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Environmental Spill-Overs Into General Community Law

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Environmental Spill-Overs Into General Community Law

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Abstract

This Article will illustrate that indeed, European environmental law is not just another sectoral policy area of the European Union (“EU”). Over the years it has proven to have a major impact on various general doctrines of European law. In that sense, European environmental law had (and still has) an important spill-over impact upon general European Community (“EC”) law. It is the modest ambit of this Article to illustrate some of the environmental spill-overs into general European law, specifically examining the role of the European Court of Justice (“ECJ”) and its case law.

ENVIRONMENTAL SPILL-OVERS INTO GENERAL COMMUNITY LAW

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INTRODUCTION¹

In 1992, I asked myself the question: “What must be understood about European environmental law and how does it relate to European law in general?”² In my inaugural address at the University of Amsterdam, I took the view that a sectoral branch of law like European environmental law can only be studied and analyzed adequately by examining its interaction with general European law doctrines. There are two possible approaches in such an analysis. A top down approach would study the influence of general European law on European environmental law. This raises questions such as “what are the consequences of the notion of ‘measures having equivalent effect’ on the ability of Member States to take environmental measures restricting the free movement of goods” or “what are the consequences of considering ‘waste’ as a ‘product’ more or less like any other product, subject to the rules of the internal market?” In contrast, a bottom up approach would examine how developments in environmental law have influenced general doctrines of European law. It goes without saying that a complete analysis of all legal aspects of European environmental law requires an examination of both approaches. However, this Article will emphasize the

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** The author acknowledges the fruitful inspiration for this Article from the article on this theme by H.G. Sevenster & J.M.P. Janssen, *Het Europees Milieurecht als Proeftuin*, in *HET MILIEURECHT ALS PROEFTUIN: 20 JAAR CENTRUM VOOR MILIEURECHT 201-18* (M.V.C. Aalders & R. Uylenburg eds., 2007). Prof. Sevenster is professor of European Environmental Law at the University of Amsterdam and member of the Dutch *Raad van State* (Council of State). Mr. Janssen lectured European Environmental Law at the Centre for Environmental Law at the University of Amsterdam and is presently working as a legal expert with *Oranjewoud*, a major Dutch environmental consultancy firm.

1. This Article expands the issues raised in J.H. JANS & H.H.B. VEDDER, *EUROPEAN ENVIRONMENTAL LAW* (3d ed. 2008).

2. J.H. Jans, *Inaugural Address at the University of Amsterdam* (Dec. 22, 1992), in *OVER GRENZEN VAN MILIEURECHT* (W.E.J. Tjeenk Willink ed., 1992).

bottom up approach. This Article will illustrate that indeed, European environmental law is not just another sectoral policy area of the European Union ("EU"). Over the years it has proven to have a major impact on various general doctrines of European law. In that sense, European environmental law had (and still has) an important spill-over impact upon general European Community ("EC") law. For example, consider the subsidiarity principle.³ Today subsidiarity is the magic word for many politicians in almost every EU Member State. Without the subsidiarity principle it is difficult to see how those politicians could sell the recent Reform Treaty⁴ to their voters. One tends to forget that within the EU the origin of this principle can be found in European environmental law. Twenty years ago the Single European Act introduced specific legal provisions on environmental policy (Articles 130r, 130s and 130t EC).⁵ Article 130r(4) stated: "The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States."⁶ Paragraph 2 of Article 130r introduced another "new" principle, the integration principle: "Environmental protection requirements shall be a component of the Community's other policies."⁷ At that time, it was one of the first integration principles in the Treaty.⁸ In contrast, nowadays, it is different. There are, more or less similar, integration principles

3. The subsidiarity principle as articulated in EC Treaty Article 5, and supplemented by the Subsidiarity Protocol added by the Treaty of Amsterdam, is complex and not without dispute concerning its meaning. Essentially, the subsidiarity principle permits the community to take action, outside of fields within its exclusive competence, when Member State action is insufficient, while community action would be more efficacious. See generally George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332 (1994).

4. See generally Treaty of Lisbon (Reform Treaty), O.J. C 306/01 (2007), opened for signature Dec. 13, 2007 (not yet ratified).

5. See J.H. JANS, *EUROPEAN ENVIRONMENTAL LAW 1-64* (1995); see also J.H. Jans, *The Development of EC Environmental Law*, in *EUROPEAN ENVIRONMENTAL LAW: A COMPARATIVE PERSPECTIVE* 271-76 (G. Winter ed., 1996); Koen Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 Fordham Int'l L.J. 846 (1994); W.P.J. Wils, *Subsidiarity and EC Environmental Policy: Taking People's Concerns Seriously*, 6 J. Envtl. L. 85 (1994).

6. See Single European Act art. 130r(4), O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA] (amending Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11).

7. *Id.* art. 130r(2), O.J. L 169/1.

8. See J.H. Jans, *Externe Integratie in Het Gemeenschapsrecht*, in *TIJDSCHRIFT VOOR MILIEU EN RECHT* 294-99 (1994).

in areas such as regional policy,⁹ culture,¹⁰ public health,¹¹ consumer protection,¹² industrial policy,¹³ and development cooperation.¹⁴ Moreover, the Treaty of Amsterdam promoted integration to a general principle of EC law.¹⁵

It is the modest ambit of this Article to illustrate some of the environmental spill-overs into general European law, specifically examining the role of the European Court of Justice ("ECJ") and its case law.¹⁶

I. LEGAL BASIS

The choice of the correct legal basis of EU environmental measures has always been a hot potato.¹⁷ Of course, since the adoption of the Single European Act, the EC Treaty provides an explicit legal base for environmental measures today.¹⁸ However, because most of the EU environmental measures have a clear impact on the internal market, the question of which legal ground to use had never faded away. The case law developed by the European Court of Justice in environmental cases has been widely exported by the ECJ to other areas of choices between possible Treaty bases for adopting legislation.

We will first examine Article 95 EC as a legal basis for enacting environmental measures. Article 95 provides that the Council, acting in accordance with the co-decision procedure, shall adopt the measures for the approximation of national legislation "which have as their object the establishment and functioning of

9. See, e.g., Consolidated Version of the Treaty Establishing the European Community art. 159, O.J. C 321 E/37, at E/118 (2006) [hereinafter EC Treaty], as amended by the Treaty of Nice, Mar. 10, 2001, O.J. C 80/1 (2001). See generally NELE DHONDT, *INTEGRATION OF ENVIRONMENTAL PROTECTION INTO OTHER EC POLICIES: LEGAL THEORY AND PRACTICE* (2003).

10. See EC Treaty, *supra* note 9, art. 151, O.J. C 321 E/37, at E/113.

11. See *id.* art. 152(1), at E/114.

12. See *id.* art. 153(2), at E/116.

13. See *id.* art. 157(3), at E/118.

14. See *id.* art. 178, at E/126.

15. But see J.H. Jans & J. Scott, *The Convention on the Future of Europe: An Environmental Perspective*, 15 J. ENVTL. L. 323, 325-27 (2003) (recounting the debate on environmental integration as a "general principle" in drafting the proposed Constitutional Treaty).

