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The Harmonization of European Environmental Law and Diverging National Measures

A General Survey of the European Community's Legal Mechanisms for the Coordination of Community Secondary Law and National Environmental Measures with a Special Focus on More Stringent National Measures and Their Legal Justification under the Existing System of Safeguard Clauses, Systematic Escape Clauses, and Minimum Standards and the Principles of Shared Responsibility, Subsidiarity, and Competition of Regulatory Systems.

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Master Thesis of Legal Studies in Comparative,
European and International Law (LL.M)

presented by Andreas R. Ziegler

Supervisors: Professor Francis Snyder and Professor Christian Joerges

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Abbreviations

AJP	Allgemeine Juristische Praxis
BB	Der Betriebsberater
CDE	Cahiers du Droit Européen
CMLRev	Common Market Law Review
DB	Der Betrieb
DV	Die Verwaltung
DVBl.	Deutsches Verwaltungsblatt
EC	European Community
EA	Europa-Archiv
ECR	Reports of the European Court of Justice
ed.	editor/edition
eds.	editors
EEC	European Economic Community
e.g.	for example
ELRev	European Law Review
et al.	and others
EuGRZ	Europäische Grundrechte-Zeitschrift
EuR	Europarecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EUI	European University Institute
EWG	Europäische Wirtschaftsgemeinschaft
EWS	Europäisches Wirtschafts- und Steuerrecht
GATT	General Agreement on Tariffs and Trade
GYIL	German Yearbook for International Law
ICLQ	The International And Comparative Law Quarterly
i.e.	that is
ILM	International Legal Materials
JCMS	Journal of Common Market Studies
JEnvL	Journal of Environmental Law
JuS	Juristische Schulung
JZ	Juristenzeitung
LIEI	Legal Issues on European Integration
MEA	Multilateral Environmental Agreement
MLRev	Modern Law Review
nyr	not yet reported
NJW	Neue Juristische Wochenschrift
NuR	Natur und Recht
NVwZ	Neue Zeitschrift für Verwaltungsrecht
OECD	Organization for Economic Cooperation and Development
RIW	Recht der Internationalen Wirtschaft
RMC	Revue du Marché Commun
RTDE	Revue Trimestrielle du Droit Européen
SEA	Single European Act
seq.	sequentes, following pages
SEW	Sociaal-Economische Wetgeving
UPR	Umwelt- und Planungsrecht
UTR	Schriftenreihe des Instituts für Umwelt- und Technikrecht der Universität Trier
TREMs	Trade Related Environmental Measures
Vol.	Volume
YEL	Yearbook of Environmental Law
ZfU	Zeitschrift für Umweltpolitik und Umweltrecht

1 Introduction

1.1 The Problem

1.1.1 Free Movement of Goods and Protection of the Environment

The *coordination of trade liberalization and environmental protection* is one of today's biggest challenges for all existing trade agreements. Since World War II the liberalization of trade has been one of the main objectives of international relations and politics. The protection of the environment, on the other hand has become a priority only in the last 20 years, mainly since the 1972 UN Environmental conference in Stockholm. In recent years there has been increasing discussion about the compatibility of liberalized trade and environmental protection and the limitation of either in the interest of the other.

For the *liberalization of trade* on a global level, a legal system - GATT - was created in 1947. This system works as a rule-oriented forum which aims at eliminating quantitative trade restrictions, and technical barriers to trade, as well as at reducing customs duties. Within this framework many regional trade agreements have established free trade areas¹. In these regional agreements customs duties have been abolished and the application of non-tariff barriers to trade has been prohibited. The European Community (EC) is probably today's most comprehensive free trade agreement. Apart from its far reaching political integration objectives it aims at establishing one Common Market without internal borders and prohibiting customs duties² and any other kind of non-tariff-barriers³.

1.1.2 The Common Market and the Environment

When the Community originated in 1957 *the protection of the environment* was not an explicit objective of the Treaty; nevertheless the elimination of technical barriers to trade soon raised questions concerning European and national environmental policy. Differing

¹Such as provided for by Article XXIV GATT.

²Articles 9, 12 of the Treaty.

³Articles 30 and 34 of the Treaty, prohibition of quantitative restrictions to trade and measures having equivalent effect.

national product standards constitute obstacles to trade, while production and process measures as well as differences in taxation or the allocation of state aids influence the competitive situation within the Common Market. Thus regulatory differences between the Member States hinder the establishment of a Common Market. This is also valid if the mentioned measures are taken in the interest of environmental protection. On the other hand there is a real interest in maintaining certain measures necessary for the efficient safeguard of the environment. With the coming into force of the Single European Act (SEA) the Community itself has been entrusted with the protection of the environment at a high level.⁴

The establishment of the Common Market for goods and the protection of the environment do not necessarily *per se* contradict each other. The pursuit of both objectives demands, however, certain *mechanisms which coordinate the two aims*. Legal theory has to elaborate adequate solutions to balance the interests concerned. As Community law stands the *prima-facie*-dilemma between national environmental measures and the elimination of trade hindering regulatory differences can be tackled in two ways.

1.1.3 The European Community in Search of Reconciliation

One approach is the establishment of certain *basic principles concerning the application of national environmental measures*. Article 36 of the European Community Treaty allows exceptions to the general prohibition of national "measures having equivalent effect to quantitative restrictions to trade". The case law of the European Court in Article 36 and the *rule of reason*⁵ allow the application of national environmental measures if they are justified for the protection of the environment, non-discriminatory and proportionate.⁶ Under this system certain national measures may be maintained in spite of their trade hindering effect.

Another way of eliminating the remaining obstacles to trade is the *harmonization of environmental standards*. Under the Treaty of Rome the European Community has been given by its Member States a broad power to harmonize national laws, rules and

⁴Article 130 r of the Treaty.

⁵Case 120/78 Rewe versus Bundesmonopolverwaltung für Branntwein (*Cassis-de-Dijon*) [1978] ECR 649.

⁶E.g. Case 302/86 Commission versus Denmark (*Danish Bottles Case*) [1988] ECR 4606.

administrative actions which hinder the establishment of the Common Market. This power also has been used to harmonize national environmental standards.⁷ Under the Single European Act it was complemented by an explicit power to introduce a comprehensive environmental policy at Community level.⁸

Recently, however, the harmonization of national rules has come under frequent criticism. Under the principles of *subsidiarity*⁹ and *competition of regulatory systems*¹⁰ there is a strong desire to limit the Community's harmonization measures to those absolutely necessary. Certain Member States have a stronger desire than the Community as a whole to apply *more stringent environmental measures*. The Community has the task of ensuring both objectives: the establishment of the Common Market and the protection of the environment at a high level. The established principle of subsidiarity, however, requires the application of mechanisms which allow a certain degree of choice as to the level of protection.

1.2 Objectives

1.2.1 The Questions to Be Answered

This thesis seeks to answer the following question: *How far does the existing Community legal framework coordinate the shared responsibility for the protection of the environment and the establishment of the Common Market between Community and Member States?* The *mechanisms* applied in the Treaty to coordinate harmonized Community rules and the application of diverging national rules will be analyzed.

It will be shown that the Community uses different instruments in different contexts, depending on the degree of homogeneity needed for the establishment of the common

⁷Articles 100, 43, 75, 99, 113 of the Treaty.

⁸Article 130 s of the Treaty, but see also the accelerated harmonization of rules under Article 100 a.

⁹See e.g. *Toth*, The principle of subsidiarity in the Maastricht Treaty, CMLRev (1992) 1079-1106.

¹⁰See e.g. *Nicolaidis*, Competition Among Rules, World Competition (1992) 113-121 or *Hauser*, Harmonisierung oder Wettbewerb nationaler Regulierungssysteme in einem integrierten Wirtschaftsraum, Aussenwirtschaft (1993) 459-476.

Market. Until a comprehensive harmonization takes place the Member States remain free to act, bound only by the basic principles of the Treaty. After harmonization, by using *safeguard clauses and minimum requirements* in its harmonization projects the Community provides for the application of more stringent national environmental instruments. The introduction of *systematic options for diverging national measures* under Article 100a (4) and Article 130 t of the Treaty has added a complementary instrument. The *mutual information and the compulsory notification* of planned national measures constitute an essential element in this system for balancing the interests in question.

