission submitted a draft action program to the Council, which the latter approved in November 1973.<sup>27</sup>

It is interesting to see how the Council addressed the issue of the Community's powers in the environmental field. The program was approved by a declaration (the "Programme on the Environment") adopted not only by the Council, but also by the "representatives of the governments of the Member States meeting in the Council."<sup>28</sup> This is the formula normally used in cases where the issues partly fall outside Community

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24. In 1967, the tanker *Torrey Canyon* broke up off southwest England, dumping 620,000 barrels of oil on the English and French coasts.

25. In 1978, the tanker *Amoco Cadiz*, carrying 68 million gallons of oil, broke in half after ramming a reef, dumping oil on the Brittany coast. See *U.S. Supertanker Splits in Two; Oil Begins Fouling Brittany Shore*, N.Y. Times, Mar. 18, 1978, at 20, col. 5.

26. Declaration of The First Summit Conference of the Enlarged Community, reprinted in E.C. Bull No. 10, at 14, 20 (1972).

27. Council Declaration of Nov. 22, 1973, on the Programme of Action of the European Communities on the Environment, O.J. C 112/1 (1973) [hereinafter Programme on the Environment]. This was not just a Council declaration, but also a declaration adopted by the representatives of the governments of the Member States meeting in the Council.

28. *Id.*

“competence.”<sup>29</sup>

In spite of this, the Programme on the Environment, quite surprisingly, then states:

[I]n 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 now be imagined in the absence of an effective campaign to combat pollution and nuisances or of an improvement in the quality of life and the protection of the environment.<sup>30</sup>

After this statement, the conclusions that “improvement in the quality of life and the protection of the natural environment are among the fundamental tasks of the Community” and that “it is therefore necessary to implement a Community environment policy”<sup>31</sup> hardly come as a surprise.

The Commission, in an attempt to get the Council to agree that environmental measures could be adopted by the Community, decided to put a precise action program to the Council for approval. This was somewhat unorthodox, because the Commission, under the institutional set-up of the EEC Treaty, has the monopoly of making proposals and, thus, of initiating the decision-making or legislative process, without being told by any other institution when to make a proposal or what kind of proposal should be made.<sup>32</sup>

That is, however, exactly what the action program does: it defines the objectives and principles of the EC’s environmental policy, describes the measures that should be taken, and contains a detailed list, with time-table, of the measures to be taken. The program even goes so far as to state that the priorities may be modified *by the Council*, on the initiative of the Commission.<sup>33</sup>

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29. Here—and quite frequently in literature on E.C. law—the word “competence” is used not in its traditional meaning of “ability,” but, rather, in the French meaning of “powers” or “responsibility.”

30. Programme on the Environment, *supra* note 27, at 1-2.

31. *Id.* at 2.

32. There are a few exceptions to this monopoly power, such as Article 84(2) of the EEC Treaty, before this Article was amended by the Single European Act (the “SEA”), *infra* note 100, and the new Article 130s, which was added by the SEA.

33. See Programme on the Environment, *supra* note 27, at 2.

Such modification has occurred three times: in 1977,<sup>34</sup> in 1983,<sup>35</sup> and in 1987.<sup>36</sup> These decisions are sometimes referred to as the second, third, and fourth environmental programs. In reality though, there is only one program, which has been periodically updated and amended.

### B. *The Search for Other Possible Legal Bases*

The Community's action program indicates, inter alia, the measures that should be adopted but does not itself provide the legal basis for doing so. That basis still had to be found in the EEC Treaty. As the Treaty does not contain any specific provisions on the environment, a more general provision had to be used. The action program did not even indicate which legal bases could be considered. In reality though, two bases have been used: Articles 100 and 235 of the EEC Treaty, sometimes separately, sometimes combined.

#### 1. Article 100

Article 100,<sup>37</sup> which allows the approximation of "such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market,"<sup>38</sup> is the general provision in the EEC Treaty on the harmonization of legislation. It contains two non-procedural requirements: there must be provisions of national law that can be "approximated," and these provisions must "directly affect" the establishing or functioning of the Common Market.<sup>39</sup>

The first requirement has not kept the Commission from submitting proposals in cases where no provisions were in force in any of the Member States, although drafts were being

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34. Council Resolution on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment, O.J. C 139/1 (1977).

35. Council Resolution on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment (1982 to 1986), O.J. C 46/1 (1983).

36. Council Resolution on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment (1987-1992), O.J. C 328/1 (1987).

37. EEC Treaty, *supra* note 2, art. 100, 1973 Gr. Brit. T.S. No. 1, at 37-38, 298 U.N.T.S. at 54.

38. *Id.*

39. *Id.*

discussed in some of them.<sup>40</sup> Given that concerns about the environment are still fairly recent and that many environmental issues are, therefore, not yet governed by specific provisions, it seems a bit odd to first wait for the introduction of national measures or, at least, for such measures to be proposed, before the Community can become active.

The second requirement gives rise to more problems. In the instances mentioned above,<sup>41</sup> differences between national standards created obstacles to the free circulation of goods, but not all environmental provisions will have so clearly a direct effect on the Common Market. Former Advocate-General VerLoren van Themaat has no doubt about measures that "are intended to regulate access to, or action in, the markets for goods, services, labor, or capital, and that have a direct effect on trade between the Member States."<sup>42</sup> However, environmental measures will often not have such an objective. According to VerLoren van Themaat, measures with a different objective can also have a direct effect on the Common Market, but then the influence must have some quantitative effect "even though it need not be susceptible of precise measurement."<sup>43</sup>

Measures to protect the habitat of an endangered species of wildlife, for example, will not normally have such an effect. Thus, Article 100 cannot be used. The effective protection of such habitats may, however, require measures that transcend the national level. In such cases the Community has used Article 235.

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40. See, e.g., Commission's Proposal for a Council Directive on the Indication by Labelling of the Energy Consumption of Domestic Appliances, O.J. C 212/2 (1978). The "considerant" in the recitals justifying the use of Article 100 simply states that the information "is currently supplied in various ways, either in accordance with national regulations or in the absence of such regulations; whereas this situation is likely to create non-tariff barriers to intra-Community trade . . ." *Id.* at 3. The subsequent directive, Council Directive No. 79/530, O.J. L 145/1 (1979), Common Mkt. Rep. (CCH) ¶ 3327, contained the same recital, though, in the meantime, national measures had been introduced in at least one Member State. *Id.* at 7, Common Mkt. Rep. (CCH) ¶ 3327, at 2539.

41. See *supra* text accompanying notes 17-20.

42. VerLoren van Themaat, *Harmonization of Laws*, in *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY ON THE EEC TREATY* 3-467, 3-551 (1988) [hereinafter *LAW OF THE EEC*].

43. *Id.*

## 2. Article 235

Although the Treaty only allows the Community institutions to become active when specific powers are provided, its drafters wanted to create a dynamic and developing Community, rather than a static one.<sup>44</sup> Article 235 is the main expression of this wish. It allows Community action that is necessary to attain, in the course of the operation of the Common Market, one of the objectives of the Community without the necessary powers having been provided.<sup>45</sup> In such cases, the Council can act unanimously on a proposal from the Commission and after consulting the European Parliament.<sup>46</sup>

Let us now take each of the non-procedural conditions of Article 235 and apply them to the environmental sector.

*The necessary powers have not been provided.* As just discussed, Article 100 allows for the taking of measures in the environmental field under certain conditions. Thus, in these cases, Article 235 cannot be used.<sup>47</sup> However, Article 235 must be used, sometimes jointly with Article 100, in order to justify provisions that cannot be taken on the basis of Article 100.<sup>48</sup>

*Community action should prove necessary.* It could be argued that this phrase means that Article 235 can only be used if a certain issue necessarily requires Community, rather than joint Member-State, action. Similarly, one could then ask whether in such cases the Member States have lost their ability to act.

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44. Kapteyn, *Preliminary Observations on Articles 235-236*, in *LAW OF THE EEC*, *supra* note 42, at 6-267.

45. The text of Article 235 is as follows:

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, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

EEC Treaty, *supra* note 2, art. 235, 1973 Gr. Brit. T.S. No. 1, at 73, 298 U.N.T.S. at 91.

46. *Id.*

47. As Article 100 of the Treaty only allows for the adoption of directives, the Commission has argued—in the customs area—that Article 235 can be relied on for adopting other types of instruments, especially regulations, when the adoption of directives is inappropriate.

48. Thus, the Commission's Proposal for a Council Directive on the Approximation of the Laws of the Member States Relating to Noise Emitted by Lawn Mowers, O.J. C 86/9 (1979), contained mostly provisions which could be based on Article 100. When, however, a provision was included to restrict the use of these machines to certain hours and certain days, it was decided to add Article 235.

Both theses have been denied,<sup>49</sup> and we tend to agree with this approach. As this touches upon the central issue discussed in this Article, we will come back to it later.

*In the course of the operation of the common market.* As Kapteyn has indicated in his commentary on Articles 235 and 236, several differing views have been expressed on the exact meaning of this clause, which demonstrates that its meaning is not all that obvious.<sup>50</sup> As does Marengo,<sup>51</sup> we interpret this clause as requiring that the measures adopted under Article 235 not impair the proper functioning of the Common Market. This obviously does not exclude the adoption of environmental measures.

*To attain one of the objectives of the Community.* How should the word "objectives" be interpreted? This is especially important in the environmental field, because, as indicated above, neither the preamble nor Articles 2 and 3 of the EEC Treaty refer to the protection of the environment as an objective of the Community. It should be recalled, however, that the Council has in fact used Article 235 to adopt measures in the environmental field. How then did it take this "hurdle"?