16. See generally Sir. Francis Jacobs, *The Role of the European Court of Justice in the Protection of the Environment*, 18 J. ENVTL. L. 185 (2006).

17. See J.H. Jans, *The Competences for EC Environmental Law*, in *EUROPEAN ENVIRONMENTAL LAW* *supra* note 5, at 317, 317-40.

18. See EC Treaty, *supra* note 9, art. 175, O.J. C 321 E/37, at E/124.

the internal market.”¹⁹ It is clear that many measures which can be characterized as environmental in character may also have a significant impact on the establishment of the internal market. This is recognized in the Treaty. According to Article 95(3), the Commission is to incorporate a high level of environmental protection in its proposals for legislative measures intended to achieve the internal market. This indicates that, at any rate, some environmental measures fall within the scope of Article 95. The Court has held that whenever the conditions for recourse to Article 95 as a legal basis are fulfilled, the European legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made. It is the author’s opinion that this argument can be made to use Article 95 as a legal basis for protection measures when they contribute to achieving the internal market.

Thus it can be said that the harmonization of the conditions under which certain environmentally harmful products are placed on the market is important for attaining the free movement of goods, and hence using Article 95 to enact the harmonization rules. After all, as long as the environmental product standard rules continue to differ in the various Member States, there can be no question of the free movement of environmentally hazardous goods. Harmonization of the conditions under which such products are allowed to be placed on the market and/or used will thus often fall within the scope of Article 95. However, many other environmental measures may also relate to the functioning of the internal market. In general, one could say that any national rule concerning modes or conditions of production has an effect on competition and may therefore be properly subject to decision-making under Article 95 EC. This has been acknowledged by the ECJ. In the *Titanium Dioxide* case concerning the permissible limits of the emission of this dangerous chemical, the Court of Justice observed:

[A]ction intended to approximate national rules concerning production conditions in a given industrial sector with the aim of eliminating distortions of competition in that sector is conducive to the attainment of the internal market and thus falls within the scope of Article 100a, a provision which is particularly appropriate to the attainment of the internal mar-

19. *Id.* art. 95(1), at E/79.

ket.²⁰

The Court held that the content of Directive 89/428²¹ on the reduction of pollution caused by waste from the titanium dioxide industry fell within the scope of Article 95. The directive contains rules prohibiting or requiring the reduction of the discharge of waste and lays down timetables for the implementation of the various provisions. An unusual feature of this case was that the directive applied to a specific industry. The Court referred to this in its judgment.²²

The next question which accordingly arises is to what extent environmental measures which have a more diffuse effect on the competitive position of companies could be enacted only on the legal basis of Article 95. In its judgment in the *Waste Framework Directive*²³ case concerning the validity of Directive 91/156 on waste, the Court acknowledged that the obligation contained in Article 4 of that directive—which requires Member States to take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without harming the environment—can have a certain harmonizing effect. However, the Court nevertheless held that the mere fact that the internal market is concerned to some degree was insufficient to enable the use of Article 95 to adopt the directive.²⁴ Thus, if the effect of attaining market integration is only incidental, an environmental protection measure cannot be adopted solely on the legal basis of Article 95.

It is reasonable to conclude that the scope of Article 95, in principle, is more than sufficient to serve as a basis for measures approximating national laws on environmental product standards and for environmental measures which regulate conditions of production and remove distortions of competition in a particular industry. In those cases it could be argued that the primary objective of the measure is related to the establishment

20. *Commission v. Council (Titanium Dioxide)*, Case C-300/89, [1991] E.C.R. I-2867, ¶ 23.

21. *See* Council Directive No. 89/428, O.J. L 201/56 (1989).

22. *See generally Titanium Dioxide*, [1991] E.C.R. I-2867.

23. *See* Council Directive No. 91/156, O.J. L 78/32 (1991).

24. *See* *Commission v. Council (Waste Framework Directive)*, Case C-155/91, [1993] ECR I-939; *see also* *European Parliament v. Council*, Case C-187/93, [1994] ECR I-2857 (affirming the Court's approach in *Waste Framework Directive* in examining the legal basis of Commission Regulation No. 259/93, O.J. L 30/1 (1993)).

or functioning of the internal market. For more general environmental measures, which have a more diffuse effect rather than having a specific effect on the competitive position of companies, it can be concluded from the case law that when the effects are of an incidental nature, the measure falls outside the scope of Article 95²⁵ and should therefore be based on Article 175 EC.

The case law focusing on the primary objective of a legislative measure is still very much alive. It is settled case law that the choice of the legal basis for a European measure must be based on objective factors which are amenable to judicial review and include, in particular, the aim and content of the measure.²⁶ In other words, the European legislature is not free to choose a legal basis as it sees fit. With respect to the use of Article 175 or Article 95 (or any other legal basis), it is important to look for the "centre of gravity" of the measure. Or in the words of the Court of Justice:

If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component.²⁷

The fact that a measure pursues an environmental objective does not necessarily imply that Article 175 is the correct legal basis.²⁸ It is clear from the practice of the past few years that the majority of recent environmental directives and regulations are based either on Article 175 or Article 95. In exceptional circum-

25. See generally *Waste Framework Directive*, [1993] E.C.R. I-939.

26. See, e.g., *Commission v. Council*, Case C-176/03, [2005] E.C.R. I-7879, ¶ 45 (deciding the appropriate legal basis of Framework Decision 2003/80); *Portugal v. Council*, Case C-268/94, [1996] E.C.R. I-6177, ¶ 22; *Commission v. Council*, Case C-300/89, [1991] E.C.R. I-2867, ¶ 10; *Commission v. Council*, Case 45/86, [1987] E.C.R. I-1493, ¶ 11.

27. *Commission v. European Parliament & Council*, Case C-178/03, [2006] E.C.R. I-107, ¶ 42. *But see* ECJ Opinion 2/00, *Cartagena Protocol*, [2001] E.C.R. I-9713 (discussing the "centre of gravity" doctrine).

28. See, e.g., *Netherlands v. European Council & Parliament*, Case C-377/98, [2000] E.C.R. I-6229 (concerning an application for annulment of European Parliament); see also Council Directive No. 98/44, O.J. L 213/13 (1998) (legal protection of biotechnological inventions).

stances, a legislative measure simultaneously pursues a number of objectives or has several components that are linked, without one being subordinate to the other. The Court held that such an act had to be adopted by reference to both legal bases.²⁹ The Court has, however, emphasized that the legislative procedures laid down for each legal basis must not be incompatible with each other and use of the two legal bases must not undermine the rights of the Parliament.³⁰ Where different legislative decision-making procedures are combined, their modalities must also be combined. In practice this means that the more demanding procedure must be adhered to as well as any additional requirements set in the less demanding procedure.