1.2.2 Existing Literature in the Field

This thesis does not have the objective of elaborating on the Community's competence to adopt environmental measures and the appropriate legal basis. There are already a large number of publications which treat in detail the Community's competence to regulate environmental policy¹¹. It is, however, necessary to show how the chosen legal basis changes the applicable mechanisms. A second range of publications has been dedicated to the interpretation of Article 100 a and its relation to Article 130 s.¹² These have analyzed the provision in detail, but the interpretation remains controversial. I intend rather to place Article 100 a (4) and also Article 130 t within the framework of the existing mechanisms without entering into the argument over all their possible interpretations. This does not seem necessary since a case concerning Article 100 a (4) is at the moment before the Court of Justice.¹³ A third set of existing literature focuses on the justification of national environmental measures under the general principles of the Common Market. However, focusing only on the admissibility of product measures under Article 36 and the rule of reason¹⁴, these neglect the possible consequences from production and process measures,

¹¹*Vorwerk*, Die umweltpolitischen Kompetenzen der Europäischen Gemeinschaft und ihrer Mitgliedstaaten nach Inkrafttreten der EEA (1990); *Hochleitner*, Die Kompetenzen der Europäischen Wirtschaftsgemeinschaft auf dem Gebiet des Umweltschutzes (1990); *Schröder*, Die Kompetenzverteilung zwischen der Europäischen Wirtschaftsgemeinschaft und ihren Mitgliedstaaten auf dem Gebiet des Umweltschutzes (1992).

¹²*Palme*, Nationale Umweltpolitik in der EG - Zur Rolle des Art. 100 a IV im Rahmen einer Europäischen Umweltgemeinschaft (1991); partly *Furrer*, Die Sperrwirkung des sekundärrechtlichen Gemeinschaftsrechts auf die nationalen Rechtsordnungen (not yet published, expected early 1994).

¹³Case C-41/93 France versus Commission (*PCP Decision*) , see OJ (1992) C 334/9 and OJ (1993) C 70/11.

¹⁴*Becker*, Der Gestaltungsspielraum der EG-Mitgliedstaaten im Spannungsfeld zwischen Umweltschutz und freiem Warenverkehr (1991); *Epiney/Möllers*, Freier Warenverkehr und nationaler Umweltschutz (1992).

taxes and state aids, as well as the existing harmonization of laws¹⁵. Economic theory shows how close all these instruments are connected, as they can easily be exchanged to attain the same effect with other means. The general tendency to use more diversified instrument for the protection of the environment makes it necessary to analyze the field using a more systematic approach. All the existing publications have been strongly influenced by German legal literature and particularly by the concept of the *Nationaler Alleingang*.¹⁶

1.3 Structure and Organization

1.3.1 Organization

After this introduction, chapter 2 will focus on the general *development of the Community's environmental policy* and the changing awareness of the need for such action in the last thirty years. Chapter 3 will show the mechanisms for harmonized standards under the *general harmonization of laws*, while chapter 4 will present the various *special areas of harmonization* which have an impact on national environmental measures. Chapter 5 is dedicated to the use of *economic instruments* for the protection of the environment. In chapter 6 the *external relations concerning the environment* are analyzed. Lastly, in chapter 7 a *systematic overview of the mechanisms* used is given.

For the better understanding of the mechanisms explained I try to include a large amount of *examples* from the existing Community law and the case law of the European Court of Justice. The examples are printed in small print and indented.

1.3.2 Outlook

In my view a systematic analysis of the Treaty coordination mechanisms should include both

¹⁵See, however, the recently published study by *Brunetti*, EG-Rechtsverträglichkeit als Kriterium der nationalen Umweltpolitik (1993). This very interesting work focuses on the different instruments of national environmental policy. It does, however, not elaborate on the system of environmental tasks and responsibilities of the Community and mainly checks the existing Community law concerning the domestic application of technical rules, state aids, taxes, and voluntary agreements.

¹⁶See *Hailbronner*, Der nationale Alleingang, EuGRZ (1989) 101 to 122.

a description of the general principles of the Treaty and of the harmonization of laws. In my contribution to the legal debate, however, I will focus only on the latter. The space is too limited for a satisfactory analysis of both sets of mechanisms. A further publication is, however, planned in which the present thesis will be extended. It will give a complete systematic analysis of the existing Community system governing the relation between the Common Market and the protection of the environment.

The establishment of the Common Market remains one of the main pillars of the Community. On the other hand the efficient protection of the environment has become a *shared responsibility* of the Community and the Member States¹⁷. The harmonization of laws including mechanisms for the application of higher national standards can be a way, might be a way for achieving both objectives. In this sense this thesis is also intended to be a contribution to *today's search for a legal solution to the possible conflicts arising from legal integration through trade rules and the need of environmental protection*.¹⁸

¹⁷The use of the term "shared responsibility" as well as the idea of a systematic approach to the Community system regulating environment and trade have been heavily influenced by the publications by *Krämer*, Environmental Protection and Article 30 EEC Treaty, CMLRev 1993 111 at 143 and *Krämer*, Community Environmental Law - Towards a Systematic Approach, YEL (1992) 151-184.

¹⁸See the current discussion in GATT, e.g. *Jackson*, World Trade Rules and Environmental Policies, Washington & Lee Law Review (1992) 1227 to 1275, or in NAFTA, e.g. *Zagaris*, The Transformation of Environmental Enforcement Cooperation Between Mexico and the USA in the Wake of NAFTA, North Carolina Journal of International Law and Commercial Regulation (1993) 59 to 133.

2 The Development of the Environment Related Policy of the Community

2.1. Summary

At the moment of its creation, in 1957, the European Community was conceived as a mainly economic organization. The original Treaty of 1957, the Treaty of Rome, did not include the protection of the environment as a Community objective. Nevertheless the establishment of the Common Market led soon to a strong need for the coordination between environmental protection and the intended elimination of obstacles to trade. The first "environmental measures" of the Community were adopted under the title of elimination of trade hindering national standards. From the late 1960s until the middle of the 1980s the existing Community provisions for the harmonization of laws for the establishment of the Common Market were also used for the protection of the environment. This led to an extensive adoption of environment related measures sometimes additionally based on Article 235. This practice was also supported by the Court of Justice, establishing, however, a detailed system for coordination between the objectives of the Common Market, Community environmental measures, and national environmental measures.

Only when the Single European Act came into force was the Community entrusted explicitly with the protection of the environment. Article 130 r in particular gave the Community the authority for a comprehensive environmental policy. The protection of the environment has become as important for the Community as the establishment of the Common Market. Article 130 r (2) has integrated environmental protection into all areas of Community action. Thus the other Treaty provisions continued to be important for the adoption of specific environmental measures. The system elaborated by the Court for the coordination of environmental protection and trade has been institutionalized in the Treaty by specific mechanisms. Furthermore the existing Treaty is very open to the need for diverging national measures. Coordination between different levels of environmental regulation within the Common Market can be seen particularly in the mechanisms under Article 100 a and 130 t for systematic diverging national measures, and also in the possibility of safeguard clauses and in the use of minimum standards. The protection of the environment has been established as an common responsibility of the Community and its Member States.

2.2 The Protection of the Environment in the Treaty

2.2.1 *General Conception of the Treaty of Rome*

The Treaty of Rome which established the European Economic Community (EEC Treaty) in 1957 did not mention the protection of the environment as an explicit objective of the Community.¹⁹ Vague mention was made of the environment in the preamble and Article 2 of the Treaty. The preamble spoke very generally of the quality of life in the Member States. It referred to the "*constant improvement of the living and working conditions of their people*" and even more generally to a "*harmonious development*" of their economies.²⁰ In a similar way Article 2 of the Treaty mentioned as general objectives of the Community the "*harmonious development*", a "*balanced expansion*" and "*the raising of the standard of living*".