The Council sometimes leaned heavily on the Treaty's preamble. In the directive on the conservation of wild birds, for example, the Council referred to "the objectives regarding the improvement of living conditions, a harmonious development of economic activities throughout the Community and a continuous and balanced expansion . . . ."<sup>52</sup> On another occasion, the Council spoke more directly of "the Community's objectives in the sphere of the protection of the environment."<sup>53</sup>

49. See Kapteyn, *supra* note 44, at 6-287.

50. See *id.* at 6-291.

51. Marengo, *Les Conditions d'Application de l'Article 235 du Traité C.E.E.*, 131 *REVUE DU MARCHÉ COMMUN* 147 (1970).

52. Compare Council Directive No. 79/409, O.J. L 103/1 (1979) [hereinafter Directive 79/409] with EEC Treaty, *supra* note 2, preamble, 1973 Gr. Brit. T.S. No. 1, at 1, 298 U.N.T.S. at 14. The preamble of the Treaty refers specifically to the objectives of improving "the living and working conditions," strengthening "the unity of . . . economies" and ensuring "their harmonious development," and guaranteeing "steady expansion." EEC Treaty, *supra* note 2, preamble, 1973 Gr. Brit. T.S. No. 1, at 1, 298 U.N.T.S. at 14.

53. See, e.g., Council Directive No. 85/337, O.J. L 175/40 (1985). It is true that the paragraph containing the words quoted goes on to speak of "the quality of life,"

The fact that the latter attitude could already be found in the Council declaration approving the original action program shows that this interpretation of the Treaty is not new. A justification is given by Marengo, who distinguishes a category of objectives that can be derived from the Treaty as a whole, though they cannot be specifically based on any particular Article.<sup>54</sup>

### C. *The European Court of Justice's Case Law*

The question whether the Community has the powers to act in the environmental field has come up in a number of cases. In *Commission v. Italy*,<sup>55</sup> the Italian government claimed that it did not have to implement Directive 73/404,<sup>56</sup> regarding the biodegradability of detergents, by the deadline provided therein. Because the directive dealt with the protection of the environment—which was not within the Community's "competence"—Italy did not consider it a directive but rather an international convention drawn up in a special form.

The Court observed, first of all, that the directive not only sought to protect the environment, but also sought to eliminate barriers resulting from disparities between provisions of national law. Thus, the directive could be validly based upon Article 100. The Court did not stop there, however, but went on to say:

[I]t 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 the undertakings to which they apply and if there is no harmonization of national provisions on the matter, competition may be appreciably distorted.<sup>57</sup>

While the Italian defense may have been somewhat unexpected and surprising, the Court's judgment certainly wasn't.

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but this does not change the fact that a separate environmental protection objective is referred to.

54. See Marengo, *supra* note 51, at 149.

55. *Commission v. Italy*, Case 91/79, 1980 E.C.R. 1099, Common Mkt. Rep. (CCH) ¶ 8657.

56. Council Directive No. 73/404, O.J. L 347/51 (1973).

57. *Commission v. Italy*, 1980 E.C.R. at 1106, ¶ 8, Common Mkt. Rep. (CCH) ¶ 8657, at 7781.

The latter cannot be said, however, of the judgment in *Brûleurs d'Huiles*.<sup>58</sup> This preliminary ruling concerned the directive on the disposal of waste oils.<sup>59</sup> Under this directive, the Member States were required to set up a system for the safe disposal of waste oils. To this effect, they were allowed to draw up zones within which specifically licensed companies had to carry out the collection and/or disposal of the oil "where appropriate in the zone assigned to them by the competent authorities."<sup>60</sup>

The French authorities implemented this directive by providing that waste oils could only be disposed of by making them available to an approved company in a given zone or by keeping them if the company had a permit for the disposal itself. The French association, defending the interests of burners of waste oils, attacked the French legislation, inter alia, on the grounds that it was incompatible with the Treaty provisions on the free circulation of goods.

The Court replied by stating, first of all, 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 of general interest pursued by the Community provided that the rights in question are not substantively impaired."<sup>61</sup>

The Court then went on to state that "[t]here 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*."<sup>62</sup>

This statement came as a surprise and did not seem to be necessary for deciding the case. The main question before the Court was whether environmental policy reasons could justify exceptions to the free circulation of goods. For this to be the case, the Court did not have to find that environmental protection was an essential objective of the Community. Although, for instance, national security reasons can justify exceptions to the free circulation of goods under Article 36 of the EEC

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58. Procureur de la République/ADBHU, Case 240/83, 1985 E.C.R. 531, Common Mkt. Rep. (CCH) ¶ 14,164.

59. Council Directive No. 75/439, O.J. L 194/23 (1975).

60. *Id.* art. 5, at 24.

61. ADBHU, 1985 E.C.R. at 549, ¶ 12, Common Mkt. Rep. (CCH) ¶ 14,164, at 15,993.

62. *Id.* at 549, ¶ 13, Common Mkt. Rep. (CCH) ¶ 14,164, at 15,993 (emphasis added).



Treaty, few Treaty experts would defend the proposition that security matters are within the Community's powers.

If the statement was not needed, why then was it made? The most likely reason seems to be that the Court wanted to indicate that environmental protection was a valid justification for "measures having an effect equivalent to quantitative restrictions," in the same manner that Article 36, and especially the "Cassis de Dijon"<sup>63</sup> jurisprudence, justify such restrictions. The quoted paragraph must then be read as referring to the protection of the environment as a "mandatory requirement."<sup>64</sup>

This reading would be in line with the Court's conclusion, which states that the French provisions do not go beyond the restrictions that are justified by the pursuit of the objective of environmental protection, which is in the general interest.<sup>65</sup>

The Court, in its recent judgment in the Danish returnable bottles case,<sup>66</sup> confirmed that this reading is indeed correct. There, the Court concluded from the waste oil case that environmental protection is a mandatory requirement that can limit the application of Article 30.<sup>67</sup>

Does this mean that the Court does not think that Article 235 can be used to adopt measures with a *specific purpose* to protect the environment? This conclusion does not necessarily

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63. See *Rewe v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, 1979 E.C.R. 649, Common Mkt. Rep. (CCH) ¶ 8543. Rewe-Zentral AG, a West German importer, attempted to import from France "Cassis de Dijon," a spirit containing 15 to 20% wine-spirit by volume. The West German government informed Rewe that the imported "Cassis de Dijon" could not be sold because of a regulation providing "that only potable spirits having a wine-spirit content of at least 32%" could be sold in that country. *Id.* at 651, Common Mkt. Rep. (CCH) ¶ 8543, at 7779. The Court, interpreting Article 30 of the EEC Treaty, held that this quantitative restriction on alcohol content did not serve a purpose that was in the general interest. *Id.* at 662, ¶ 14, Common Mkt. Rep. (CCH) ¶ 8543, at 7787. The "Cassis de Dijon" jurisprudence, therefore, refers to the prohibition on measures having an effect equivalent to quantitative restrictions on imports in Article 30 of the Treaty.

64. In *Rewe*, the Court held that "[o]bstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements . . ." *Id.* at 662, ¶ 8, Common Mkt. Rep. (CCH) ¶ 8543, at 7786.

65. *ADBHU*, 1985 E.C.R. at 552, ¶ 30, Common Mkt. Rep. (CCH) ¶ 14,164, at 15,994.

66. *Commission v. Denmark*, Case 302/86, 1988 E.C.R. \_\_ (not yet published).

67. *Id.* at \_\_.

follow from the judgment. The directive at stake in the waste oils case was partly based on Article 235. The national court raised not only questions on the interpretation of the directive but also on the validity of certain articles thereof. The Court of Justice has made clear that the procedure laid down in Article 177<sup>68</sup> is one of "judicial cooperation," in which two courts, each within their own sphere, contribute directly and reciprocally to the decision of a case.<sup>69</sup>

If, therefore, the Court had considered the directive *ultra vires* because the Treaty, and especially Article 235, did not permit the adoption of this sort of environmental measure, it could have been expected to inform the national court thereof. Possibly on the basis of this more indirect argument, the Court, in the waste oils case, accepted the principle that Article 235 can be used to pass legislation in the environmental field.<sup>70</sup>

That still does not mean, of course, that any kind of environmental measure would be possible. Waste in general, and waste oils in particular, are clearly economically tradeable goods. The important question, therefore, is whether Article 235 also allows for legislation on environmental issues that do not have an economic impact. The two cases mentioned do not directly provide an answer to this question.

#### D. *The Use of Article 235 by the Council and the Commission*

Although never sanctioned by the Court, the Commission and the Council have used Article 235 in a wide variety of cases. These include measures on the conservation of wild birds,<sup>71</sup> migratory species,<sup>72</sup> and natural habitats.<sup>73</sup> Even in these cases, the Commission and the Council normally man-

68. EEC Treaty, *supra* note 2, art. 177, 1973 Gr. Brit. T.S. No. 1, at 58, 298 U.N.T.S. at 76-77.

69. *See, e.g.*, *Schwarze v. Einfuhr-und Vorratsstelle Getreide*, Case 16/65, 1965 E.C.R. 877, Common Mkt. Rep. (CCH) ¶ 8039.

70. *Procureur de la République/ADBHU*, Case 240/83, 1985 E.C.R. 531, Common Mkt. Rep. (CCH) ¶ 14,164.

71. Directive 79/409, *supra* note 52.

72. Council Decision 82/461, on the Conclusion of the Convention on the Conservation of Migratory Species of Wild Animals, O.J. L 210/10 (1982).