The Court was faced with an interesting political issue in 2005.³¹ The question was to what extent, if any, Article 175 can or even must be used as a legal basis to harmonize national criminal law.³² Based on Title VI of the Treaty on European Union ("TEU"), (in particular Articles 29 TEU, 31(e) TEU and 34(2)(b) TEU) the Council adopted Framework Decision 2003/80 on the protection of the environment through criminal law.³³ In essence, this framework decision for a number of environmental offenses required the Member States to introduce criminal penalties. The Commission challenged the Council's choice of the Treaty on European Union's Title VI as the legal basis for the framework decision.³⁴ The Commission contended that the decision could be adopted by use of Articles 174-176 EC, which set out the scope of the Community's powers in the field of the environment.³⁵ The Court of Justice commenced by pointing to Treaty on European Union Article 47, which provides that nothing in the Treaty is to affect the EC Treaty and that "[i]t is the task of the Court to ensure that acts which, according to the Council, fall within the scope of Title VI of the [Treaty on European Union] do not encroach upon the powers conferred by the

29. See *Commission v. European Parliament & Council*, [2006] E.C.R. I-107, ¶ 43.

30. See *id.* ¶ 57. See generally *Commission v. Council*, [1991] E.C.R. I-2867.

31. See generally *Commission v. Council*, [2005] E.C.R. I-7879.

32. See generally ENVIRONMENTAL CRIME IN EUROPE: RULES OF SANCTIONS (François Comte & Ludwig Krämer eds., 2004) (general discussion of European environmental criminal law).

33. Commission Decision No. 2003/80/JHA, O.J. L 29/55 (2003).

34. See *Commission v. Council*, [2005] ECR I-7879, ¶ 18.

35. *Id.*

EC Treaty on the Community.”³⁶ The Court acknowledged that the framework decision did indeed “entail partial harmonisation of the criminal laws of the Member States” and that “as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence.”³⁷ However, the Court observed that this:

[D]oes not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an *essential measure* for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers *necessary* in order to ensure that the rules which it lays down on environmental protection are fully effective.³⁸

The Court concluded that the framework decision had as its main purpose the protection of the environment (and not harmonizing criminal law as such) and therefore could have been properly adopted on the basis of Article 175.³⁹

The Commission, in the aftermath of *Case C-176/03*, has now proposed a Directive on the protection of the environment through criminal law.⁴⁰ The proposed directive establishes a minimum set of serious environmental offenses that should be considered criminal throughout the EU when committed intentionally or with serious negligence.⁴¹ The scope of liability of legal persons is defined in detail. For offenses committed under certain aggravating circumstances the minimum level of maximum sanctions for natural and legal persons is likewise harmonized.⁴² Note that this part of the proposal goes well beyond the level of harmonization of the annulled Framework Decision in *Case C-176/03*.⁴³ In view of the ECJ judgment in *Case C-440/05*, to be discussed *infra*, it is questionable whether the Council and European Parliament are competent to enact this proposal under Article 175(1) alone.

36. *Id.* ¶ 39.

37. *Id.* ¶ 47.

38. *Id.* ¶ 48.

39. *Id.* ¶ 51.

40. See generally Proposal for Directive of European Parliament and Council on the Protection of the Environment through Criminal Law, O.J. C 180E/238 (2001).

41. *Id.* arts. 6-7.

42. See generally *Commission v. Council*, Case C-176/03, [2005] E.C.R. I-7879.

43. See *id.*

The judgment in *Case C-176/03* was confirmed in *Case C-440/05*.⁴⁴ In that case the Commission was seeking annulment of Council Framework Decision 2005/667 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution.⁴⁵ However, the Court made it in that case perfectly clear that “the determination of the type and level of the criminal penalties to be applied does not fall within the Community’s sphere of competence.”⁴⁶

In sum, whenever criminal penalties are essential for combating serious offenses against the environment, Article 175 EC provides for the correct legal basis to require Member States to introduce such penalties, but it does not provide a legal basis to determine the type and level of criminal penalties. This would require legislative measures under the Third Pillar of the Treaty on European Union. However, this debate on the use of correct legal basis for harmonizing environmental criminal law will become obsolete after the entry into force of the Reform Treaty. In general, the “depillarization” undertaken by the Reform Treaty will cause the “ordinary legislative procedure” to be applicable for both European environmental law and European criminal law.

II. DEROGATION UNDER ARTICLE 95(4)-(6)

Paragraphs 4 and 5 of Article 95 read as follows:

If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them. Moreover, without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the

44. *Commission v. Council (Ship-source Pollution)*, Case C-440/05 (ECJ Oct. 23, 2007) (not yet reported).

45. *Id.*

46. *Id.* ¶ 70.

harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.⁴⁷

The Court of Justice has held that the procedure of Article 95 EC allows a Member State to maintain⁴⁸ (paragraph 4) or to introduce (paragraph 5) national rules derogating from a harmonization measure taken in the framework of the internal market.⁴⁹ Article 95(4)-(5) provides an exception to the principles of uniform application of European law and the unity of the market and therefore must be strictly interpreted.⁵⁰ It is for the Member State that invokes Article 95(4)-(5) EC to prove that the conditions for application of those provisions have been met.⁵¹

As Sevenster & Janssen rightly noted, it is quite remarkable that although the derogation procedure is applicable to all "Article 95-measures," the case law related to this provision is more or less exclusively environmental.⁵² Let us have a look at some of the more recent cases.⁵³

A. *New National Legislation*

Although a Member State's adoption of new measures derogating from harmonization legislation is covered by Article 95(5) EC, the cumulative conditions under which this is permitted are not altogether clear.⁵⁴ First of all, paragraph 5 requires that Member States must prove that there is "new scientific evidence" justifying their measures.⁵⁵ New evidence requires that the scientific evidence on which the request is based was not available

47. See EC Treaty, *supra* note 9, art. 95, O.J. C 321 E/37, at E/79.

48. In general, national provisions which exist only in draft form at the moment of adoption of the measure will have to be examined under Article 95(5). For the exception to that rule, see Commission Decision No. 2002/884/EC, O.J. L 308/30 (2002).

49. See *France v. Commission*, Case C-41/93, [1994] E.C.R. I-1829.

50. See EC Treaty, *supra* note 9, art. 95, O.J. C 321 E/37, at E/79.

51. See *Land Oberösterreich & Austria v. Commission* (Land Oberösterreich), Case T-366/03, [2005] E.C.R. II-4005, ¶ 63; see also *Netherlands v. Commission*, Case T-182/06, ¶ 50 (CFI June 27, 2007) (not yet reported); *Denmark v. Commission*, Case C-3/00, [2003] E.C.R. I-2643, ¶ 84.