It remains, however, arguable whether this included at the time of its drafting preoccupation for the natural environment. It is interesting that, apart from these introductory statements, the only other reference to the environment was in the provisions referring to trade. Article 36 of the Treaty allows Member States to adopt certain trade restrictions "*for the protection of health and life of humans, animals or plants*".²¹ Under the principle of attributed powers there was no explicit legal basis in the Treaty on which the Community could have based a proper environmental policy.²² These attributed powers constitute the necessary basis for every Community action²³. This framework of powers granted in the Treaty reflects the desire of the Member States to restrict the transfer of national sovereignty to the Communities to the agreed areas.²⁴

¹⁹See for details: *Johnson/Corcelle*, Environmental Policy (1989) 1; *Rehbinder/Stewart*, Environmental Policy (1985) 15; *Koppen*, The European Community's Environmental Policy (1988) 1; *Hildebrand*, The European Community's Environmental Policy, Environmental Politics (1992) 13-44.

²⁰Preamble of the Treaty of Rome, fourth and sixth paragraph.

²¹See *Johnson/Corcelle*, Environmental Policy (1989) 1, who consider this as a kind of "negative reference".

²²*Kapteyn/VerLoren van Themaat*, Law of the European Communities (1988) 112.

²³The principle of attributed powers is sometimes called principle of limited powers, in German *Prinzip der beschränkten Einzelermächtigung*, in French *principe des pouvoirs d'action limités*, but generally referred to as the *compétence d'attribution*, although there might exist a slight difference, as stated by: *Schwartz*, Artikel 235, in: *Groeben/Boeckh/Thiesing/Ehlermann*: Kommentar EWGV. See for a classical description *Ipsen*, Europäisches Gemeinschaftsrecht (1972) 20-36.

²⁴*Kapteyn/VerLoren van Themaat*, Law of the European Communities (1988) 113.

As the term *environmental protection* does not appear in the Treaty of Rome of 1957²⁵, it seems that the drafters of the Treaty did not consider the protection of the environment a task of the European Community, at this time, in fact, most Member States did not yet have a proper environmental policy.²⁶ The concept of environmental protection and of the need for a coherent environmental policy, as we understand it today, simply did not yet exist.²⁷

2.2.2 The Evolving Common Market and the Environment

In spite of the absence of an explicit Community competence it was realized soon after the Treaty entered into force that the creation of a Common Market might conflict with the concern for the environment.²⁸ Particularly the abolition of national borders to allow an accelerated exchange of goods was closely linked to the problem of different environmental standards and different national conceptions of how to safeguard the human environment. Thus the original incentive for implementing regulations concerning the environment was the implementation of common standards for the establishment of the Common Market itself rather than a real awareness of environmental problems.²⁹ There existed a general fear that diverging national standards would hinder the free movement of goods and thus jeopardize one of the main objectives of the Community. Despite the absence of an explicit competence for environmental measures the Community therefore adopted internal measures with the aim of ensuring the elimination of certain environment related technical trade barriers. Most of the relevant harmonizing instruments were made on the basis of the general competence under Article 100, and sometimes in connection with Article 235.³⁰

As early as 1967 the Council adopted a directive on the classification, packaging and labeling of

²⁵Nor do the terms *environment* or *pollution*, as observed by *Rehbinder/Stewart*, *Environmental Protection Policy* (1985) 15.

²⁶*Bungarten*, *Umweltpolitik* (1978) 119; *Kreuzberger*, *Umweltschutz*, *ZfU* (1986), 169; even today only four Member States of the Community mention the protection of the environment as a specific objective in their constitutions: Constitution of Greece of 1975 (Article 24), Constitution of Spain of 1978 (Article 45), Constitution of Portugal of 1975 (Article 66), Constitution of The Netherlands of 1982 (Article 21), as reported by *Krämer*, *Environmental Protection*, *CMLRev* (1993) 111.

²⁷*Johnson/Corcelle*, *Environmental Policy* (1989) 1.

²⁸See *Krämer*, *EEC Treaty* (1990) 1.

²⁹See *Bleckmann*, *Europarecht* (1990) 69.

³⁰*Rehbinder/Stewart*, *Environmental Protection Policy* (1985) 16.

dangerous substances.³¹ This directive was based on Article 100 of the Treaty and aimed at eliminating different national provisions which could hinder trade in these substances and thus directly affect the establishment and functioning of the Common Market. Although the directive mentioned in its objectives "*the protection of the public*" and "*in particular workers using such substances and preparations*", it did not specifically mention the protection of the environment. Its main focus was the establishment of the Common Market for goods, which obviously included the regulated dangerous substances. The following directives implicitly concerning the human environment were also based on Article 100 of the Treaty and aimed at the approximation of diverging national provisions which directly affected the establishment or functioning of the Common Market.³² Further examples were the directives on noise levels³³ and pollutant emissions³⁴ for motor vehicles, both adopted in 1970. It is interesting to observe that these two directives made no mention of the protection of the public or the protection of the environment. They were formulated purely to eliminate technical obstacles to trade, as provided for by Article 100. These directives made clear reference to previously introduced national measures in France and Germany, which, it was considered, would hinder the establishment of the Common Market if no approximation of standards took place.³⁵

Although the first measures were aimed directly at the reduction of pollution and thereby at the protection of the human environment, this term was not mentioned in either their preambles or in any of their provisions. These directives were strictly based on the approximation of laws for the establishment of the Common Market (as laid down in Article 100), although they did have an important environmental impact. The same is true for evolving environment related regulations in other fields such as agriculture, the common commercial policy, etc., which were included under the more specific harmonization provisions of the Treaty³⁶.

2.2.3 *The Paris Summit and the Environmental Action Programmes*

It was only 15 years after the conclusion of the Treaty of Rome, that the Community

³¹Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labeling of dangerous substances, OJ (1967) L 196/1.

³²See *Scheuing*, *Umweltschutz auf Grundlage*, EuR (1989) 152 at 154.

³³Council Directive 70/157/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the permissible sound level and the exhaust system of motor vehicles, OJ (1970) L 42/16.

³⁴Council Directive 70/220/EEC of 20 March 1970 on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive ignition engines of motor vehicles, OJ (1970) L 76/1.

³⁵See *Krämer*, EEC Treaty (1990) 1.

³⁶See chapter 4.

"officially" started its own environmental policy at the 1972 Paris Summit.³⁷ The basic idea was that economic expansion should also result in an improvement of the quality of life and that this should include the protection of the environment. To bring the European Community closer to the concerned citizens, the Heads of State and Government proposed³⁸ that the Community institutions should establish an Action Programme³⁹ for the environment, as well as similar programmes in other areas such as social and regional policy or consumer protection.⁴⁰ The first Community Environmental Action Programme was published in 1973.⁴¹ It was followed by the programmes of 1977⁴², 1983⁴³, 1988⁴⁴ and most recently by the Fifth Action Programme 1992⁴⁵.

The idea of an Environmental Action Programme had been mentioned for the first time by the Commission in a memorandum to the Council in 1970, followed by an official communication in 1971⁴⁶. This gave rise to an intense debate over the level at which environmental problems were best dealt with.⁴⁷ That there was a need for common action was not doubted. The question was rather whether there was a need for Community action or whether intergovernmental agreements and coordination of national environmental policies

³⁷The UN Environment Conference 1972 in Stockholm must have had a substantial influence on the Paris summit, see *Krämer*, Artikel 130, 1610 in: *Groeben/Boeckh/Thiesing/Ehlermann*, Kommentar EWGV; for more details on the development of the environmental policy of the Community see *Hildebrand*, The European Community's Environmental Policy, *Environmental Politics* (1992) 13-44; *Sands*, European Community Environmental Law, *Modern Law Review* (1990) 685-698.

³⁸Declaration of the Heads of State and Government of 19/20 October 1972 at the Paris Summit about collaboration in environmental policy, *EC Bulletin* 10 (1972) 21.

³⁹On the legal value of the Action Programmes see *Krämer*, *Focus* (1993) 64 and *Krämer*, *EEC Treaty* (1990) 2, although it seems arguable whether a mere statement by the Commission in its Environmental Action Programme that a certain environmental measure should be taken at Community level is a sufficient proof for the necessity of a Community action.

⁴⁰*Johnson/Corcelle*, *Environmental Policy* (1990) 2.

⁴¹OJ (1973) C 112/1.

⁴²OJ (1977) C 139/1.

⁴³OJ (1983) C 46/1.

⁴⁴OJ (1987) C 328/1.

⁴⁵Presented by the Commission on 27 March 1992, COM (92) 23 (final), approved by the Council on 15 December 1992, OJ (1993) C 138/1; see e.g. *Wägenbauer*, Ein Programm für die Umwelt, *EuZW* (1993) 241-244.