73. Council Decision 82/72, Concerning the Conclusion of the Convention on the Conservation of European Wildlife and Natural Habitats, O.J. L 38/1 (1982) [hereinafter Decision 82/72].

aged to find some economic aspects. Thus, the birds directive dealt with economic activities such as catching wild birds or reaping bird eggs,<sup>74</sup> while the decision on protection of the natural habitats provided that such habitats could not be used for economic purposes.<sup>75</sup>

These examples show, in fact, that it is rather difficult to think of environmental measures that do not have some economic impact. Article 235 does not, however, require just any economic impact but, rather, a necessity to attain one of the objectives of the Treaty. What the Commission and the Council have really done is consider environmental measures as part of the effort to improve the living and working conditions of the people of the Member States, which, according to the preamble of the EEC Treaty, is an "essential objective" of the Community.<sup>76</sup>

It must be admitted that from a legal point of view, this is not a very convincing argument. As stated above, the Court has not yet given its position on this issue. Many writers are of the opinion that the legal foundations of the Community's environmental policy in fields not directly related to the basic principles of the Common Market, and, in particular, the free circulation of goods, are not all that strong.<sup>77</sup>

It is obvious, however, that until the Court strikes down the Council's interpretation, the latter paves the way toward the adoption of virtually any kind of environmental measure. Indeed, there does not seem to be one single case in which the Community—both the Commission and all members of the Council—wanted to adopt certain environmental measures but refrained from doing so because it did not have the necessary powers to act.

#### E. *The "Danish Problem"*

A unanimous decision of the Council is required for the Community to use its powers under Article 235. This means

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74. See Directive 79/409, *supra* note 52, art. 5, at 3.

75. See Decision 82/72, *supra* note 73, art. 7(3), at 4.

76. EEC Treaty, *supra* note 2, preamble, 1973 Gr. Brit. T.S. No. 1, at 1, 298 U.N.T.S. at 14.

77. See 2 E. REHBINDER & R. STEWART, *INTEGRATION THROUGH LAW: ENVIRONMENTAL PROTECTION POLICY* 18-19 nn.12-13 (1985) (providing an extensive list of writers).

that even the more doubtful cases mentioned above received the agreement of all of the Member States. In this context, Denmark's position is particularly interesting.

Denmark has traditionally been one of the most reluctant in accepting the use of Article 235. At the same time, for domestic political reasons, it placed a high priority on environmental policy. Although it could, therefore, agree with the aims pursued by most of the Commission's proposals in the environmental field, it did have a problem when these proposals were based on Article 235. Another aspect of this so-called "Danish problem" was that Denmark often opposed proposals founded on other Treaty provisions, especially Article 100, that would lower the level of environmental protection already in place in Denmark on the basis of existing national legislation.<sup>78</sup> As both Articles 100 and 235 required a unanimous Council decision, these problems often meant that proposals were being blocked in the Council without much hope of an early compromise.

#### F. *An External Environmental Policy for the Community*

We have thus far discussed the possibilities for an environmental policy within the Community. It is obvious, however, that this area often calls for action on an even wider scale. As the original Treaties did not provide any internal powers in the environmental field, it is hardly surprising that no external powers were provided either.

As with the case of the internal powers, this does not mean that the Community cannot act externally. Basically, there are two ways in which the Community can become active in this field. Article 113 can be used if the environment is to be protected through the regulation of international trade.<sup>79</sup> In other cases, the Community can invoke the theory of "parallelism": if the Community has the *internal* powers to act on environmental issues, it can do so *externally* as well. If the internal powers have already been exercised, the external powers will often be "exclusive," which means that they do not leave any powers to the Member States.

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78. The same was true for provisions on the protection of workers.

79. EEC Treaty, *supra* note 2, art. 113, 1973 Gr. Brit. T.S. No. 1, at 42-43, 298 U.N.T.S. at 60.

## 1. Article 113

Since the end of the transitional period (January 1, 1970), Article 113 has given the Community an exclusive power to act on international trade matters. If environmental protection calls for restrictions on imports or exports, the question, therefore, arises whether Article 113 could or even should be used. This question has come up in relation to import restrictions on whales or other cetacean products and on seal pups and products derived from them (especially seal skins). It has also come up in discussions regarding the implementation in the Community of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (the "Washington Convention" or "CITES").<sup>80</sup> As the name indicates, this convention dealt specifically with international trade and, therefore, under Article 113, the Community would seem to be exclusively responsible.

Although the convention was concluded after the end of the transitional period, the Community did not participate in the negotiations and was not a party to the convention. Some of its Member States were, however, party to the convention, which created a number of problems. Some of these problems were solved by the inclusion in the convention of an article that excludes trade within a customs union from the application of the convention. As not all Member States were parties to the convention, however, many other problems remained.

In order to solve these problems, the Commission sent a proposal to the Council for a regulation that amounted to nothing less than a *de facto* implementation of CITES in the whole Community, including the Member States not party to the convention.<sup>81</sup> The Commission proposal was based on Article 113.<sup>82</sup> However, during the discussions in the Council, several Member States raised objections to this legal base.

In the first place, it was said that Article 113 only covered measures whose final objective was to regulate trade. If, as in

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80. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, Washington, D.C. (concluded in the framework of the United Nations Environmental Program (UNEP)).

81. See Proposal for a Council Regulation on the Implementation in the Community of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, O.J. C 243/16 (1980).

82. *Id.*

this case, the import restriction was merely an instrument to achieve other objectives, then Article 113 was not available.<sup>83</sup> Furthermore, some Member States simply did not want to use Article 113 because it would give exclusive powers to the Community. In the end the Council decided to use Article 235,<sup>84</sup> the same article that had been used earlier for the import restrictions on whales<sup>85</sup> and which would again be used in the case of the import prohibition on skins of certain seal pups.<sup>86</sup>

From a strictly legal point of view, Article 113 should have been used in all of these cases. The fact that the regulation of trade was only incidental does not seem to be a convincing argument for excluding the use of the Article. It could be argued that trade regulation is never an end in itself. Placing import restrictions on textile products or levying import duties on alcoholic beverages, for instance, are done with the purpose of protecting national manufacturers or the health of the population. Such measures are, however, founded on Article 113 without any discussion.

## 2. External Powers Stemming from *Kramer* and *ERTA*

In its judgment in *Kramer*,<sup>87</sup> the Court had to decide whether the Community, in the absence of specific Treaty provisions authorizing it to enter into international commitments, could, nevertheless, be allowed to do so.<sup>88</sup> The Court's answer was summarized in the following terms:

The Court has concluded *inter alia* that whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an ex-

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83. This has also been the position of the Legal Service of the Council and is reflected in the fourth "whereas" recital to Council Regulation No. 3626/82, O.J. L 384/1 (1982) [hereinafter Regulation 3626/82]. This "whereas" clause mentions the need to uniformly apply "certain commercial policy instruments . . . ." *Id.*

84. *See id.*

85. Council Regulation No. 348/81, O.J. L 39/1 (1981).

86. Council Directive No. 83/129, O.J. L 91/30 (1983).

87. *Kramer*, Joined Cases 3, 4 and 6/76, 1976 E.C.R. 1279, Common Mkt. Rep. (CCH) ¶ 8372.

88. *Id.* at 1307-08, ¶¶ 16-20, Common Mkt. Rep. (CCH) ¶ 8372, at 7741.

press provision in that connexion.<sup>89</sup>

According to this so-called theory of "parallelism," the Community *can* act externally whenever it has the powers to act internally. As long as the Community has not used these powers, the Member States are still free to act independently. However, once the Community has exercised its powers, either internally or externally, Member States are no longer allowed to take measures or enter into any agreements "which might affect those rules or alter their scope," as was stated by the Court in its famous *ERTA* judgment.<sup>90</sup> Thus, in such cases, the Community enjoys exclusive powers.

Where the Community wants to act on the basis of the Court's *Kramer* or *ERTA* case law, the concept of parallelism means that the legal base to be used externally is the one from which the internal powers follow. Thus, an international agreement in an area where the Community has already adopted a directive based on Article 100 should then be negotiated and ratified on the basis of that article. If the internal powers result from Article 235, it is this article that is to be used for the external action.<sup>91</sup>

In all cases in which the Community participates in international negotiations—with or without previously existing internal legislation—it is the Commission that negotiates on behalf of the Community.<sup>92</sup> Although no mandate from the Council or the European Parliament is required, it is obviously

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89. Opinion 1/76, O.J. C 107/4, at 12 (1977).

90. Commission v. Council, Case 22/70, 1971 E.C.R. 263, 275, ¶ 22, Common Mkt. Rep. (CCH) ¶ 8134, at 7525. That case considered international Member State action that was taken after the Community had passed legislation internally. This is just one example of a possible conflict with Article 5, which requires Member States to abstain from any measure that might jeopardize the attainment of the objectives of the Treaty. See EEC Treaty, *supra* note 2, art. 5, 1973 Gr. Brit. T.S. No. 1, at 4, 298 U.N.T.S. at 17.

91. Similarly, the Council used Article 43 to conclude the Convention on the Conservation of Antarctic Marine Living Resources. See Council Decision 81/691, O.J. L 252/26 (1981).

92. Article 228 of the EEC Treaty states:

[W]here this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organisation, such agreements shall be negotiated by the Commission. Subject to the powers vested in the Commission in this field, such agreements shall be concluded by the Council, after consulting the Assembly where required by this Treaty.