52. See H.G. Sevenster & J.M.P. Janssen, *Het Europees Milieurecht als Proeftuin*, in *HET MILIEURECHT ALS PROEFTUIN: 20 JAAR CENTRUM VOOR MILIEURECHT 201, 208* (M.V.C. Aalders & R. Uylenburg eds., 2007).

53. See, e.g., N. de Sadeleer, *Procedures for Derogations From the Principle of Approximation of Laws Under Article 95 EC*, 40 *COMMON MKT. L. REV.* 889, 889-915 (2003).

54. See e.g., *Germany v. Commission*, Case C-512/99, [2003] E.C.R. I-845, ¶ 81.

55. See EC Treaty, *supra* note 9, art. 95, O.J. C 321 E/37, at E/79.

at the time of adoption of the directive in question.⁵⁶ However, it is not quite clear whether “new” must be understood as evidence produced and/or published after the adoption of the European measure only, or that it also includes “older” evidence that was not taken into account by the European institutions during the decision-making procedure.

In a case concerning emissions of particulate matter by diesel powered vehicles, the Dutch Government produced recent scientific studies to show that susceptible population groups are subject to higher health risks associated with particulate matter.⁵⁷ Although the Commission noted that the environmental and health effects related to particulate matter concentrations were already known to a certain extent before the adoption of Directive 98/69, it did accept the studies as new evidence. Since the adoption of the directive, a large number of new epidemiological studies on many aspects of exposure and health effects of particulate matter have been completed which led the World Health Organization to produce updates of its air quality guidelines.

Watertight proof should not be necessary, as this clause must be interpreted in the light of the precautionary principle.⁵⁸ However, a mere change in national policy views would not seem sufficient to permit a state to derogate from a prior directive.⁵⁹ Secondly, paragraph 5 requires that this evidence relate to the protection of the environment or the working environment.⁶⁰ The public policy grounds of Article 30 EC are omitted. This clearly restricts a Member State’s options to derogate from European standards in the area of chemicals, dangerous substances, biocides, etc. This may seem odd, particularly given that public policy grounds can be used for maintaining existing national standards. Introducing new national standards is therefore more difficult than maintaining existing ones. The reason for this has been explained by the Court in the *German Man-made Mineral Fibres* case:

The difference between the two cases provided for in Article

56. See *Denmark*, [2003] E.C.R. I-2643, ¶ 57.

57. See Commission Decision No. 2006/372, O.J. L 142/16 (2006).

58. See Commission Decision No. 1999/832, O.J. L 329/25, ¶ 104 (1999).

59. The precautionary principle does not imply that either. See *Denmark*, [2003] E.C.R. I-2643, ¶ 103.

60. See EC Treaty, *supra* note 9, art. 95, O.J. C 321 E/37, at E/79.

95 EC is that, in the first, the national provisions predated the harmonisation measure. They were therefore known to the Community legislature but it could not or did not seek to be guided by them for the purpose of harmonisation. It was therefore considered acceptable for the Member State to request that its own rules remain in force. To that end, the EC Treaty requires that such national provisions must be justified on grounds of the major needs referred to in Article 30 EC or relating to the protection of the environment or the working environment. By contrast, in the second case, the adoption of new national legislation is more likely to jeopardise harmonisation. The Community institutions could not, by definition, have taken account of the national text when drawing up the harmonisation measure. In that case, the requirements referred to in Article 30 EC are not taken into account and only grounds relating to protection of the environment or the working environment are accepted, on condition that the Member State provides new scientific evidence and that the need to introduce new national provisions results from a problem specific to the Member State concerned arising after the adoption of the harmonisation measure.⁶¹

This line of reasoning is not entirely convincing. This imbalance in the Treaty, sanctioned by the Court, could result in a national measure being allowed in one Member State (as existing national legislation covered by an Article 30 EC) but not in another (because it was being introduced there).

B. *A Problem Specific to That Member State and Article 95(5)*

Under Article 95(5) EC, the Member State must show that the new national measures are necessary to tackle a problem that is specific to that Member State, for instance, because of its high population density, highly concentrated infrastructure, special geological, metrological or geomorphological circumstances, etc. In other words, there have to be circumstances specific to that Member State which can justify the more stringent environmental measures. This means that simply “wanting stricter environmental legislation” would not be sufficient. The *Land Oberösterreich* case made this quite clear.⁶²

61. Germany v. Commission, Case C-512/99, [2003] E.C.R. I-845, ¶ 41.

62. See *Land Oberösterreich*, Case T-366/03, [2005] E.C.R. II-4005, *judgment upheld* by Joined Cases C-439 & C-454/05 P, [2007] E.C.R. __, [2007] 3 C.M.L.R. 52.

The case concerned a notification under Article 95(5) EC of a draft law of Land Oberösterreich (Province of Upper Austria) banning genetic engineering altogether.⁶³ The decision of the Commission rejecting Austria's request for derogation was challenged at the Court of First Instance ("CFI") under Article 230 EC. The Court upheld the Commission's decision in view of Austria's failure to establish that the territory of Land Oberösterreich contained "unusual or unique ecosystems that required separate risk assessments from those conducted for Austria as a whole or in other similar areas of Europe."⁶⁴ Consequently, the Court held that the arguments by which the applicants have disputed the findings made by the Commission on the condition relating to the existence of a problem specific to the notifying Member State had to be rejected.⁶⁵

In the *Dutch Diesel Engine* case, the CFI further clarified this requirement.⁶⁶ It argued that it is not possible to rely on Article 95(3) in order to deal with a general environmental danger in the Community:

Any problem which arises in terms which are on the whole comparable throughout the Member States and which lends itself, therefore, to harmonised solutions at Community level is general in nature and is, consequently, not specific within the meaning of Article 95(5) EC. It is therefore necessary, in order correctly to interpret Article 95(5) EC, to envisage the requirement of national specificity of a problem essentially from the angle of the aptness or inaptness of the harmonisation of the applicable Community rules to confront adequately the difficulties encountered locally, since the established inaptness of those rules justifies the introduction of national measures.⁶⁷

In other words, justification for a Member State's derogation must be based upon the fact that, due to the local nature of the problem, a solution at the European level is not suitable to resolve the problem established.

However, this requirement does not necessarily mean that a

63. *Id.* ¶ 6.

64. *Id.* ¶ 67.

65. *Id.* ¶ 71.

66. See *Netherlands v. Commission*, Case T-182/06, ¶ 50 (CFI June 27, 2007) (not yet reported).

67. *Id.* ¶¶ 62-64.

Member State would be precluded from taking more stringent measures simply because the same problem also occurred elsewhere also. In the *Dutch Diesel Engine* case, the Dutch Government complained that the Commission had made the grant of the derogation requested subject to the requirement that a specific air quality problem relied upon in support of its request affects the Netherlands exclusively. After stating, as a matter of principle, "for a problem to be specific to a Member State within the meaning of the relevant provision, it is not necessary that it is the result of an environmental danger within that State alone," the CFI found that the Commission did not in fact apply such an exclusivity test and rejected the Netherlands government's claim as lacking any factual basis.⁶⁸ Indeed, specific does not mean exclusive.