⁴⁶OJ (1972) C 52/1.

⁴⁷See *Krämer*, *EEC Treaty* (1990) 1.

would be sufficient.⁴⁸ Finally, the Paris Summit set the basis for Community action although it would be another 15 years before the environment was explicitly included in the Treaty.⁴⁹

At the 1972 Paris Summit the Heads of Government and State showed no intention of officially amending the Treaty or including a special provision concerning the environment. They simply stated:

*"Economic expansion is not an aim in itself. Its firm aim should be to enable disparities in living conditions to be reduced. It must take place with the participation of all the social partners. It should result in an improvement in the quality of life as well as in standards of living. As benefits the genius of Europe, particular attention will be given to intangible values and to the protecting the environment, so that progress may really be put at the service of mankind."*⁵⁰

It is interesting to observe that this statement of the Heads of State and Government led only to the relatively vague request that the Commission draw up an action programme on the environment. The declaration by the Heads of State and Government very carefully searches for terms close to the already existing wording of the Treaty, "*improvement*" in the "*living conditions*" (Preamble of the Treaty) and "*standards of living*" (Article 2 of the Treaty).

A more important step for the development of a Community environmental policy was that at the same time the participants of the summit recommended giving a more generous and broader meaning to Article 235 of the Treaty in order to take action in fields where the Community was given a task without an explicit competence for action in the field of the environment. The interpretation of the preamble and Article 2 of the Treaty in connection with Article 235 could provide the legal basis for further Community regulations on the

⁴⁸Krämer, EEC Treaty (1990) 2.

⁴⁹With the introduction of the new article 130 s in the Single European Act 1987.

⁵⁰Commission, Sixth General Report (1972) 8.

grounds of Article 100 of the Treaty.⁵¹ One can therefore take this summit to be the official beginning of the Community's environmental policy.⁵² In spite of the missing explicit competence, the Community was invited to adopt environmental provisions in the application of Article 235.

According to legal doctrine, Article 235 of the Treaty allows the Community to act where the Contracting Parties wanted it empowered to act.⁵³ After the end of the transitional period the European Communities were more often confronted with problems which were not explicitly covered by a corresponding competence in the Treaty. Therefore at the 1972 Paris Summit the Heads of State and Government of the Member States recommended a fairly loose interpretation of Article 235 to allow the existing Treaties to deal with the new problem areas.⁵⁴ Still the scope of Article 235 is limited.⁵⁵ It does not provide a general competence for new areas of Community action which might seem useful in the framework of the Treaty. It allows the Community to act only where the mentioned objectives of the Treaty make such an action necessary.⁵⁶

Between 1973 and 1983 over 70 legislative texts on environment related areas were adopted and several international agreements concluded on the basis of Article 100⁵⁷ and/or 235⁵⁸. The legal basis for this important legislation in the field of the environment⁵⁹ was, however,

⁵¹See chapter 3.1.

⁵²See *Johnson/Corcelle*, Environmental Policy (1990) 2.

⁵³See for details *Kapteyn/VerLoren van Themaat*, Law of the European Communities (1988) 1; *Schwartz*, Artikel 235, in: *Groeben/Boeckh/Thiesing/Ehlermann*, Kommentar EWGV.

⁵⁴See *Everling/Schwartz/Tomuschat*, Die Rechtsetzungsbefugnis der EWG, EuR (1976) special issue, 1-73.

⁵⁵See e.g. Case 45/86 Commission v. Council [1987] ECR 1493 which limits the use of Article 235 of the Treaty in comparison to the former view expressed e.g. in Case 8/73 Hauptzollamt Bremerhaven v. Massey Ferguson GmbH [1973] ECR 897.

⁵⁶In German this article is often referred to as *Vertragsabrundungsklausel*, see *Oppermann*, Europarecht (1991) 169.

⁵⁷At the same time the Community continued to adopt environment related regulations under the specific Treaty provisions for certain fields such as agriculture (Article 43) or traffic (Articles 75, 84 (2)); see chapter 4.

⁵⁸*Behrens*, Umweltpolitik der EG und Art. 235, DVBl. (1978) 462-469.

⁵⁹See *Oppermann*, Europarecht (1991) 741, 742; for a list see: *Umweltbundesamt (ed.)*, Rechtsakte der EG auf dem Gebiet des Umweltschutzes, Stand 1.3.1991, Berlin (1991). On the relevant jurisdiction see *Krämer*, Environmental Protection, CMLRev (1993) 111 at 112.

considered by most legal writers to be relatively weak.⁶⁰

This policy was considerably strengthened by the jurisdiction of the Court of Justice. While it had usually legitimized environment-related measures under Article 100 with the possible trade effects of diverging national standards⁶¹ it later considered the protection of the environment to be an essential objective of the Community which legitimized Community measures and even certain restrictions of the free movement of goods.⁶² This reasoning allowed the Court in the context of the implied powers theory to accept a Community competence for measures concerning the environment. Although there was no explicit competence, the general objectives of the Treaty enabled the Community to take measures for their safeguard. Article 100 and eventually 235 (for the filing of *lacunae*) were possible provisions for such action.

The Case 240/83 *ADBHU* was concerned with a request for a preliminary ruling by a French court on the lawfulness of the Directive 75/439/EEC on the disposal of waste oil and a related French national measure. France implemented the directive by installing a system of districts and the compulsory authorization of recycling undertakings. The plaintiffs argued this was an infringement of the free movement of goods (Article 30 and 34). The Court, however, held that the principle of free movement of goods was not absolute and that the other objectives of the Community had to be observed as well and could therefore lead to a lawful restriction of the free movement of goods. It considered the protection of the environment to be such an essential objective: "*The directive must be seen in the perspective of environmental protection which is one of the Community's essential objectives.*"⁶³

2.2.4 *The Single European Act and the Environment*

In 1983 the Stuttgart European Council stressed the urgent need to speed up and reinforce the action carried out at all levels against the pollution of the environment and decided that environmental protection policy should be given more priority within the Community.⁶⁴ In March 1985, at its Brussels session, the European Council judged that environmental policy should become a fundamental part of the policies set up by the Community and its Member

⁶⁰For details see chapter 3, or also: *Rehbinder/Stewart*, Environmental Protection Policy (1985) 18.

⁶¹See chapter 3.

⁶²Case 240/83 *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 532 at 548.

⁶³Case 240/83 *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 532 at 548.

⁶⁴See *Johnson/Corcelle*, Environmental Policy (1989) 2.

States.⁶⁵ In particular the difficulties concerning the implementation of environmental measures at a national level led to "the environment" being introduced as a part of the Community constitution.⁶⁶

With the coming into force of the Single European Act (SEA) in 1987 did the European Community obtain an explicit basis for its own environmental actions. The provisions under the new title *VII Environment* provided a framework for the environmental policy of the Community. Article 130 r provides in a relatively detailed way the principles of the Community's environmental policy including its objectives and instruments.⁶⁷ The environment also became a general objective of the Community in all its activities: Article 130 r (2) of the Treaty⁶⁸. Particularly interesting for the relation between national environmental policy and Community environmental policy was the inclusion of a provision concerning diverging national measures: Article 130 t. This provision allows, subject to certain conditions, the systematic introduction and application of diverging national measures after a harmonization.⁶⁹

The case law of the Court concerning the restriction of the free movement of goods for environmental reasons⁷⁰ was institutionalized by recognizing the protection of the environment as a main objective of the Community and by introducing a particular exception clause. Unlike the Treaty of Rome the Single European Act includes the Environment as a public interest besides the areas of Article 36 of the Treaty which allows diverging national measures in areas where an approximation of laws in the interest of the internal market has taken place⁷¹: Article 100 a (4).

⁶⁵See *Johnson/Corcelle*, Environmental Policy (1989) 3.

⁶⁶*Vandermeersch*, The Single European Act, ELRev (1987) 407.

⁶⁷See for details: *Vandermeersch*, The Single European Act, ELRev (1987) 406 at 415; *Grabitz/Zacker*, Umweltkompetenzen, NVwZ (1989) 297 at 299, for recent examples of the fast growing environmental legislation see *Krämer*, L'environnement, RMC (1993) 45 at 63.