EEC Treaty, *supra* note 2, art. 228, 1973 Gr. Brit. T.S. No. 1, at 71-72, 298 U.N.T.S. at 90.

useful for the Commission to know at least the views of the Council. Otherwise the embarrassing situation might arise in which the Commission would negotiate an agreement that the Council would then refuse to "conclude." It is in the framework of these informal consultations that the Member States have a possibility to influence the decision whether or not the Community should participate in certain negotiations.

If Member States would like to participate in an international agreement in an area in which the Community has partly exercised its powers, they can only do so if the Community participates as well. This led to interesting debates—both between the Community and its Member States and with "third" countries including the United States—in relation to the Vienna Convention for the protection of the ozone layer<sup>93</sup> and a supplementary protocol, the so-called Montreal Protocol, on substances that deplete the ozone layer.<sup>94</sup> Both were jointly signed and ratified by the Community and several of its Member States.<sup>95</sup>

Although the parallelism criteria of the *Kramer* judgment seems rather easy to apply, the criterion used in the *ERTA* decision creates more difficulties in practice. It is not always clear when or how an obligation entered into by a Member State "might affect [community] rules or alter their scope."

Three different interpretations of this criterion have been defended.<sup>96</sup> According to the first, the Community would be exclusively responsible for the whole of the subject-matter on which it had legislated. The second interpretation limits that exclusive responsibility to only those international agreements that would affect the existing legislation or alter its scope; insofar as this is not the case, Member States could still act. The third interpretation justifies the exclusive Community responsibility on the basis of the text of the regulation that was at

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93. The Vienna Convention was signed on March 22, 1985. See Council Decision 88/540, O.J. L 297/8, annex I, at 16 (1988).

94. The Montreal Protocol was negotiated and adopted September 16, 1987. *Id.* at 27.

95. *Id.* at 9; see also Council Regulation No. 3322/88, O.J. L 297/1 (1988) (on certain chlorofluorocarbons and halons which deplete the ozone layer).

96. For a discussion of these interpretations, see Temple Lang, *The ERTA Judgment and the Court's Case-Law on Competence and Conflict*, in 6 Y.B. EUR. L. 183, 197-203 (1986).



issue in the *ERTA* case.<sup>97</sup> Had that regulation not specifically barred Member States from concluding international agreements, then they could still have done so, according to this interpretation.

The third interpretation seems too restrictive and is difficult to defend on the basis of the wording of the judgment. If Member States would not have been able to conclude any agreement in this area, why then did the Court speak of affecting existing legislation or altering its scope? The exact consequences of the first two interpretations can be illustrated very well by applying them to the case of CITES.

As indicated above, CITES was implemented at Community level at a time when the Community was not even a party to it.<sup>98</sup> CITES contains a list of protected species, which can be amended by a two-thirds majority of the parties present and voting. Such amendments would then apply to all parties except those making a formal reservation. Conceivably, some Member States might agree to the inclusion of a certain species while others might object. Whether each Member State could then vote as it liked, or whether each Member State would either have to vote in the same way as other Member States or abstain from voting, depends on which of the above interpretations is accepted. The first interpretation would exclude any independent role for the Member States externally, even though the implementing regulation contains a provision, article 15, which allows Member States—under certain conditions—to adopt stricter measures.<sup>99</sup> Precisely because of this provision, it could be argued that the second interpretation mentioned above would allow Member States individually to vote for an amendment to the appendices of CITES, even though the whole Community had not decided in favor of it.

Some Member States have argued that this example illustrates that the first interpretation is wrong. If, in fact, Member States would still have the possibility of internally adopting measures that differ from the regulation, why then would they not have the right to vote for them externally? The final an-

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97. See Council Regulation No. 543/69, 12 J.O. L 77/49 (1969), O.J. Eng. Spec. Ed. 1969, at 170.

98. See *supra* notes 80-82 and accompanying text.

99. See Regulation 3626/82, *supra* note 83, art. 15, at 14.

swer in this debate will have to be given by the Court of Justice, which has not yet conclusively done so. That answer will ultimately depend on whether or not the Community is seen as on the way to becoming a "real" federation. In a federation of states, it is usually the federal authorities who are solely responsible for external relations, even though the states may well have a large degree of internal independence. The first interpretation, viewed in this perspective, is certainly the most federalist. It may, therefore, also be a bit too early for its "adoption."

### III. *ENVIRONMENTAL POLICY UNDER THE SINGLE EUROPEAN ACT*

As far as protection of the environment is concerned, the Single European Act (the "SEA")<sup>100</sup> amended the EEC Treaty in two respects. First, a new title, dealing specifically with the environment (the "Environmental Title") was inserted in part three of the EEC Treaty.<sup>101</sup> Second, a reference to the level of environmental protection was included in the new Article 100a on the harmonization of legislations.<sup>102</sup> That same article also contains a possibility for Member States to "opt out" of harmonized measures on grounds of major needs relating to the environment.<sup>103</sup> This article shall examine each of these provisions and their interrelation.

It is interesting to note that neither Article 2 nor Article 3 of the EEC Treaty have been amended by the SEA. Thus, although an environmental title was added, it was not deemed necessary to add environmental protection to the objectives or the activities of the Community. This seems to indicate that—at least according to the negotiators of the SEA—such protection was already included in the original Treaty.

#### A. *Why Were New Provisions Needed?*

If the Community institutions could already adopt all nec-

100. Single European Act, O.J. L 169/1 (1987).

101. *See id.* art. 25, at 11.

102. *See EEC Treaty, supra* note 2, art. 100a(3), *added by* Single European Act, *supra* note 100, art. 18, at 8.

103. *See id.* art. 100a(4), *added by* Single European Act, *supra* note 100, art. 18, at 8.

essary environmental measures by using either Article 100 or Article 235, why then were new provisions needed at all?

As decided at the European Council meeting in Milan, the objectives of the SEA were to streamline the decision-making process and make it more democratic, and confirm the necessity of completing the single market by the end of 1992. Some Member States had political problems with both of these objectives. Streamlining the decision-making process would lead to increased powers for the European Parliament, which some Member States equated to diminishing the powers of their own national Parliaments; this was clearly not a very popular result.

Confirming the necessity of completing the single market gave rise to somewhat different objections. Some Member States with high standards of protection in the environmental field, for example, feared that the commonly agreed standards that would replace their national standards would offer a lower level of protection. This could happen because under the SEA, harmonization of national standards, in most cases, would no longer require unanimity.

In order to overcome the first problem, the Commission suggested the inclusion in the new Treaty of a chapter on the environment. Although not exclusively, this suggestion seems to have been intended, in particular, to avoid Danish opposition to the SEA. Denmark opposed the transfer of powers from the national to the European Parliament and also attached a high priority to environmental protection. It was hoped that the inclusion of the environmental chapter would be seen as being so positive that it would outweigh the negative aspect of an increased transfer of powers to the European Parliament.

The problem caused by the fear that lower Community-wide standards would replace higher national standards was to be solved by the inclusion in the new Treaty of a possibility to "opt out" of a harmonized standard for reasons relating, inter alia, to environmental protection. This article will discuss each of these aspects separately.

#### B. *The New Environmental Title*

The new Environmental Title was inserted into part three

of the Treaty, concerning the Community's policies, and not into part two, which means that the environment is not mentioned among the "foundations of the Community." This is interesting, because one could well argue that environmental considerations should be part of any policy decision that the Community makes, whether such decision is on agriculture, transportation (both of which policies are found in part two), industrial, fiscal, or other policies. A clean environment could, therefore, also have been included among the principles of the Community in part one of the Treaty.

During the first years of the EC's environmental policy, the emphasis was clearly on the adoption of specific legislation, rather than on "integrating" environmental thinking into other Community policies. During the 1980s the Commission began to stress this latter aspect.<sup>104</sup> This policy is confirmed by a provision in Article 130r, which makes environmental protection a component of the European Community's other policies.

Of course, the conclusion that the insertion of the Environmental Title was not meant to change anything works both ways: the negotiators did not want to create new powers, but at the same time, they did not want to limit the scope of the Community's existing environmental policy. De Ruyt explains that questions would have been otherwise raised about the legality of those measures that had already been adopted, which would have created problems not only internally but also with regard to "third" countries and international organizations.<sup>105</sup> A limitation of the Community's powers in the environmental field would indeed have raised doubts about the validity of certain obligations that the Community had agreed to in the international arena.

The new Environmental Title consists of three articles, numbered 130r, 130s, and 130t. The first lays down objectives and principles, the second the procedure for implementing en-

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104. See, e.g., Council Regulation No. 797/85, O.J. L 93/1 (1985), which makes the protection and improvement of the environment an important part of a scheme of investment aid to farmers. This regulation represents not only a recognition of the important role that farmers play in the conservation of the natural habitat, but also acts as a guarantee that no investment aid is given to projects that do not take environmental protection criteria into account.

105. J. DE RUYT, *L'ACTE UNIQUE EUROPÉEN* 214 (1987).

environmental policy, and the third makes possible more stringent national measures.

1. Article 130r

a. *The Objectives*

Article 130r defines, in rather broad terms, the objectives of the Community's "action" with regard to the environment:

- to preserve, protect and improve the quality of the environment,
- to contribute towards protecting human health,
- to ensure a prudent and rational utilization of natural resources.<sup>106</sup>

The broad character of these objectives reflects the wish to include everything that the Community had already adopted. Originally, the Commission had proposed a much longer list, but fear of leaving out a measure finally led to the shorter but much broader description.<sup>107</sup> According to Vandermeersch,<sup>108</sup> the fact that the second and third objective could, in principle, also be covered by the first does not mean that the latter objective should be interpreted narrowly. This view would be in line with the Court's tendency to broadly interpret the provisions that grant powers to the Community institutions.