III. LEGAL PROTECTION AND ENFORCEMENT

A. Articles 226-228 Infringements

The mere transposition of directives into national law is, of course, not enough. The obligations they contain have to first be applied and then enforced. This is primarily, but certainly not exclusively, a responsibility of the Member States. In the absence of concrete and specific provisions, the Member States must determine how the factual situation must be brought in line with the legally desired situation. The manner in which European law is enforced by the Member States is, however, under Commission control. Inadequate enforcement, either in law or in fact, may be a reason for the Commission to initiate proceedings under Article 226 EC (future Article 258 TFEU).⁶⁹ In this respect an interesting development should be noted.

According to the judgment of the European Court of Justice in *Commission v. Ireland, Case C-494/01*, on twelve alleged infringements, in fact, of the Waste Framework Directive, the Court ruled that:

[I]n principle nothing prevents the Commission from seeking in parallel a finding that provisions of a directive have not

68. *Id.* ¶¶ 65, 72.

69. See *Commission v. Ireland, Case C-317/02*, slip op. (ECJ Nov. 18, 2004), cited in O.J. C 6/7 (2005). The Court ruled that Member States are required to ensure that the appropriate measures are taken, including administrative action or criminal proceedings, against those persons who have failed to comply with European rules.

been complied with by reason of the conduct of a Member State's authorities with regard to particular specifically identified situations and a finding that those provisions have not been complied with because its authorities have adopted a general practice contrary thereto, which the particular situations illustrate where appropriate.⁷⁰

In other words, the Commission is entitled to deduct that there is a general practice of non-compliance and non-enforcement based on a series of individual infringements. This implies that the Commission is not only entitled to demand that these individual infringements of the directive are remedied, but also that the public authorities in question change, more fundamentally and structurally, their enforcement policies.⁷¹ To qualify as a general practice of non-compliance the State conduct must be, to some degree, of a consistent and general nature and must not be geographically confined to only a part of the territory of the Member State in question.⁷² This is yet another environmental case with important spill-over effects upon the enforcement of European law in general.

B. *Imposing Financial Sanctions on a Member State*

Since the Treaty of Maastricht introduced Article 228 into the EC Treaty, the Court has been able to impose a lump sum and/or penalty payment⁷³ on a Member State that has failed to implement a judgment establishing an infringement.⁷⁴ Although the decision on the imposition of the sanctions lies with the Court of Justice, which has full jurisdiction in this area, the

70. See *Commission v. Ireland*, Case C-494/01, [2005] E.C.R. I-3331, ¶ 27; see also Pål Wennerås, *A New Dawn for Commission Under Directive Articles 226 and 228 EC: General and Persistent (GAP) Infringements, Lump Sums and Penalty Payments*, COMMON MKT. L. REV. 31, 31-62 (2006).

71. See PAL WENNERAS, *THE ENFORCEMENT OF EC ENVIRONMENTAL LAW* 252-61 (2007).

72. See *Commission v. Germany*, Case C-441/02, [2006] E.C.R. I-3449, ¶ 50; see also *Commission v. Ireland*, Case C-248/05 (ECJ Oct. 25, 2007) (not yet reported) (describing the criterium of "geographically confined").

73. The judgment in *Commission v. France*, Case C-304/02, [2005] E.C.R. I-6263, confirmed that the two kinds of financial sanctions (penalty and lump sum) can apply cumulatively for the same infringement. According, the Commission favors combined sanctions, although the Commission does not exclude the possibility, in very specific cases, of recourse to the lump sum alone. See Commission Communication—Application of Article 228 of the EC Treaty, SEC (2005) 1658, at 3.

74. *Id.* at 1.

Commission plays a decisive initial role in so far as it is responsible for initiating the Article 228 procedure and bringing the case before the Court of Justice with a proposal for the application of a lump sum and/or penalty payment of a specific amount.⁷⁵ In 1996, the Commission published guidelines on how to apply financial sanctions under Article 228.⁷⁶ According to the Commission the fixing of sanctions should be based on three fundamental criteria:

- the seriousness of the infringement;
- its duration;
- the need to ensure that the penalty itself is a deterrent to further infringements.⁷⁷

From the point of view of the effectiveness of the sanction, the Commission regards that it is important to fix sanction amounts that are appropriate to ensure their effectiveness. The Commission's first use of a proposal of Article 228 penalties came in environment-related cases.⁷⁸

In *Case C-387/97*, the Commission requested that Greece be ordered to pay a penalty as long as it fails to take necessary measures to ensure that toxic waste in an area in Crete is disposed of without endangering human health and without harming the environment.⁷⁹ The Court had already found in 1992 that Greece had failed to prevent environmental pollution.⁸⁰ The Court agreed with the Commission and ordered Greece to pay a penalty of €20,000 per day as long as it failed to take the necessary measures.⁸¹ The Court emphasized that the failure to comply with the obligations resulting from the Framework Waste Directive could, by the very nature of that obligation, endanger human health directly and harm the environment and therefore had to be regarded as particularly serious.⁸²

Case C-278/01 concerned the failure of Spain to comply with

75. This proposal "cannot bind the Court and merely constitute a useful point of reference." *Commission v. Spain*, Case C-278/01, [2003] E.C.R. I-14141, ¶ 41.

76. See generally Commission Communication, *supra* note 73, SEC (2005) 1658.

77. *Id.* at 6.

78. See, e.g., *Commission v. Greece*, Case C-387/97, [2000] E.C.R. I-5047; see also *Spain*, [2003] E.C.R. I-14141.

79. See *Greece*, [2000] E.C.R. I-5047, ¶ 99.

80. See *Commission v. Greece*, Case C-45/91, [1992] E.C.R. I-2509.

81. See *Greece*, [2000] E.C.R. I-5047, ¶ 99.

82. See *id.* ¶ 94.

the minimum water standards in the Bathing Water Directive.⁸³ The Court ordered Spain to pay to the Commission a penalty payment of €624,150 per year per one percent of area suitable for swimming in Spanish inshore waters which did not conform to the minimum standards laid down under the directive for the year in question. The penalties would commence from the time when the quality of bathing water in the first bathing season following delivery of the judgment was determined and run until the year in which Spain fully complied with the judgment.⁸⁴

In both cases the Court affirmed the importance of the proportionality principle, stating that a penalty payment should be appropriate to the circumstances and proportionate both to the breach found and to the ability of the Member State concerned to pay the penalty. According to the Court in *Case C-278/01*, there may be infringement situations, for instance concerning quality standards for bathing water set by the directive, where, as the Court noted, "it is particularly difficult for the Member States to achieve complete implementation," and where "it is conceivable that the defendant Member State might manage significantly to increase the extent of its implementation of the Directive but not to implement it fully in the short term."⁸⁵ In those circumstances, the Court ruled, "a penalty which does not take account of the progress which a Member State may have made in complying with its obligations is neither appropriate to the circumstances nor proportionate to the breach which has been found."⁸⁶

The Commission acknowledged that the suspension of a penalty might sometimes be justifiable. For instance, a Member State which is held to have permitted an important nature site to deteriorate as a result of land drainage, and then subsequently undertakes infrastructure works aimed at restoring the hydrological conditions that are ecologically necessary. The Commission may have to undertake monitoring in order to determine whether the works have succeeded in remedying the harm done.⁸⁷

In fixing the amount of the penalty, the Commission con-

83. See *Spain*, [2003] E.C.R. I-14141.

84. See *id.* ¶ 62.

85. See *id.* ¶¶ 47-48.

86. *Id.* ¶ 49.