⁶⁸In German referred to as "*Querschnittsklausel*", see *Oppermann*, Europarecht (1991) 744; *Jahns-Böhm*, Die umweltrechtliche Querschnittsklausel, EuZW (1992) 49.

⁶⁹See for details chapter 4.

⁷⁰Case 240/83 *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 532 at 548.

⁷¹See for details chapter 3.

Even if the concrete meaning of Article 100 a (4) has given rise to much controversy it shows nevertheless the particular focus on regulatory cooperation in this field. Furthermore the Member States wanted the protection of the environment to be given a fundamental place in the Community constitutional framework and the Community to be given the competence to continue its environmental policy on an explicit legal basis: Article 130 r. At the same time the Member States should take part in the protection of the environment in those fields where a harmonization at Community level is not necessary or is politically not possible at the desired level. Both the Community and the Member States are competent to regulate the protection of the environment and the Community shall only act when the objectives can be better attained at Community level.⁷² Even in the case of a harmonization the Member States, under certain conditions, keep the regulatory power to improve their national environmental quality.

Article 130 r *seq.* do not exclude the use of other provisions of the Treaty as a legal basis for the adoption of environmental measures. In the fields of agriculture, transport, tax harmonization, and commercial policy the relevant provisions remain important for the Community's environmental policy. Article 130 r (2) explicitly allows all these provisions to be handled in an ecological way and for environmental purposes.⁷³

2.2.5 The European Union and the Environment

The Treaty on the European Union signed at Maastricht on 7 February 1992 came into force on the 1st of November 1993. Its impact on the Community's environmental policy⁷⁴ is therefore still difficult to evaluate. It seems, however, that the current concept of the Community's environmental policy is a broad continuation of that started with the Single European Act.

On the one hand the revised text of the Treaty now includes as one of the Community's

⁷²Article 130 r (4) first sentence.

⁷³For the conditions see the relevant sections, mainly chapter 3 and 4.

⁷⁴See *Wilkinson, Maastricht and the Environment*, JEnvL (1992) 221-239; *Jenkins, The Maastricht Treaty*, European Trends (1992) 1-35; *Epiney/Furrer, Umweltschutz nach Maastricht*, EuR (1992) 369-408.

basic tasks in the promotion of "*sustainable and non-inflationary growth respecting the environment*" (amendment of Article 2). The requirement that environmental protection should be integrated into other Community policies has been reinforced: new Article 130 r (2), third sentence. On the other hand the procedural requirements for the adoption of new measures have been radically changed, which might cause delay and confusion in the adoption of new environmental measures.⁷⁵

On the whole it seems, however, that the protection of the environment is now definitely a Community objective. Several provisions indicate that the level of protection is intended to be high. The Maastricht Treaty also includes a new provision for the establishment of a cohesion fund⁷⁶. It shall help the less developed Member States pay the often substantial costs of introducing the higher environmental standards required by Community legislation. This might indicate the willingness of the environmentally advanced Member States to contribute financially to guaranteeing a high standard of environmental protection in the Community.

⁷⁵*Wilkinson, Maastricht and the Environment* (1992) 221 at 222.

⁷⁶Article 130 s (5)

3 The General Approximation of Laws

3.1 Summary

Although the original pillars of the Community were basically the four freedoms, the harmonization of laws has always been considered important for the establishment of the Common Market. As long as national exceptions are necessary to safeguard certain public order interests, then by definition obstacles to trade remain. While classical trade agreements accept such restraints provided they are not used to discriminate against foreign producers⁷⁷, the Community has further reaching objectives. The general harmonization of laws under Article 100 and 100 a of the Treaty⁷⁸ is continuously used for the elimination of existing trade obstacles, such as technical rules, quality requirements, production and process measures, administrative testing requirements etc.⁷⁹

The main legal basis for the harmonization of national rules hindering the establishment and the functioning of the Common Market was, until 1987, Article 100 of the Treaty. In the field of the environment the Community sometimes used (additionally) Article 235. In harmonized fields Member States only kept regulatory power if a Community measure provided for specific safeguard clauses or did not completely cover an area. In the absence of Community measures the Member States were, however, responsible for the adoption of environmental measures. These had to be compatible with the other Treaty obligations and the procedural information duties in drafting had to be observed by the Member States.

With the coming into force of the Single European Act, Article 100 a of the Treaty has become predominant for the general harmonization of laws. In the interest of the

⁷⁷See the case law under the General Agreement on Tariffs and Trade (GATT) or the Free Trade Agreements EFTA-Member States-European Community, see e.g. *Petersmann, Umweltschutz und Welthandelsordnung*, EA (1992) 257 seq.

⁷⁸The term general harmonization is used to mark the difference to special harmonizations provisions for certain areas such as Article 43 (Agriculture), 75 and 84 (2) (Transport), 99 (Indirect Taxes), 118 a (Social Policy), 130 s (Environment) etc.

⁷⁹See *Kapteyn/VerLoren van Themaat*, Law of the European Communities (1988) 467-469. In its *White Paper to complete the Internal Market by January 1, 1993* the Commission had set out a detailed scheme of some 300 legislative proposals to remove still remaining barriers, among which many concerned environment-related standards, see COM (85) 310 final.

establishment of the internal market it allows the adoption of new measures by majority vote and allows diverging national measures. In spite of controversy over its appropriateness for environmental secondary legislation, Article 100 a is considered to be an important basis for such action. In spite of existing harmonization it allows Member States to adopt their own measures under specific safeguard clauses (Article 100 a (5)) or under the general provision of Article 100 a (4). The Member States must observe the relevant information procedures of Article 100 a (4) and (5).

3.2 The Common Market: Article 100 and 235 of the Treaty

3.2.1 General Observations

Since 1967⁸⁰ the Community has based most of its environment related secondary legislation on Article 100 of the Treaty and later sometimes (additionally) on Article 235 of the Treaty⁸¹. Article 100 of the Treaty entails the Community with the task

"to issue directives for 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."

In a first phase the Community only adopted directives to harmonize existing national environmental laws in order to abolish obstacles to trade consisting in different environmental standards between Member States. They were all proposed in the framework of the General Programme for the Elimination of Technical Obstacles to Trade.⁸² Later, however, the Community also adopted measures in fields where no regulation had previously been made by the Member States.

⁸⁰See for the first relevant examples chapter 2.2.

⁸¹See e.g. *Kapteyn/VerLoren Van Themaat*, Law of the European Communities (1988) 655, *Grabitz/Zacker*, Umweltkompetenzen, NVwZ (1989) 297.

⁸²OJ (1969) C 76/1, updated version OJ (1973) C 117/1.

3.2.2 *The Appropriateness of Article 100 for Environmental Action*

Before the coming into force of the Single European Act in 1987, the legal basis of almost all the directives were Articles 100 and 235 of the Treaty, sometimes combined⁸³, while certain measures were adopted under special provisions concerning special fields (agriculture, traffic, common commercial policy etc.)⁸⁴. In spite of the large number of environment related measures based on Articles 100 and 235 of the Treaty, the question of whether these articles used together⁸⁵ or used separately were a sufficient legal basis for environmental action remained controversial⁸⁶.

In several cases the European Court of Justice, however, had the opportunity of expressing its opinion on whether these articles were appropriate as a basis for Community action in the field of environmental protection. In view of the development of the Community environmental policy it is interesting to observe how carefully the Court in its reasoning kept to the terms of the Treaty of Rome, provided environmental protection was not mentioned there explicitly. Initially the European Court of Justice held, in two cases concerned with the Community legislation in the field of waste oil, that in principle Article 100 could serve as a legal basis for the approximation of laws necessary for the functioning and the establishment of the Common Market even if it included an approximation of laws on environment related topics⁸⁷:

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

⁸³See *Johnson/Corcelle*, *The Environmental Policy* (1989) 3 *seq.*

⁸⁴See chapter 4.

⁸⁵See *Vandermeersch*, *The Single European Act*, *ELRev* (1987) 407 at 412; *Rehbinder/Stewart*, *Environmental Protection Policy* (1985) 245 *seq.*

⁸⁶Critical: *Grabitz/Sasse*, *Umweltkompetenz* (1977) 93 and 96 *seq.*

⁸⁷Case 91/79 *Commission versus Italy (Detergents)* [1980] ECR 1099 at 1106 and Case 92/79 *Commission versus Italy (Maximum Sulphur Content of Liquid Fuels)* [1980] ECR 1115 at 1122.

distorted."