How then should the second and third objectives be interpreted? Both the protection of human health and the rational utilization of natural resources seem to be on the edge of environmental protection. Rather than an addition to the first objective, these two objectives should be seen as confirming the fact that both issues are part of the EC's environmental policy. In this sense, they stress how large the scope of the EC's environmental policy really is. As De Ruyt points out, it was precisely for this reason that Member States insisted that unanimity still be required for the implementing measures.<sup>109</sup>

Although the unanimity rule already formed an interesting

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106. EEC Treaty, *supra* note 2, art. 130r(1), added by Single European Act, *supra* note 100, art. 25, at 11.

107. DE RUYT, *supra* note 105, at 214.

108. Vandermeersch, *The Single European Act and the Environmental Policy of the European Economic Community*, 12 EUR. L. REV. 407, 413-14 (1987).

109. See DE RUYT, *supra* note 105, at 215.

guarantee that the Community would not "abuse" its powers, the negotiators went a step further on the third objective by adopting a declaration that "confirmed" that the Community's activities in the sphere of the environment may not interfere with national policies regarding the exploitation of energy resources. Although the exact legal value of these declarations is still unclear, they at least give some indication as to the "original intent" of the negotiators.

b. *The Principles*

The second paragraph of Article 130r states three principles that shall guide the EC's environmental policy. These principles are "that preventive action should be taken, that environmental damage should *as a priority* be rectified at source, and that the polluter should pay."<sup>110</sup> A fourth principle, that environmental protection requirements shall be a component of other policies, does not relate directly to the environmental policy, but to those other policies. The emphasized words ("as a priority") qualify only the second, and not the other, principles. Does this mean that those principles should be seen in absolute terms? And are these the only principles governing the environmental action, or are there still other, possibly even higher principles that, in case of conflict, may even overrule the ones listed in Article 130r? A further question that arises is whether compliance with these principles will be a factor when the Court is asked to review the legality of an environmental or, in the case of the fourth principle, other measure.

The first question will have to be answered in the negative. If the first principle had to be taken strictly there would not really be a need for the second one, for if preventive action must be taken at all times, then no damage will occur. Similarly, if damage does occur, then the first principle apparently has been violated.

If the main objective of the negotiators of the new Environmental Title was to codify existing rules rather than create new ones, then a further argument can be deduced from the historic development of these principles. The "polluter-pays" principle, for example, was introduced in the Community's en-

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110. EEC Treaty, *supra* note 2, art. 130r(2), *added by* Single European Act, *supra* note 100, art. 25, at 11 (emphasis added).

vironmental policy in the very early stages. The "first" action program made this principle a cornerstone of that policy, and in March 1975, the Council recommended to Member States that in respect of allocation of costs and of action by public authorities in the field of environmental protection, they conform, *inter alia*, to the polluter-pays principle as contained in the Commission's communication annexed to this recommendation.<sup>111</sup> The principle should not be seen in absolute terms, as the communication allows for exceptions and for it to be overridden by other principles.

This is made clear by point three of that communication, which states:

[I]f identifying the polluter proves impossible or too difficult, and hence arbitrary . . . the cost of combating pollution should be borne at the point . . . and by the legal or administrative means which offer the best solution from the administrative and economic points of view and which make the most effective contribution towards improving the environment.<sup>112</sup>

In addition to the fundamental principles such as those that exclude arbitrary, discriminatory, or disproportionate decisions, the language just quoted seems to formulate yet another overriding principle, *i.e.*, the one of "making the most effective contribution to the improvement of the environment." The fact that the Council's recommendation and the accompanying communication have not been amended following the entry into force of the SEA seems to indicate that the negotiators did not intend to change the character of the principle; they did not intend to make the principle an absolute one, nor one that allows no exceptions. It also seems to confirm that the environmental policy must be guided by not only the three principles mentioned, but by others as well.

The question whether the Court will review the validity of Community legislation in the environmental field on the basis of its compatibility with these principles is an interesting and important one. A positive answer would mean that decisions

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111. Council Recommendation 75/436, Regarding Cost Allocation and Action by Public Authorities on Environmental Matters, O.J. L 194/1 (1975) [hereinafter Recommendation 75/436].

112. *Id.* at 2.

that require private parties to pay certain sums of money—for example, to contribute to certain clean-up schemes—could be attacked on the basis that the Community regulations or directives upon which such decisions are founded violate the polluter-pays principle.

It is hard to find a reason why the Court would not admit such a review. As indicated above, however, the principles should not be seen in absolute terms and are subject to certain exceptions. Thus, the institutions of the Community can claim a relatively large discretionary margin, which means that the Court will be very restrictive in its review and will only declare a regulation or directive invalid when it contains a manifest error, when it constitutes a misuse of power, or when the institution clearly exceeds the bounds of its discretion.<sup>113</sup>

As already stated, the fourth principle of Article 130r is somewhat different from the other three, first of all because it relates to the other policies of the Community. This means that it is really a separate “track” of environmental policy. Rather than emphasizing specific environmental action, this track emphasizes the importance of integrating environmental considerations into other policy decisions.

The principle is worded in rather strong terms: “Environmental protection requirements shall be a component of the Community’s other policies.”<sup>114</sup> Does this mean that for each individual decision reached in the framework of any other policy, the Community must demonstrate that the environmental “component” has been considered? This seems somewhat exaggerated. In cases in which the environmental impact is rather obvious, it can be argued, however, that the recitals do need to include a paragraph explaining the manner in which the environmental component was taken into account. Because of the wide scope of the environmental policy, this is likely to affect many measures. As these considerations must only be a “component,” the discretionary margin is, again, fairly wide, which means that judicial review will lead to the invalidity of the measure only in exceptional cases.

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113. See, e.g., *Racke v. Hauptzollamt Mainz*, Case 136/77, 1978 E.C.R. 1245, 1256, ¶ 4, *Common Mkt. Rep. (CCH)* ¶ 8494, at 8864.

114. EEC Treaty, *supra* note 2, art. 130r(2), added by Single European Act, *supra* note 100, art. 25, at 11.



c. *Matters to be Taken Account of*

The third paragraph of Article 130r requires that the Community, in preparing its environmental action, 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 of lack of action,
- the economic and social development of the Community as a whole and the balanced development of its regions.<sup>115</sup>

The second and fourth points are interesting because they seem to allow for what is sometimes referred to as “differentiation,” i.e., different rules for different regions to take account of objective differences in the environment, the economy, and social developments.

One of the first examples of such “differentiation,” even before the SEA was negotiated, was partly based on environmental arguments. The first Directive on the lead content of petrol (“Directive 78/611”)<sup>116</sup> required Member States to fix the maximum level of lead in gasoline at a value between 0.40 and 0.15 grams per liter. Article 7 of Directive 78/611, however, allowed Ireland to establish a higher lead content. The reasons for this were two-fold. The Irish oil refineries did not have the required technology and, thus, were not suited to produce the required low-lead gasoline (this would be the economic balancing referred to in the fourth point of Article 130r). At the same time, the environment in Ireland was not as polluted with lead as was the rest of the Community, so that a slightly higher lead content could be objectively justified (the second point mentioned above). The legality of such a “differentiation” has never been challenged. The Treaty, however, now seems to provide a basis for it.

The wording of the four points mentioned above contains many ambiguities. It does seem, however, that in the case of a conflict between a principle (on which the environmental pol-

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115. *Id.* art. 130r(3), added by Single European Act, *supra* note 100, art. 25, at 11-12.

116. Council Directive No. 78/611, O.J. L 197/19 (1978).

icy shall be *based*) and one or several of the elements formulated here (which shall only be *taken account of*) the former would take precedence. Most of the conclusions formulated above, in relation to the principles of environmental policy, would, it seems, also apply in this case. Because the principles are more directly related to the policy decisions than are the points that should be taken account of, judicial review, though possible, is even less likely to lead to measures being declared invalid than in the case of the "principles."

d. *Distribution of Powers Between the Community and its Member States*

According to the fourth paragraph of Article 130r, the Community shall become active in the environmental field only if the objectives formulated in the first paragraph "can be attained better at Community level than at the level of the individual Member States."<sup>117</sup> This has sometimes been referred to as the principle of "subsidiarity,"<sup>118</sup> but as Roelants du Vivier, Vice-President of the European Parliament's Environmental Committee, and Hannequart point out,<sup>119</sup> this misses the point.

This provision is without precedent in either the original Treaties establishing the Community or in the other codified policies in the SEA. This still does not mean, however, that the new environmental title brings about a change from the previously existing situation. Because of the unanimity requirement in both Articles 100 and 235, the Community has never been able to legislate under these articles unless all Member States were of the opinion that a certain issue could be better dealt with at Community, rather than at Member-State, level.

Why then was the insertion of this principle necessary? First, because Article 130s provides for possible majority voting, and certain measures could, therefore, be adopted against the will of a Member State. The negotiators, furthermore, wanted to avoid situations in which Commission proposals

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117. EEC Treaty, *supra* note 2, art. 130r(4), added by Single European Act, *supra* note 101, art. 25, at 12.

118. See, e.g., Vandermeersch, *supra* note 108, at 422.

119. Roelants du Vivier & Hannequart, *Une Nouvelle Stratégie Européenne pour l'Environnement dans le Cadre de l'Acte Unique*, 316 *REVUE DU MARCHÉ COMMUN* 225, 228 (1988).

were blocked in Council without any hope of ever being adopted. The simple existence of these proposals would create political pressure on the Council and on individual Member States.