87. See Commission Communication, *supra* note 73, SEC (2005) 1658, at 5.

siders the importance of the European rules breached and the impact of the infringement on general and particular interests. “[S]erious or irreparable damage to human health or the environment” is explicitly mentioned by the Commission as such a factor.⁸⁸

C. Revitalizing the VNO-Doctrine

Traditional Court doctrines hold that provisions of European law can only be directly effective (and thus relied upon before national courts) if they satisfy the test of “unconditional and sufficiently precise” measures.⁸⁹ This criterion meant that when a State has discretionary powers in the implementation of a provision of EC law, this will prevent it from having direct effect. Examples are provisions allowing a certain degree of freedom of choice or ones that leave the exercise of powers to the discretion of the public authorities. Indeed, regulatory discretion precludes a European rule from having direct effect. The Court of Justice made only one exception in a rather obscure Dutch tax law case which seemed to take a more loose view on the matter.⁹⁰ However, as the Court never followed precedent of that case, one assumed that it was “dead.” However, two recent environmental cases have revitalized this doctrine. In the *Kraaijeveld v. Van Zuid-Holland* case, the court had to consider the question to what extent certain infrastructure works involving dykes should be subject to a prior environmental impact assessment under the Environmental Impact Directive.⁹¹

Article 2(1) of the Directive lays down the general obligation that “projects likely to have significant effects on the environment” are to be subject to an assessment.⁹² This general obligation is further specified in Article 4(1) in combination with Annex I of the Directive, which states the projects for which an assessment is always required.⁹³ There is no question of any discretion here. However, Article 4(2) in combination with Annex

88. *Id.* at 7.

89. See generally J.H. JANS ET AL., *EUROPEANISATION OF PUBLIC LAW* (2007); S. PRECHAL, *DIRECTIVES IN EUROPEAN COMMUNITY LAW* (2005).

90. See generally *Verbond van Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen*, Case 51/76, [1977] E.C.R. I-113.

91. See *Kraaijeveld v. Van Zuid-Holland*, Case C-72/95, [1996] E.C.R. I-5403.

92. *Id.* ¶ 7.

93. See *id.* ¶ 46.

II clearly gives the national legislature more freedom when implementing the Directive. So much so that the Dutch *Raad van State* (Council of State) denied that the directive could have direct effect.⁹⁴ This was because it allows the national legislature to establish the criteria and/or thresholds necessary to determine whether or not a project is to be subject to an assessment.⁹⁵ In the Netherlands, works involving dykes (among the projects listed in Annex II), were subject to an assessment if the dyke was five kilometers or more in length, with a cross-section of at least 250 square meters.⁹⁶ The Court of Justice concluded that Article 4(2) did allow Member States “a certain discretion,” namely to fix specifications, thresholds and criteria.⁹⁷ However, it went on to say that this discretion was itself limited, namely by the obligation set out in Article 2(1) that projects likely to have significant effects on the environment are to be subject to an impact assessment.⁹⁸ The national court was instructed to examine whether the legislature had remained within the limits of its discretion, and thus to review the national legislation in the light of the directive.⁹⁹

In *Landelijke Vereniging tot Behoud van de Waddenzee* (“Waddenzee”),¹⁰⁰ the Court extended this approach. Where the national court was required in *Kraaijeveld* to examine whether the national legislature had remained within the limits of discretion allowed by the directive, in this case it became clear that even where there is no implementing legislation, the decisions of an administrative authority must also remain within those limits, and that the national courts must examine whether or not this is the case. This case concerned Article 6 of the Habitats Directive.¹⁰¹

Thus, the Court in fact acknowledged in *Kraaijeveld* and *Waddenzee* that individuals may also rely on directive provisions that allow Member States some discretion in their application

94. See Dutch Raad van State, 3 August 1993 [1994] AB 287; see also JANS ET AL., *supra* note 89, at 70.

95. See generally *Kraaijeveld*, [1997] E.C.R. I-5403.

96. See *id.* ¶ 1.

97. See *id.* ¶ 3.

98. See *id.*

99. See *id.* ¶ 4.

100. *Landelijke Vereniging tot Behoud van de Waddenzee v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Waddenzee)*, Case C-127/02, [2004] E.C.R. I-7405, ¶ 65.

101. See generally *id.*

(in this case the freedom to make exceptions in certain cases). The national court must then examine whether the *national legislature* has stayed within the limits of the law when exercising its powers.

D. *Inverse Direct Effect*

A well known doctrine of the Court is that directives do not produce horizontal or third-party effect in the sense that, in the absence of national implementing measures, they directly result in obligations for private individuals.¹⁰² Under Article 249(3) EC, directives are addressed to Member States and hence oblige the Member States to take the necessary steps. They therefore only have vertical direct effect. In principle, therefore, direct effect cannot be invoked to establish a breach of a provision of a directive in relations between individuals. Apart from lacking horizontal effect, a directive *a fortiori* also lacks "inverse direct effect."¹⁰³ The notion of "inverse direct effect" was introduced by the Court in the environmental case of *Wells v. Secretary of State for Transport, Local Government and the Regions*.¹⁰⁴ In *Wells*, however, the Court accepted that all kinds of indirect effects on the legal position of individuals could not be equated to "inverse direct effect," and thus limited the consequences of its "no-horizontal-effect-of-directives" doctrine to a considerable degree.¹⁰⁵

An environmental directive can give rise to obligations in a more indirect way. If the competent authorities grant a permit which is in conflict with a directive, an appeal by an interested third party will result in its annulment. Acts which were allowed by the permit before are no longer allowed once it has been annulled. This has obvious consequences in the sphere of civil liability. In this roundabout way, horizontal effects on third parties may arise after all.