In cases 91/79 and 92/79 *Commission versus Italy* the Court was asked *inter alia* in a preliminary ruling whether Article 100 of the Treaty was a sufficient basis for a Council directive concerning the biodegradability of detergents and the sulphur content of liquid fuels respectively. The Court took into consideration that these directives had been taken in view of the Environmental Action Programme but also adopted in the framework of the General Programme in order to eliminate the technical barriers to trade which result from disparities between the provisions laid down by law, regulation or administrative action in Member States.⁸⁸ The Court held that the directives were validly founded on Article 100 of the Treaty.⁸⁹

In these cases the Court based its reasoning and its decision completely on the competitive effects of diverging environmental standards.⁹⁰ Although the Action Programme showed the importance of the Community objective "*environmental protection*" in itself, the latter was not mentioned as an important justification for Community action. The Court avoided mentioning the Community interest in environmental protection in general and stressed the general aim of measures based on Article 100 of the Treaty - the elimination of trade distorting regulative differences between the Member States of the Community.⁹¹

In 1985, in its judgement in Case 240/83 *ADBHU*⁹² the Court again had the opportunity of judging the validity of an environment related directive based on Article 100 of the Treaty. The Court maintained its reasoning from the earlier cases⁹³ but went further in its considerations. Apart from the reference to possible trade effects the Court also stated that the adoption of measures for the protection of the environment itself an essential objective of the Community⁹⁴.

⁸⁸Adopted by the Council on 28 May 1969, OJ (1969) C 76/1.

⁸⁹Case 91/79 *Commission versus Italy (Detergents)* [1980] ECR 1099 at 1106 and Case 92/79 *Commission versus Italy (Maximum Sulphur Content of Liquid Fuels)* [1980] ECR 1115 at 1122.

⁹⁰An argument that is still used in the Court's recent case law: e.g Case C-300/89 *Commission versus Council (Titanium Dioxide)* [1991] ECR 2867, see for this aspect: *Everling, Durchführung, NVwZ* (1993), 209 at 211.

⁹¹See *Kapteyn/VerLoren van Themaat, Law of the European Communities* (1988) 656.

⁹²Case 240/83 *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 532.

⁹³See above: Case 91/79 *Commission versus Italy (Detergents)* [1980] ECR 1099.

⁹⁴Case 240/83 *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 532 at 548.

3.2.3 Article 235 as a Complementary Legal Basis

The application of Article 100 alone to introduce environmental directives was, however, always problematical. Therefore, Article 235 of the Treaty was regarded as an important additional legal basis for environment oriented measures.⁹⁵ This was strengthened by the Court's view of the environment as an essential objective of the Community.⁹⁶ Referring to the preamble and Article 2 of the EEC Treaty, the Community considered the protection of the environment to be an essential objective and therefore an area where the Community can take action. While most product related measures were taken on the basis of Article 100, certain measures, more generally concerned with the environment, were adopted on the basis of Article 100 in connection with Article 235. This was considered to allow the adoption of environment related directives, which were not provided for by Article 100 on its own. Reliance on Article 235 alone has always been very unusual.⁹⁷

3.2.4 The Degree of Harmonization

Once an area has been completely harmonized by secondary legislation on the basis of Article 100 and/or Article 235 respectively⁹⁸, a Member State is no longer able to introduce more stringent environmental regulation in this field⁹⁹, except for particular safeguard clauses¹⁰⁰ or minimum requirements in the Community legislation. A Member State cannot, for example, invoke the provisions of Article 36 or the rule of reason thereby creating new obstacles to trade.¹⁰¹ This applies, however, only where a Community measure under Article

⁹⁵Particularly since the recommendation of the Heads of Government and State at the Paris Summit, see chapter 2.3; in the framework of the use of Article 235 for the filling of lacunae, see: *Kapteyn/VerLoren van Themaat*, Law of the European Communities (1988) 113; *Oppermann*, *Europarecht* (1991) 740; *Behrens*, *Die Umweltpolitik der EG und Art. 235*, DVBl. (1978) 462.

⁹⁶See Case 240/83 *ADBHU* [1985] ECR 532 at 548.

⁹⁷See *Rehbinder/Stewart*, *Environmental Protection Policy* (1985) 18 and *Vandermeersch*, *The Single European Act*, ELRev (1987) 407 at 411; *Oppermann*, *Europarecht* (1991) 740.

⁹⁸The same is true for the other provisions of the Treaty such as Article 43, 99, 113 etc., apart from the few provisions which provide explicitly for the possibility to introduce or maintain higher national standards such as, for example, Article 130 t or Article 100 a (4).

⁹⁹*Everling*, *Durchführung* (1993) 209 at 211.

¹⁰⁰See chapter 3.2.4.

¹⁰¹See Case C-169/89 *Gourmetteria Van den Bourg* [1990] ECR 2143; Case 172/82 *Syndicat National* [1983] ECR 255, see also *Furrer*, *Nationale Umweltkompetenzen*, AJP (1992) 1517 at 1525; *Krämer*, *Environmental Protection*, CMLRev (1993) 111 at 117; but restricting this principle *Zuleeg*, *Umweltschutz in der Rechtsprechung*, NJW (1993) 31 at 34.

100 covers *entirely* the relevant area.¹⁰² As all the measures based on Article 100 must be adopted with unanimity in the Council, a Member State is supposed to integrate its own view of the needs for environmental protection from the beginning within the framework of the directive to be adopted.¹⁰³

Provided an area is not regulated by the Community or the adopted measures do not lead to *full harmonization* of a certain field, the Member States remain responsible for the adoption of measures to safeguard their environment.¹⁰⁴ These must, however, be compatible with the other provisions of the Treaty. A Member State may take environment related measures¹⁰⁵ provided they do not "*jeopardize the objectives and the proper functioning of the system established by the regulations*" of the Community.¹⁰⁶ This derives from the general principle of shared competence for environmental protection.¹⁰⁷

As Article 100 only allows the adoption of directives¹⁰⁸, the Member States always have a certain autonomy when implementing Community measures. Thus, there remains a limited discretion here for national needs and choices of methods and instruments.¹⁰⁹ This is particularly so if a regulation does not prescribe exact standards but rather qualitative objectives such as "*the best available technology not entailing excessive costs*" or uses terms

¹⁰²See the classical decisions Case 5/77 Carlo Tedeschi versus Denkavit [1977] ECR 1555 at 1576 and Case 251/78 Denkavit Futtermittel [1979] ECR 3369 at 3388.

¹⁰³See the different procedure under the new Article 100 a of the Treaty.

¹⁰⁴See e.g. *Krämer*, L'environnement, RMC (1993) 45 at 47.

¹⁰⁵See joint cases 3,4 and 6/76 Cornelis Kramer et al. (*Biological Resources of the Sea*) [1976] ECR 1273 at 1276.

¹⁰⁶See Case 78/79 Criminal Procedure against Gilli and Andres [1980] ECR 2071 at 2078 or Case 216/84 Commission versus France [1988] ECR 793 at 811; for more environmental examples see also *Zuleeg*, Umweltschutz in der Rechtsprechung, NJW (1993) 31 at 34.

¹⁰⁷See e.g. *Jadot*, Mésures nationales, CDE (1990) 403 at 409.

¹⁰⁸For the use of regulations under Article 235 see *Krämer*, Community Environmental Law, YEL (1992) 151 at 157.

¹⁰⁹See, however, the minimum requirements for the implementation of a directive in the field of the environment, e.g. the Court's qualification of the German implementation of certain Directives: Case C-361/88 Commission versus Germany (*TA Luft*) [1991] ECR 2567 at 2609; Case C-131/88 Commission versus Germany (*Groundwater Directive*) [1991] ECR 825 at 866; details given by: *Everling*, Durchführung, NVwZ (1993) 209 at 213, *Zuleeg*, Umweltschutz in der Rechtsprechung, NJW (1993) 31 at 35. For the effect of Community law on national legislation and national enforcement see *Snyder*, The Effectiveness of European Community Law, MLRev (1993) 19-54.

like "*significant disturbance*", or "*major risk*".¹¹⁰

3.2.5 *Safeguard Clauses*

The measures under Article 100 may, however, in spite of a complete harmonization, provide special safeguard clauses which explicitly allow the Member States to apply more stringent measures.¹¹¹ Many of the regulations based on Article 100 contained such clauses¹¹². They often allow Member States to provisionally ban or restrict the use of certain products. The application of such rules must, however, be environmentally justified and non-discriminatory.