The principle does raise some interesting legal questions, however. For example, can it be invoked in a judicial procedure? As in the cases discussed before, the answer clearly has to be yes. This immediately raises the question of how the Court can determine whether a criterion as vague and subjective as "better" has been met? In most cases, the Court, indeed, will have to base its decision on the fact that all, or at least a qualified majority, of the members of the Council apparently found that the pursued objective could be better attained at Community level and would, thus, have to declare the measure valid.

There may be cases in which the Council clearly went beyond its discretionary margin in this respect. This may well lead the Court to declare the measure invalid. Such cases will, however, be extremely rare. They will not, for example, necessarily include all cases in which a Community standard offers a lower level of protection than some or even all of the national standards it harmonizes. The Community-wide character of the measure may, in fact, add certain advantages that outweigh the disadvantage of a less strict standard.

A further question that arises is whether the clause limits only the powers of the Community or also limits those of its Member States, in the sense that these Member States would no longer be able to act in areas where the Community could "better" attain the pursued objective. This is an interesting thesis but is difficult to defend on the basis of the text of paragraph four. According to that text, the Community shall take action *to the extent that* certain conditions are met. Had the negotiators wanted a "two-way" criterion, they would have chosen a more neutral expression, such as *when* the objectives can be better attained by the Community.

The conclusion, therefore, must be that although the clause does not have any practical consequences because in the past Member States would not agree to Community measures that could be "better" passed at Member-State level, the clause, nevertheless, transforms a factual situation into a legal

requirement. Because the word "better" is of a rather vague and subjective character, this legal requirement is not very strong, and, thus, the powers of the Community institutions are only marginally affected. Because this is a very crucial provision in the Community's federal system, we will return to it in the last section of this article.

e. *Financing and Implementing Non-Community Measures*

Another very interesting provision in the framework of our topic is found in the second sentence of paragraph four of Article 130r. According to this sentence, the Member States shall, "[w]ithout prejudice to certain measures of a Community nature . . . finance and implement the other measures."<sup>120</sup>

The meaning and intention of this provision are not immediately clear. Vandermeersch concludes that this provision leaves the power of implementation to the Member States and, therefore, that it reveals a preference for the use of directives rather than regulations.<sup>121</sup> He goes a step further when he concludes from this clause that the Community is "a legislator only" because the implementation and financing of *Community* environmental measures would be reserved to the Member States.<sup>122</sup>

This provision can be seen in its proper perspective only if one keeps in mind that the environmental title was an attempt to codify existing Community policy. In 1983, the Commission made a proposal for a regulation on what was officially called "action by the Community relating to the environment" but was commonly referred to as the "environment fund."<sup>123</sup> This controversial proposal would have allowed Community

120. EEC Treaty, *supra* note 2, art. 130r(4), added by Single European Act, *supra* note 100, art. 25, at 12.

121. See Vandermeersch, *supra* note 108, at 423-24. A directive is "binding . . . upon each Member State to which it is addressed," but leaves to the Member State "the choice of form and methods," while a regulation is "binding in its entirety and directly applicable in all Member States." EEC Treaty, *supra* note 2, art. 189, 1973 Gr. Brit. T.S. No. 1, at 60, 298 U.N.T.S. at 79.

122. *Id.* at 424-25.

123. Proposal for a Council Regulation on Action by the Community Relating to the Environment (ACE), O.J. C 30/8 (1983). The proposal was in fact intended to create the necessary framework for using funds that the European Parliament had allocated to specific budget headings with an aim of constituting a "European Fund for the Environment." *Id.*

funding of various environmental actions undertaken at the *national* level. Some Member States feared that this was the start of a full-fledged environmental fund, similar to the existing Regional and Social Funds.<sup>124</sup> In their minds, this fund would have intervened to an unacceptable degree in their national policies. The granting of funds for actions to preserve wildlife habitats might, for example, frustrate national zoning or industrial policies and generally provide some ammunition to opponents of certain environmentally harmful developments.

Against this background, the second sentence of paragraph four of Article 130r is much more understandable. Contrary to Vandermeersch's thinking, this sentence applies only to the financing and implementation of "other" measures, i.e., non-Community measures. Thus, no preference is being expressed for any particular kind of measure or manner of financing as concerns Community action. An attempt is made, however, to make it impossible for the Community to finance national environmental policies.

Does this only apply to a possible Environmental Fund or are all so-called "Structural Funds,"<sup>125</sup> and perhaps even the European Investment Bank, affected? The principle is in no way restricted to an Environmental Fund, and there is really no reason why it should not apply to any kind of financial support in this field. The clause must be read in context, however, and thus applies only to "action relating to the environment." This should presumably be read as specific action and not to include any more general type of activity that also has an environmental effect.

#### f. *The Community's Powers in the External Relations Field*

The first sentence of paragraph five of Article 130r provides that "[w]ithin their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the relevant international organiza-

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124. See EEC Treaty, *supra* note 2, art. 123, 1973 Gr. Brit. T.S. No. 1, at 45, 298 U.N.T.S. at 63; *id.* art. 130b, *added by* Single European Act, *supra* note 100, art. 23, at 9.

125. According to Article 130b of the Treaty, "Structural Funds" include the Guidance Section of the European Agricultural Guidance and Guarantee Fund, the European Social Fund, and the European Regional Development Fund. *Id.*

tions."<sup>126</sup> Thus, the Community does not have a general responsibility for the external relations in the environmental field but only for those that are "within its sphere of competence."

But even within that sphere, the Community does not automatically have so-called "exclusive competence," as is clear from the second subparagraph of point five, which states that "[t]he previous paragraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements."<sup>127</sup>

This must be read together with a Declaration of the "Conference" according to which the second paragraph does not affect the principles resulting from the judgment handed down by the Court of Justice in the *ERTA* case. Again this means that the previously described situation under the original Treaties remains intact.

Thus, exclusive responsibility arises only in cases where the *ERTA* principle applies, while in other areas there is only a potential responsibility, according to the rule "*in foro interno, in foro externo.*" This also seems to imply that where the internal Community powers are restricted, as in the case where Member States can "better" achieve a certain objective, this same restriction applies externally.

The procedural requirements for the negotiation and conclusion of international agreements are—according to the second sentence of the fifth paragraph of Article 130r—to be found in Article 228. This is, again, no change from the previous situation.

## 2. Article 130s

Article 130s<sup>128</sup> lays down the procedure for the implementation of the Community's environmental policy. The first paragraph contains the normal procedure, which is almost identical to the previously used procedure of both Articles 100 and 235.<sup>129</sup> This means, inter alia, that the unanimity requirement

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126. *Id.* art. 130r(5), added by Single European Act, *supra* note 100, art. 25, at 12.127. *Id.*

128. *Id.* art. 130s, added by Single European Act, *supra* note 100, art. 25, at 12.

129. *Id.* The first paragraph of Article 130s provides that "[t]he Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide what action is to be

still stands and that the cooperation procedure, introduced by the SEA in many other areas, does not apply.

The second paragraph makes it possible for the Council, "under conditions laid down in the preceding subparagraph," to "define those matters on which decisions are to be taken by a qualified majority."<sup>130</sup> Thus, the Council could unanimously decide that a certain category of environmental measures shall be decided by a qualified majority. Although when the SEA entered into force it seemed highly unlikely that this provision would ever be used, the current tendency towards more qualified majority voting may well make this possible in the environmental area too. In the first instance, it will probably be limited to less politically-sensitive measures. For these measures, however, Article 145, as amended by the SEA,<sup>131</sup> provides for a system under which the Council lays down the principles that shall then be implemented by the Commission.

### 3. Article 130t

The final article of the Environmental Title, Article 130t,<sup>132</sup> provides that "[t]he protective measures adopted in common pursuant to Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty."<sup>133</sup>

This principle could already be found in many environmental measures adopted under the original Treaty, but has now been made generally applicable. The exact meaning depends on the interpretation given to several of the somewhat ambiguous expressions in this provision. What, for instance, are "protective measures," and when are they "compatible

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taken by the Community." *Id.* This procedure is, in fact, identical to the procedure in Article 100. In comparison with Article 235, it adds the requirement of consulting the Economic and Social Committee. This seems fairly logical for measures with an important economic impact, but is somewhat surprising for measures that are purely environmental. It would have appeared more logical for such measures to be submitted to a special advisory body on environmental policy, similar to the one existing in the consumer protection field.

130. *Id.*

131. EEC Treaty, *supra* note 2, art. 145, 1973 Gr. Brit. T.S. No. 1, at 51, 298 U.N.T.S. at 69, as amended by Single European Act, *supra* note 100, art. 10, at 6.

132. EEC Treaty, *supra* note 2, art. 130t, added by Single European Act, *supra* note 100, art. 25, at 12.

133. *Id.*

with this Treaty"? Is the adjective "protective" used to limit this possibility to only one of the three categories in the first objective of Article 130r?<sup>134</sup>

As for this last question, the reply can hardly be positive, as no justification can be seen for treating the measures to preserve or to improve the quality of the environment differently than those that are to protect it. Again, the truth is probably to be found in the previously existing situation. Although many directives and regulations contained a "minimum-harmonization" clause, it was only used in cases that did not involve an aspect of harmonizing conditions under which companies from different Member States could compete. Obviously, if the Community intended to place all competitors on an equal footing, then Member States could not be allowed to reintroduce certain differences. This is, presumably, the way in which Article 130t must be read, i.e., as not allowing stricter national measures if the objective of the Community legislation was not only *environmental protection* but also, for example, the free circulation of goods.