There are other ways in which environmental directives can produce indirect horizontal effects. Thus, where an interested third party invokes a directly effective provision of an environ-

102. See *Marshall v. Southampton & South-West Hampshire Area Health Auth.*, Case 152/84, [1986] E.C.R. I-737, ¶ 48.

103. See *Pretore di Salò v. Persons Unknown*, Case 14/86, [1987] E.C.R. I-2545, ¶ 19.

104. See *Wells v. Sec'y of State for Transp., Local Gov't & the Regions*, Case C-201/02, [2004] E.C.R. I-723, ¶ 58.

105. See *generally* Jans, *supra* note 2.

mental directive, for example in an appeal against the grant of an environmental permit, a successful appeal would mean that the permit-holder would be placed in a less favorable position, because his permit would be void. There is nothing surprising about this, because a permit which contravenes national environmental law can be annulled. The Court of Justice addressed this problem in the *Wells* case.¹⁰⁶

This case concerned a dispute between Mrs. Wells and the Secretary of State for Transport, Local Government and the Regions concerning the grant of a new consent for mining operations at Conygar Quarry without an environmental impact assessment having first been carried out.¹⁰⁷ In 1947 an "old mining permission" had been granted for Conygar Quarry under the Town and Country Planning Order 1946.¹⁰⁸ Conygar Quarry was divided into two sections, of slightly more than seven and one half hectares each, separated by a road on which Mrs. Wells' house was situated.¹⁰⁹ Mrs. Wells had bought her house in 1984, that is to say thirty-seven years after the mining permit had been granted, but at a time when exploration of the Quarry had long been dormant.¹¹⁰ The site was recognized to be environmentally extremely sensitive. The area in or adjacent to which the quarry lay was subject to several designations of nature and environmental conservation importance. At the beginning of 1991, the owners of Conygar Quarry applied to the competent Mineral Planning Authority ("MPA") for registration of the old mining permission under the Planning and Compensation Act 1991.¹¹¹ Registration was granted by a decision of August 24, 1992, which stated that no development could lawfully be carried out unless and until an application for the determination of new planning conditions had been made to the MPA and finally decided (the registration decision).¹¹² The owners of Conygar Quarry had therefore applied to the competent MPA for the determination of new planning conditions. As the MPA, by decision of Decem-

106. See generally *Waddenzee*, Case C-127/02, [2004] E.C.R. I-7405; *Wells*, [2004] E.C.R. I-723.

107. See *Wells*, [2004] E.C.R. I-723, ¶ 2.

108. See *id.* ¶¶ 8-9.

109. See *id.* ¶ 21.

110. See *id.*

111. See *id.* ¶ 23.

112. See *id.* ¶ 24.

ber 22, 1994, had imposed more stringent conditions than those requested by the owners of Conygar Quarry, the latter exercised their right of appeal to the Secretary of State. By decision of June 25, 1997, the Secretary of State imposed fifty-four planning conditions, leaving some matters to be decided by the competent MPA.¹¹³ Those matters were approved by the competent MPA by decision of July 8, 1999.¹¹⁴ Neither the Secretary of State nor the competent MPA had examined whether it was necessary to carry out an environmental impact assessment pursuant to Directive 85/337.

According to the United Kingdom government, acceptance that an individual was entitled to invoke Directive 85/337 would amount to inverse direct effect. The Court of Justice rejected this: “[M]ere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned.”¹¹⁵ These adverse repercussions, the Court stated in paragraph 58, were “not directly linked” to the performance of any obligation which would fall on the quarry owners under the directive.¹¹⁶ They were “the consequence of the belated performance of [the Member State’s] obligations.”¹¹⁷

This case demonstrates that, where a third party successfully invokes the direct effect of the directive, this may put the permit holder at a disadvantage. However, it is impossible to regard this as an unacceptable form of horizontal effect: “mere adverse repercussions on the rights of third parties” do not constitute inverse direct effect. The effects for the permit holder have to be seen as flowing from the rights which the third party has obtained under the directive vis-à-vis the competent authorities and are not “directly linked”¹¹⁸ with obligations of the permit holder. The adverse consequences of direct effect for the permit holder do not stem from the directive, but from the fact that the authorities have failed to fulfil their obligations under it. If the directive had been correctly implemented, the authorities would not have

113. *See id.* ¶ 27.

114. *See id.* ¶ 28.

115. *See id.* ¶ 57.

116. *See id.* ¶ 58.

117. *See id.*

118. *See id.* ¶ 56.

granted the authorization in the first place. In so far as the additional burden results from the authorities' failure to fulfil their obligations under the directive vis-à-vis other individuals, this cannot be regarded as horizontal effect. However, whenever the obligations of the authorities are *directly linked* with obligations of individuals stemming from the (non-implemented) directive, this would amount to inverse direct effect. Note that the Court's new doctrine based on this judgment is not limited to environmental issues, but may have general application in any area of public law where national public authorities have to deal with different rights and interests of the public concerned.

IV. *FREE MOVEMENT OF GOODS*

In order to guarantee unobstructed movement of goods between the Member States, Article 28 EC prohibits national authorities from imposing quantitative import restrictions on the import of goods from other Member States, and all measures having equivalent effect.¹¹⁹ Article 29 EC contains a similar prohibition with respect to exports.¹²⁰ Article 30 EC lists a number of exceptions to these two prohibitions.¹²¹ In addition, the Court of Justice has formulated a number of supplementary grounds justifying barriers to imports of goods ("rule of reason" or *Cassis de Dijon* exceptions). In the *Cassis de Dijon* judgment and in subsequent cases, it was decided that, in the absence of harmonized rules, obstacles to free movement within the EU resulting from disparities between the national laws must be accepted, in so far as such rules, applicable to domestic and imported products without distinction, may be deemed to be necessary in order to satisfy national mandatory requirements which are accepted by the Court.¹²²

As far as the rule of reason is concerned, the national measure in question must be applied without distinction to domestic and foreign products. It was well-established case law that the rule of reason doctrine cannot be relied on to justify national measures which are not applicable to domestic products and im-

119. See EC Treaty, *supra* note 9, art. 51, O.J. C 321 E/37, at E/62.

120. See *id.* art. 29, at E/53.

121. See *id.* art. 30, at E/53.

122. See *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, Case 120/78, [1979] E.C.R. I-649.

ported products without distinction, which usually means they discriminate against imported products.¹²³ This meant that national protective measures which might be justified on environmental grounds, but do not fall within the more limited scope of the treaty based exceptions to free movement of goods set out in Article 30 EC, are only allowed if they can be regarded as measures applicable without distinction.

However, the judgment in the *Walloon Waste* case was the first case which caused some confusion as to the degree to which a measure must be applicable without distinction for the rule of reason to apply.¹²⁴

In that case, the lawfulness of a Walloon prohibition on the disposal of foreign waste was at issue. The Commission argued that these mandatory requirements of environmental protection could not be relied on to allow the Walloon restrictions.¹²⁵ The Commission insisted that the measures at issue discriminated against waste coming from other Member States though that waste was no more harmful than that produced in Wallonia.¹²⁶ The same line of reasoning was developed by Advocate General Jacobs in his Opinion. In the Advocate General's view, there was "plainly" discrimination between foreign and Belgian waste and therefore the ruling of the Court in the *Danish Bottles* case could not serve as a precedent.¹²⁷ The Court of Justice first confirmed that the mandatory requirements are to be taken into account only with regard to measures which apply to national and imported products without distinction.¹²⁸ However, in order to determine whether the obstacle in question is discriminatory, the particular type of waste must be taken into account. The principle that environmental damage should as a priority be rectified at source—a principle laid down by Article 174(2) EC for action relating to the environment—means that it is for each region, commune or other local entity to take appropriate measures to receive, process and dispose of its own waste. Consequently,

123. See e.g., *Aragonesa de Publicidad Exterior SA & Publivia SAE v. Departamento de Sanidad y Seguridad Social de la Generalitat de Catalunya*, Joined Cases C-1/90 & C-176/90, [1991] E.C.R. I-4151, ¶ 13.