3.2.6 *The General Notification Procedure*

The notification of planned national measures to the Commission is an essential element for the coordination of national and Community measures in these cases.¹¹³ Member States are not generally required to notify the Commission when they intend to enact new environmental measures. However, because of the trade effects such measures can have on the Common Market there exist certain notification rules within the Community.

In 1973 the Member States adopted an agreement to inform the Commission about any draft environmental legislation¹¹⁴. This agreement was intended to allow the Commission to take action for the prevention of any new technical barriers to trade which jeopardized the establishment and functioning of the Common Market. The non-mandatory character and the short delays of this gentleman's agreement mean that it has, however, little effect.¹¹⁵

As a result, in 1983, the Community has adopted a Directive on the notification of national

¹¹⁰Examples taken from *Krämer*, Community Environmental Law, YEL (1992) 151 at 159, 160.

¹¹¹See *Krämer*, EWG-Umweltrecht, UTR (1990) 437 at 447, *Palme*, Nationale Umweltpolitik (1992) 56.

¹¹²See *Furrer*, Nationale Umweltkompetenzen, AJP (1992) 1517 at 1525, referring to certain rules adopted under Article 100 as minimal requirements.

¹¹³See for details *Krämer*, Community Environmental Law, YEL (1992) 151 at 179.

¹¹⁴Agreement of 5 March 1973, OJ (1973) C 9/1; see *Oppermann*, Europarecht (1991) 740.

¹¹⁵*Krämer*, Community Environmental Law, YEL (1992) 151 at 172.

draft legislation for product specifications.¹¹⁶ It provides for compulsory notification¹¹⁷ and a standstill period for national measures of between three and twelve months.¹¹⁸ The Commission's broad interpretation of this Directive leads to the compulsory notification of almost all draft national environmental legislation.¹¹⁹

3.2.7 Articles 100 and 235 After the Single European Act

While most environmental Community measures were initially based on Article 100 (sometimes in connection with Article 235) the coming into force of the Single European Act has substantially changed the application of these articles as a legal basis for the harmonization of laws. Article 100 a in particular provides a new, much more flexible way of approximating diverging national rules and laws.¹²⁰ As it allows by simple majority vote the adoption of regulations as well as other measures, it has definitely replaced Article 100 as an overall legal basis for the harmonization of laws. Nevertheless it remains possible to adopt environment related directives under Article 100, if their objectives fall under the concept of the Common Market. Although this may be exceptional¹²¹, its application is definitively appropriate for the areas mentioned in Article 100 a paragraph 2¹²². These, however, do not directly concern the environment, apart from possible fiscal provisions¹²³.

Article 235, since the introduction of the specific environment related Article 130 s, is no

¹¹⁶Directive 83/189/EEC, OJ (1983) L 109/8; on the effect *Krämer*, Community Environmental Law, YEL (1992) 151 at 172.

¹¹⁷For the failure to notify see e.g. Case C-139/92 Commission versus Italian Republic, judgement delivered by the Court on 2 August 1993, nyr.

¹¹⁸The principle of notification of national environmental legislation corresponds to the newly introduced specific Treaty provisions under Article 100 a (4), (5) and since the coming into force of the Treaty on European Union also in Article 130 t.

¹¹⁹See *Krämer*, Community Environmental Law, YEL (1992) 151 at 173 referring to the exceptions of nature protection laws and packaging regulations.

¹²⁰See *De Ruyt*, L'acte unique européen (1989) 167 who indicates 17 proposals for noise protection which could not be adopted or only after long negotiations.

¹²¹See *Zuleeg*, Vorbehaltene Kompetenzen, NVwZ (1987) 280 at 281, relevant in this context might be the distinction between internal market (Article 100 a) and Common Market (Article 100). See e.g. *Schröer*, Kompetenzverteilung (1992) 170.

¹²²For details see *Schröer*, Kompetenzverteilung (1992) 167-170; *Becker*, Der Gestaltungsspielraum (1990) 93-95; *Henke*, EuGH (1992) 83-90; *Everling*, Abgrenzung, EuR (1991) 179 at 181.

¹²³*Henke*, EuGH (1992) 90; *Pernice*, Auswirkungen, NVwZ (1990) 201 at 203.

longer an appropriate basis for the adoption of environment related Community measures¹²⁴. This new provision provides the Community with the explicit competence and states the instruments to be used to achieve the environmental objectives of the European Community.¹²⁵

3.3 The Internal Market: Article 100 a of the Treaty

3.3.1 General Remarks

By derogation from Article 100 the Single European Act introduced the new Article 100 a for the

*"approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and the functioning of the internal market"*¹²⁶

As one of the main purposes of Article 100 a of the Treaty is the accelerated elimination of diverging technical rules and requirements between the Member States, this provision is very important for environmental product standards as well as any kind of production and process requirement. In relation to these possible trade obstacles the exception clause of Article 36 and the case law of the European Court of Justice allow certain national requirements to products because of environmental reasons.¹²⁷ These national rules and regulations can likewise be removed by an extensive harmonization of laws under Article 100 a of the

¹²⁴See *Epiney/Möllers*, Freier Warenverkehr (1992) 6; *Schröer*, Kompetenzverteilung (1992) 193-195.

¹²⁵See the case law of the Court: e.g. Case 45/86 General Customs Preferences [1987] ECR 1493 at 1520; Case 242/87 Commission versus Council (*Erasmus*) [1989] ECR 1425 at 1452; Case 62/88 Greece versus Council (*Chernobyl I*) [1990] ECR 1545. See *Henke*, EuGH (1992) 99 with many references to mainly German legal writers.

¹²⁶As a special provision in relation to Article 100 this provision replaces the application of the latter in most cases.

¹²⁷See Case 240/83 *ADBHU* [1985] ECR 532 at 548 or Case 302/86 Commission versus Denmark (*Danish Bottles Case*) 1988 ECR 4607.

Treaty¹²⁸.

3.3.2 Article 100 a and Other Specific Treaty Provisions

The use of Article 100 a and its relation to the other provisions of the Treaty have been controversial since its introduction.¹²⁹ As it provides a very flexible instrument for the approximation of national rules by majority vote there have been many fears that its use would lead to an accelerated approximation of laws against the will of outvoted minorities in the Council. As it provides for different procedural requirements and particularly because of the majority vote, the Council might choose Article 100 a instead of another, more appropriate legal basis for political considerations.¹³⁰ Furthermore it has been suggested that almost every approximation of diverging national rules fits into the broad scope of Article 100 a, in order to eliminate the use of other more appropriate specific Treaty provisions.¹³¹

Particularly controversial in the field of environmental protection has been the discussion concerning the different application of Article 100 a and Article 130 s for the approximation of environment related rules.¹³² Apart from their different objectives these provisions differ mainly in the procedural requirements for the adoption of measures. Before the coming into force of the Treaty on the European Union Article, 100 a of the Treaty required for the adoption of a Community measure a Parliament cooperation procedure and a qualified majority within the Council. Article 130 s of the Treaty, on the other hand, requires only the consultation of the Parliament although unanimity within the Council.¹³³

¹²⁸An example is: Directive 99/220 on the deliberate release of genetically modified organisms, OJ (1990) L 117/15.

¹²⁹For the field of protection of health and nuclear radiation see: *Schröer*, Abgrenzung der Gemeinschaftskompetenzen, *EuZW* (1992) 207 to 210.

¹³⁰For the consequences of the choice of a wrong legal basis see: *Röttinger*, Bedeutung, *EuZW* (1993) 117 to 121.

¹³¹See also *Gilsdorf/Priebe*, Art. 38, paragraph 18, in: *Grabitz*, Kommentar EWGV; *Goetz*, Anmerkungen, *EuR* (1988) 298 at 299.