National "protective measures" are only allowed if "compatible with this Treaty." This may be a reference to Articles 30 through 36 of the Treaty, but if the above interpretation of the word "protective" is correct, this is not very likely. In cases where intra-Community trade might be affected, the Community measure will normally aim not only at protecting the environment, but will also aim at facilitating the free circulation of goods, thus rendering stricter national measures impossible. There are, however, other Treaty provisions that must be respected, such as Article 5<sup>135</sup> and Article 7.<sup>136</sup>

Should the polluter-pays principle also be respected? As indicated above, the reference to that principle in Article 130r only applies to "action by the Community." Member-State action is not governed by a binding principle of this kind but by a

134. See *supra* note 106 and accompanying text.

135. EEC Treaty, *supra* note 2, art. 5, 1973 Gr. Brit. T.S. No. 1, at 4, 298 U.N.T.S. at 17 (Member States should not adopt measures that make it harder for the Commission or Council to fulfill their tasks).

136. *Id.* art. 7, 1973 Gr. Brit. T.S. No. 1, at 4, 298 U.N.T.S. at 17 (prohibiting, within the scope of application of the Treaty and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality).



recommendation.<sup>137</sup> It would be hard to claim that failure to respect the latter amounts to a violation of the Treaty. This is important, for if the principle did apply, it would probably be much harder to adopt stricter measures. These might then, indeed, lead to higher costs for national industry and, therefore, to a less favorable competitive position. It is obvious that this would be a disincentive to such stricter measures.

### C. *Harmonization of Environmental Legislation*

As indicated above, the first Community measures in the environmental field were based on Article 100 and were aimed at eliminating barriers to intra-Community trade, resulting from differences between national environmental standards.<sup>138</sup> The fact that the new Article 100a, introduced by the SEA,<sup>139</sup> contains two references to environmental policy demonstrates that the SEA did not intend to change this by having all measures that affect the environment adopted in the framework of the new Environmental Title.

According to the third paragraph of Article 100a, "[t]he Commission, in its proposals envisaged in paragraph 1 concerning . . . environmental protection . . . will take as a base a high level of protection."<sup>140</sup>

This provision reflects the criticisms of several Member States, according to whom the Community directives on harmonization of legislation too often led to the lowest common denominator. It is interesting, however, that although the clause is only addressed to the Commission, most of the criticism dealt not with the Commission's proposals, but with the Council's decisions, which, because of the need to find compromises, often had the danger of leading to a low standard.

The new clause only refers to the proposals envisaged in paragraph 1 of Article 100a, which means that it does not apply to harmonization proposals under Article 100 or to any other proposals, including those under the new Environmental Title.<sup>141</sup> Apparently, the reason for this was that Article 100a

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137. Recommendation 75/436, *supra* note 111.

138. See *supra* notes 37-43 and accompanying text.

139. See EEC Treaty, *supra* note 2, art. 100a, added by Single European Act, *supra* note 100, art. 18, at 8.

140. *Id.* art. 100a(3), added by Single European Act, *supra* note 100, art. 18, at 8.

141. A different position is apparently defended by Vandermeersch, who men-

allows decision-making by a qualified majority, whereas the other two provisions still require unanimity. There was fear that the introduction of majority decision-making might lead to situations in which some Member States with high levels of protection could be out-voted and thereby forced to lower those levels of protection.<sup>142</sup> The German and Danish negotiators especially had expressed this fear. The fact, of course, that the clause only applies to Commission proposals makes this argument much less convincing. It was precisely for this reason that a so-called "opting-out" procedure was also included.<sup>143</sup> Article 130s does not present the same problems, because it still requires unanimity and, in addition, normally allows stricter national measures.

The new requirement seems of little legal importance, as it is hardly imaginable that there would be any judicial recourse if the Commission were to disrespect it. Article 173 allows the Court to review the legality of acts other than recommendations or opinions.<sup>144</sup> Although not excluded from doing so, it is highly unlikely that the Court would review directly the legality of a proposal of the Commission.<sup>145</sup>

#### D. "Opting-Out" of Community-Wide Standards

A second mention of environmental protection in Article 100a is found in paragraph four, which reads as follows:

If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36 or relating to protection of the environment . . . it shall notify the Commission of these provisions.

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tions this provision as one of the basic principles of EEC environmental action. See Vandermeersch, *supra* note 108, at 415. However, later in the same text, Vandermeersch claims this provision is not an integral part of EEC environmental policy. *Id.* at 417.

142. See DE RUYT, *supra* note 105, at 74-75.

143. See *infra* text accompanying notes 146-48.

144. See EEC Treaty, *supra* note 2, art. 173, 1973 Gr. Brit T.S. No. 1, at 57, 298 U.N.T.S. at 75-76.

145. The only, and very remote, possibility would be judicial review of an individual decision, addressed to a private person or to a company, that was based on a Council Act adopted on the basis of a proposal that did not "take as a bas[is] a high level of protection."

The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.<sup>146</sup>

This rather long and complicated procedure is normally referred to as "opting-out." For the above reasons, it is again only part of Article 100a and not part of either Article 100 or 130s. This procedure is, in fact, what is left in the SEA of the two-tiered or multi-tiered Europe. The debate over such a "Europe-à-la-carte" had been going on for several years, especially after the Belgian Prime Minister Leo Tindemans, in his report on the European Union,<sup>147</sup> suggested a new approach in which those States that had the possibility of making progress had the *duty* to go forward. At the same time, the other States would receive aid to try to "catch-up."

Tindemans's suggestion was made in an effort to escape "Eurosclerosis," which, according to many, was caused by the fact that there were "good" European nations, which were prepared to move forward toward European integration but could not do so because others, who under the unanimity rule also had to agree, could not or would not follow.

The final version of the SEA is only slightly reminiscent of Tindemans's suggestions. It is based on the premise that decisions are made by a qualified majority. The Member States that, under the unanimity rule, would have blocked "progress" towards a Community compromise could now be out-voted. Rather than offering a general possibility for Member States to maintain or introduce different national rules, the provision subjects this right to certain conditions as well as to a Community review procedure.

The conditions are such that one could argue that the minority, rather than the majority, is moving forward. Different

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146. See EEC Treaty, *supra* note 2, art. 100a(4), added by Single European Act, *supra* note 100, art. 18, at 8.

147. Report on European Union, *reprinted in* E.C. Bull. Supp. 1/76, at 11 (1976) (presented by Leo Tindemans to the European Council).

national measures must, in fact, be justified on the grounds of "major needs referred to in Article 36, or relating to protection of the environment or the working environment . . ." <sup>148</sup> This can only mean that the measures must mean stricter rules as compared to the Community measures.

Does this subparagraph allow *any* stricter measure "relating to the environment," or do certain limitations apply? Two kinds of limitations could, in principle, be distinguished. A first one seems to follow from the use in Article 100a of the words "major needs." These words could be read, however, as a simpler way of referring to all of the grounds mentioned in Article 36 without mentioning each one individually. We do not believe, therefore, that only *major* needs of environmental protection can justify stricter measures.

The real limitation flows from Article 36. It should be noted that a Community directive cannot "legalize" national measures that are normally incompatible with Articles 30 through 36. This means that the limitations developed by the Court, in its case law on Article 36, apply. Such limitations include, for example: the requirement to choose the instrument that would hinder intra-community trade to the least possible extent; and the "proportionality" requirement, according to which the measure should not have negative effects disproportionate to the objective pursued.

That the restrictions of Article 36 apply is also demonstrated by another provision in Article 100a, according to which the Commission, which must be notified of the measures, must *confirm* that these measures are neither a means of arbitrary discrimination nor a disguised restriction on trade between Member States. <sup>149</sup> This means that the measures must be compatible with the last sentence of Article 36. It is interesting to note that this requirement applies *ex post facto*. In other words, the Member State in question can apply the measures without waiting for the Commission's opinion.

Article 100a does not provide for a sanction when the Commission does not confirm the measure but only refers to the procedure laid down by Article 169, the infringement pro-

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148. EEC Treaty, *supra* note 2, art. 100a(4), *added by* Single European Act, *supra* note 100, art. 18, at 8.

149. *Id.*

cedure.<sup>150</sup> In order to somewhat strengthen this "sanction" and to allow for more rapid action, the Commission or any Member State may bring the matter directly before the Court if it considers that improper use has been made of the powers provided for in Article 100a. Improper use must be read to include not only the case where the second subparagraph has not been respected but also any infringement upon other applicable rules, especially Article 36.

#### IV. IMPLEMENTATION OF EC ENVIRONMENTAL LAW

The implementation of European Community measures in the environmental field takes two different forms. Generally speaking, the Community does not have at its disposal the necessary infrastructure or the staff to apply the measures in individual cases. As is normal in the European Community, this is left to the authorities of the Member States. Because most of the acts take the form of directives, there is, however, another aspect of implementation. Member States must amend their legislation to bring it into line with the provisions of the directive, if they have not already done so, and must do so by the deadline set in each directive.

Under Article 155, the Commission must ensure, *inter alia*, that each of the twelve Member States effectively implements a directive.<sup>151</sup> This constitutes an additional task for the already limited number of staff working on environmental matters. In most cases the deadline is not met by the majority of the Member States. Thus, many environmental directives only reach their full effect long after their adoption.