124. See *Commission v. Belgium (Walloon Waste)*, Case C-2/90, [1992] E.C.R. I-4431.

125. See *id.* ¶ 33.

126. See *id.*

127. *Id.*; see also *Commission v. Denmark*, Case 302/86, [1988] E.C.R. I-4607.

128. See *Walloon Waste*, [1992] E.C.R. I-4431, ¶ 34.

waste should be disposed of as close as possible to the place where it is produced.¹²⁹ The Court then observed that this principle is in conformity with the principles of self-sufficiency and proximity set out in the Basel Convention. The Court therefore concluded that, having regard to the differences between waste produced in one place and that in another and its connection with the place where it is produced, the Belgian measures could not be considered to be discriminatory.¹³⁰

What is interesting is, in the first place, that the Court has de facto equated the fact that a measure applies without distinction to the absence of discrimination. By thus equating the two, the Court has made the test of whether or not a measure applies without distinction a test of whether or not it is discriminatory. The relevance of this discussion could be that, for a national measure to benefit from the rule of reason exception, it no longer has to be framed as a measure applicable without distinction. Apparently, differential measures can also be excepted using the rule of reason, as long as there is an objective justification. More recent case law indeed seems to suggest that the criterion "measure applicable without distinction" is no longer a hard and fast rule in the case law of the Court of Justice.

For example, it could be argued that the German noise pollution rules in *Aher-Waggon GmbH v. Bundesrepublik Deutschland* do indeed adversely affect foreign aircraft in particular, and that the Danish bee regulations protecting rare local bees from contamination by foreign bee imports in *Bluhme* are essentially distinctly applicable measures.¹³¹ *PreussenElektra AG v. Schlesweg AG* represents the best example of an environmental case where the Court applied a rule of reason test, albeit not explicitly, with respect to a distinctly applicable measure.¹³² The German rules clearly favored domestic "green energy" producing undertakings and it is hard to see those rules as being indistinctly applicable. It is the author's opinion that the Court in that case applied the rule of reason and not Article 30 EC. The judgment indicates,

129. *See id.*

130. *See id.* ¶ 35.

131. *See Aher-Waggon GmbH v. Bundesrepublik Deutschland*, Case C-389/96, [1998] E.C.R. I-4473, ¶ 2; *see also In re Bluhme*, Case C-67/97, [1998] E.C.R. I-8033, ¶ 16.

132. *See generally PreussenElektra AG v. Schlesweg AG*, Case C-379/98, [2001] E.C.R. I-2099.

where the Court ruled that the German measures “are not incompatible” with Article 28 EC, that the Court is not applying the exception of Article 30 EC.¹³³ In that case the dictum of the judgment would entail something like “. . . is justified by Article 30 EC” or “Article 30 EC does not preclude”

Finally, we should mention *Case C-320/03*, which involved regional Austrian legislation prohibiting trucks weighing more than seven and one half tons, carrying certain goods, from being driven on a section of the A12 motorway in the Inn Valley.¹³⁴ This legislation had clearly discriminatory elements as the prohibition affected the international transit of goods, when non-Austrian undertakings constituted over eighty percent of the truck industry concerned.¹³⁵ Nevertheless, the Court ruled—subject to the proportionality principle—that the Austrian legislation had been adopted in order to ensure the quality of ambient air and could be justified on “environmental protection grounds.”¹³⁶

Taken together with indications in the Court’s case law outside the field of the environment that the rule of reason will be applied where measures do make a distinction between domestic and imported products,¹³⁷ it cannot be ruled out that the relevance of the distinction between Article 30 interests and rule of reason exceptions has ceased to exist. Perhaps it is time that the Court should rule on this explicitly.¹³⁸

CONCLUSION

The purpose of this Article is to show that many important developments on central issues of European law have their origins in the Court of Justice’s case law concerning environmental protections.

133. *See id.* ¶ 2.

134. *See generally* Commission v. Austria, Case C-320/03, [2005] E.C.R. I-9871.

135. *See id.* ¶¶ 38, 95.

136. *See id.* ¶ 71.

137. *See* Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA & van Riet v. Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen, Case C-385/99, [2003] E.C.R. I-4509; *see also* Belgium v. Spain, Case C-388/95, [2000] E.C.R. I-3123; De Agostini Case, C-34/95, [1997] E.C.R. I-3843.

138. The Court has been invited to do so by Advocate General Jacobs in *PreussenElektra*. *See* PreussenElektra AG v. Schlesweg AG, Case C-379/98, [2001] E.C.R. I-2099, ¶ 229; *see also* Opinion of Advocate General Geelhoed, Commission v. Austria, Case C-320/03, [2005] E.C.R. I-9871, ¶ 106.

The choice of the correct legal basis for EU measures has been largely developed by environmental cases, such as the case concerning the Titanium Dioxide Directive, the Waste Framework Directive, Framework Decision 2003/80 on the protection of the environment through criminal law and the Framework Directive on Ship-source Pollution.

With respect to the question whether and to what extent Member States are allowed to derogate from EU internal market legislation, once again, the importance of environmental cases is quite visible, as we have seen in the *German Man-made Mineral Fibres* case and the *Land Oberösterreich* case in particular.

On enforcement, *Commission v. Ireland* has effectively handed the European Commission a very useful tool to tackle enforcement issues in the Member States. Also, environmental cases in particular have provided the initial basis for the application of Article 228 enforcement penalties.

With respect to legal protection before the national courts of the Member States, we must not underestimate the importance of the *Kraaijeveld* and *Waddenzee* case law, revitalizing the VNO-Doctrine, thus enabling citizens to rely on European law, even if the harmonization permits States administrative discretion. The *Wells* case is important in this respect, as it limits, as far as possible, the consequences of the “no-horizontal-effect-of-directives” doctrine.

Finally, we have discussed environmental protection measures as limits upon free movement of goods. The *Walloon Waste* case can be seen as the source for the view that the relevance of the distinction between Article 30 interests and rule of reason exceptions has largely ceased to exist, as well as with respect to the application of the rule of reason, the criterion of a “measure applicable without distinction” is no longer a hard and fast rule in the case law of the Court of Justice. Not in environmental cases, not in other cases as well.