Obviously, these are major weaknesses in the Community's environmental policy. The most obvious solution would be to use regulations wherever possible. This has become much easier now that action in the environmental field no longer has to take the form of a directive, as was the case when Article 100 was still being used.<sup>152</sup> The legal obstacle has, thus, virtually been removed. A practical obstacle still exists,

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150. See EEC Treaty, *supra* note 2, art. 169, 1973 Gr. Brit. T.S. No. 1, at 56-57, 298 U.N.T.S. at 75.

151. *Id.* art. 155, 1973 Gr. Brit. T.S. No. 1, at 53, 298 U.N.T.S. at 71.

152. Article 100 is, of course, still theoretically available for environmental action. In practice, however, almost all cases apply Article 100a or Article 130s.

however. As indicated, Article 130t allows Member States to adopt stricter measures than those adopted at the Community level. It is hard to imagine how this could be done if the Community instrument takes the shape of a directly applicable regulation.<sup>153</sup>

Another solution could be the setting-up by Member States—possibly at the request of the Community—of procedures that would enable fast and accurate implementation of directives. One could argue that Article 5 already requires such procedures, and the Court has indeed accepted the notion that Article 5 creates certain obligations for the Member States with regard to the implementation of directives.<sup>154</sup>

### *CONCLUSIONS FOR THE FEDERAL SYSTEM OF THE EUROPEAN COMMUNITY*

At the beginning of this article, two questions were formulated. In what manner are the governmental powers in the environmental field distributed between the Community and the Member-State levels, and to what extent can these powers be exercised free from interference?

In reply to the first of these questions, we found that the EC Treaties do not confer a general power to act. The Community's institutions can act only if the Treaties have created the powers to do so. This also means that those powers that are not covered by the Treaties still reside with the Member States. This may look like a relatively easy criterion, but we have found that there may be some surprises, particularly in the environmental field. Before the SEA entered into force, none of the three Treaties provided specific powers in the environmental field. One would, therefore, expect that the governmental powers in this field would reside with the Member

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153. It is, of course, not absolutely impossible for Member States to adopt stricter measures than those adopted at Community level. Before the adoption of the SEA, a provision allowing stricter national measures was included in the Regulation implementing CITES. See Regulation 3626/82, *supra* note 83. This was, however, really a directive adopted in the form of a regulation, as is demonstrated by article 22 of the regulation, which requires Member States to notify the Commission of the provisions adopted "for the implementation of this Regulation," a provision normally found in directives.

154. See *Commission v. Netherlands*, Case 96/81, 1982 E.C.R. 1791, 1803, ¶¶ 7, 12, *Common Mkt. Rep. (CCH)* ¶ 8841, at 7948.

States. Yet, the Community has established a very broad environmental policy.

What is surprising is not so much the fact that environmental measures were adopted, but, rather, the scope of these measures. Obviously, many measures in the environmental field have economic consequences and will, thus, have a direct bearing on the common or single market. For example, if companies in one Member State are required to clean their polluted sewer water before disposing of it, while their competitors in other Member States do not face such an obligation, the latter clearly have a competitive advantage. This may result in trade distortions within the Common Market. It is this that triggers the responsibility of the Community in this area.

The Community's environmental policy, however, is not limited to measures that have this kind of direct bearing on the Common Market. Even before the inclusion of specific environmental powers in the EEC Treaty through the SEA, the Community adopted environmental measures that had little or no effect on the Common Market in the manner described above. These measures could, nevertheless, be adopted, because all of the Community's institutions, including the Court of Justice, were willing to interpret the EEC Treaty's preambular reference to the improvement of the living and working conditions of the peoples of the Member States in such a way as to make the protection of the environment an objective of the EEC Treaty.

The conclusion from this seems to be that although the Community can act only if the powers to do so have been specifically granted, its institutions have interpreted these powers so widely that an extremely broad range of activities are made possible. This leaves only a limited number of areas outside the scope of the Treaties.

The extension of Community powers into a large number of areas does not automatically mean that Member States have lost their governmental powers in these areas. There are certain areas within the Treaties in which the Community has so-called "exclusive competence," thus eliminating the ability of Member States to act on their own initiative, whether or not the Community has effectively occupied these areas. In many other fields, however, Member States can act as long as the

Community has not exercised its powers. The environmental policy provides a good example of this. Member States could develop their own policies until the Community decided to become active. The loss of Member-State powers in the environmental field did not suddenly occur when the Community adopted its first measure in that field; rather, the loss of power occurred gradually and only in cases of possible conflicts between Community and Member-State measures.<sup>155</sup> An exception to this general rule exists in cases where environmental measures are part of another policy that happens to be one of exclusive Community responsibility, such as the common commercial policy.

This illustrates that in determining the manner in which powers of government are distributed, one must look whether those powers are within or outside the scope of the Treaties. With regard to the former, one must also look as to whether such powers confer exclusive rights and duties on the Community institutions or, as long as there is no conflict with Community measures, whether they still allow Member-State activity.

This brings us to the second question. How is the freedom to exercise these governmental powers without interference guaranteed? As for the Community's powers, we have found that the SEA has greatly increased the number of cases in which the Council can make decisions with a qualified majority.<sup>156</sup> This has greatly diminished the possibility of individual Member States influencing the manner in which the Community exercises its powers, although the exact extent of the decrease in influence requires a separate study. In the environmental field, however, this is only of limited importance, because measures based on Article 130s will still, in most cases, require unanimity.

There are, however, not only these political considerations of which account must be taken, but legal considerations as well. The Community's ability to exercise its powers as it

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155. See Temple Lang, *supra* note 96, at 206-07.

156. Normally this would not have had a dramatic impact on the Council's decision-making process, as discussions were normally carried on until consensus was reached. An amendment to the Council's rules of procedure, agreed upon in 1986, allows the Commission and each Member State to ask for a vote at any time. It is this change that has led to a tremendous increase in the number of decisions reached by a qualified majority.



sees fit has been strengthened by the Court of Justice's case law on exclusive competence, as well as the case law on conflicts—as in the *ERTA* case—which recognizes the supremacy of Community law. Thus, if a Member State tries to act in an area where the Community has already exercised its governmental powers, there is a legal remedy for the Community against such intrusion.

Governmental powers in the environmental field do not, however, reside solely with the Community. As has been shown, such powers reside with the Member States as well. But how can the Member States be sure that the Community will not interfere with their acts? This question is of particular importance because the legal guarantees surrounding Community powers seem stronger than the political guarantees, while for the Member States, it seems to be the other way around.

Before the SEA came into effect, Community action on the environment required unanimity in all cases. The SEA diminished this political guarantee against unwanted Community intrusion into areas so far covered by Member State legislation only slightly, because measures adopted on the basis of Article 130s basically still require unanimity. Member States can, therefore, “veto” any proposal that encroaches upon their powers. In addition, a quasi-legal guarantee was inserted in paragraph four of Article 130r. According to this provision, the Community shall take action when the objectives can be “better” attained at Community level than at the level of the individual Member States.<sup>157</sup>

It seems appropriate at this point to take a second look at this provision and its exact meaning. In so doing, one should perhaps make a distinction between the level at which decisions are reached and the level at which implementation takes place. We have found that in the Community system, the latter normally occurs at the Member-State level. There is, therefore, no real difference between the implementation of environmental measures decided at Community level and those decided at the national or regional level. Thus, it is not because of differences in implementation that environmental objectives

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157. See EEC Treaty, *supra* note 2, art. 130r(4), added by Single European Act, *supra* note 100, art. 25, at 12.

can be better attained at the Member-State, rather than the Community, level.

The provision, therefore, probably applies to the decision-making level. It is, however, hard to see how the objectives can be "better attained," because decisions are made at Member-State level, rather than by the Community. This might be the case if the Member States possessed certain information that the Community institutions did not have. However, Article 5 of the Treaty obliges Member States to "facilitate the achievement of the Community's tasks,"<sup>158</sup> which would include providing information necessary for deciding which measures should be adopted.

There are, apparently, few cases imaginable in which the objectives set out in Article 130r can be better attained because of the level of decision-making. This is not to say that Community decisions will be called for in all cases. Environmental problems that exist in a small area and do not have an impact outside the Member State in which they occur, normally could, and probably should, be dealt with at the local or national level. This would, however, be because of considerations such as administrative efficiency, and not because such an approach will "better attain" the objectives of the Community's environmental policy.

The conclusion, therefore, must be that the provisions in Article 130r do not create a real *legal* guarantee for Member States, in the sense that Member States will be "protected" against a limitation of their powers by the Community in the environmental area. Thus, the only guarantee for the Member States is the political one, resulting from the voting requirements.

This virtual lack of legal guarantees for Member States, coupled with the development by the Court of Justice of very effective legal guarantees where Member States try to limit Community powers, reflects the fact that the Community is still in its "formative years." In the beginning, the Member States did not need any legal guarantees because all political power resided with them. This was not the case regarding Community institutions, which is why the Court of Justice developed

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158. EEC Treaty, *supra* note 2, art. 5, Gr. Brit. T.S. No. 1, at 4, 298 U.N.T.S. at 17.

the legal instruments and theories to "help" the Community in this regard.

Several developments, however, including the introduction by the SEA of majority voting requirements, have caused a change in the distribution of political powers in a manner beneficial to the Community institutions. If this process continues—and there is no obvious reason why it should not—there may come a time when the Member States also need some legal guarantees that allow them to exercise their powers without Community interference.

Such a guarantee could well be the recognition of Member-State autonomy as a separate, though probably limited, objective. In cases where the proposed measure would do more harm to the objective of Member-State autonomy than it would contribute to the achievement of another objective of the Community, the former should then take precedence. This is the sort of legal "guarantee" of Member-State freedom to act that would seem to be an essential element of a "mature" federal structure.

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