¹³²For examples see: *Barents*, Milieu en interne markt, *SEW* (1993) 5-29; *Everling*, Durchführung, *NVwZ* (1993) 209, *Zuleeg*, Umweltschutz in der Rechtsprechung, *NJW* (1993) 31; *Lenz*, Immanente Grenzen, *EuGRZ* (1993) 57-64; *Epiney*, Gemeinschaftsrechtlicher Umweltschutz, *JZ* (1992) 564-570; *Everling*, Abgrenzung, *EuR* (1991) 179.

¹³³For the impact of the new provisions in the Treaty on European Union see: *Krämer*, Community Environmental Law, *YEL* (1992) 151 at 168.

The procedural requirements for Article 100 a and Article 130 s have been changed by the Treaty on the European Union. The Treaty now allows a majority vote in both cases, but still requires different procedures. While measures under Article 100 a follow the procedure of Article 189 b, the Treaty requires for measures under Article 130 s the procedure of Article 189 c. As there are still different procedural requirements depending on the legal basis chosen there must also lead to a difference in the appropriateness of the two provisions.¹³⁴ Both allow in principle all possible legal instruments of Article 189 of the Treaty¹³⁵, but a declaration of the Member States governments¹³⁶ gives evidence that in the framework of Article 100 a there will be a preference for directives¹³⁷. The Court has twice had the opportunity of declaring its view on the appropriate legal basis for measures which concern the approximation of environmental rules having at the same time an impact on the internal market.¹³⁸

Its reasoning can be divided into two stages: First, the question whether a measure relates to the protection of the environment (Article 130 s) or the establishment of the internal market (Article 100 a) is to be determined by reference to its purpose and content. The purpose of such a measure is, however, not to be interpreted subjectively by the institution adopting it. If a measure falls, *prima facie*, under both provisions, the decision on which legal basis a measure is to be adopted depends on various objective criteria established by the Court. Article 100 a of the Treaty must be chosen in those cases where a measure is specifically devoted to the completion of the internal market.¹³⁹ The Court sees in Article 100 a a "*lex specialis*" for the adoption of measures related to the establishment of the internal market, while under Article 130 s of the Treaty all kinds of environmental measures could be

¹³⁴See *Epiney/Möllers*, Freier Warenverkehr (1992) 6, *Scheuing*, Umweltschutz auf Grundlage, EuR (1989) 152 at 185, *Krämer*, Einheitliche Europäische Akte, in *Rengeling*, Europäisches Umweltrecht (1988) 137 at 157. Another opinion have: *Lietzmann*, Einheitliche Europäische Akte, in *Rengeling*, Europäisches Umweltrecht (1988) 163 at 178; *Everling*, Abgrenzung, EuR (1991) 179 at 181.

¹³⁵Unlike Article 100 of the Treaty which mentions only directives.

¹³⁶See *Vandermeersch*, The Single European Act, ELRev (1987) 406 at 424.

¹³⁷As mandatory under Article 100; see also *Everling*, Probleme der Rechtsangleichung, in: FS Steindorff (1990) 1155 at 1166.

¹³⁸Case C-300/89 Commission versus Council (*Titanium Dioxide*) [1991] ECR 2867, Case C-155/91 Commission versus Council (*Waste Directive*) judgement of 17 March 1993, nyr.

¹³⁹See e.g. *Brunetti*, EG-Verträglichkeit (1993) 51 to 52.

adopted.¹⁴⁰ Article 130 s remains the appropriate legal basis if the measure in question aims mainly at the protection of the environment and only accessorially has a harmonizing effect on the conditions of the internal market.¹⁴¹

This very broad understanding of the application of Article 100 a as a legal basis for Community measures must also include regulations concerning products whose production in one Member State is submitted to less stringent environmental requirements than in another. This can lead to a distortion of the competitive situation in the internal market.¹⁴² Most legal writers thus argue that product related measures fall in any case under Article 100 a.¹⁴³

In its decision in case C-300/89 *Titanium Dioxide*¹⁴⁴ in 1991 the Court had to judge on the appropriateness of the legal basis for a Council Directive on procedures for the harmonization of programmes on pollution reduction and improvement the conditions of competition in the titaniumdioxide industry. While the Commission had proposed Article 100 a of the Treaty¹⁴⁵, the Council adopted the directive on the basis of Article 130 s. The Commission, supported by the Parliament, brought the case before the Court of Justice. The Court followed two steps in its reasoning: first it held that in principle the measure in question could, *prima facie* be adopted under both provisions. Secondly, with reference to the general principle that, under Article 130 s (2) of the Treaty, the protection of the environment should be a component of the Community's other policies and the measure's important impact on the internal market the Court held Article 100 a the appropriate legal basis for the measure.¹⁴⁶

¹⁴⁰See the explicit reference by the Court to the case law for the adoption of environmental measures under Article 100, cases 91/79 *Commission v. Italy (Detergents)* [1980] ECR 1099 and 92/79 *Commission v. Italy (Sulfur Content of Liquid Fuels)* [1980] ECR 1115, now under Article 100 a: Case C-300/89 *Commission versus Council (Titanium Dioxide)* [1991] ECR 2867; for comments *Everling*, *Durchführung*, NVwZ (1993) 209 at 211 and *Zuleeg*, *Umweltschutz in der Rechtsprechung*, NVwZ (1993) 31 at 32.

¹⁴¹Case C-155/91 *Commission versus Council (Waste Directive)* judgement of 17 March 1993, nyr.; for a similar constellation between Article 100 a and Article 31 European Atomic Energy Community: *Zuleeg*, *Umweltschutz in der Rechtsprechung*, NVwZ (1993) 31 at 33.

¹⁴²See *Furrer*, *Nationale Umweltschutzkompetenzen*, AJP (1992) 1517 at 1521.

¹⁴³see *Becker*, *Der Gestaltungsspielraum* (1991) 43; another opinion have: *Soell Überlegungen*, NuR (1990) 158 *seq.* and *Vorwerk*, *Kompetenzen* (1990) 67.

¹⁴⁴Case C-300/89 *Commission v. Council (Titanium Dioxide)* [1991] ECR 2867; see *Brunetti*, *EG-Rechtsverträglichkeit* (1993) 52.

¹⁴⁵In the early stage of the proposal the Commission had proposed Article 100 and 235 of the Treaty, as this was before the coming into force of the Single European Act.

¹⁴⁶For a detailed commentary on the decision see e.g. *Robinson*, *The legal basis of EC environmental law*, JEnvL (1992) 109 to 120, *Somsen*, *Case 300/69*, CMLRev (1992) 140 to 151.

This principle was upheld in the more recent decision in the case C-155/91 *Waste Directive*¹⁴⁷. Here the Court had to express its opinion on the appropriateness of Article 130 s as the legal basis for a Council Directive on Waste management.¹⁴⁸ Here again the Council had based the directive on Article 130 s in spite of the Commission proposing Article 100 a as the appropriate legal basis. The Court held that the directive was validly based on Article 130 s as it touched the harmonization of laws only accidentally and was on the contrary concerned with the limitation of the free movement of goods for environmental requirements rather than with the complete approximation of national laws for the establishment of the internal market.¹⁴⁹ In the Court's view the very weak harmonizing effect did not allow for an adoption under Article 100 a. Article 130 s was the appropriate basis for such a measure introducing environmental principles explicitly justifying exceptions from the free movement of goods.¹⁵⁰

3.3.3 Possible Safeguard Clauses: Article 100 a (5)

Article 100 a (5) of the Treaty provides the general possibility of including specific safeguard clauses in harmonization measures adopted under Article 100 a (1) of the Treaty. According to Article 100 a (5) such measures shall in appropriate cases include

"a safeguard clause authorizing the Member State to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Community control procedure".

For environmental measures this leads to the disputed question whether the environment is included in the reasons referred to in Article 36.¹⁵¹ Even when applying a narrow interpretation¹⁵² of Article 36 many measures may fall under this provision, as concerning *"the protection of health and life of humans, animals or plants"*.

This new provision is a continuation of the practice under Article 100¹⁵³, where most directives contained safeguard clauses for special situations. They usually allow Member

¹⁴⁷Case C-155/91 *Commission v. Council (Waste Directive)* judgement of 17 March 1993, nyr.

¹⁴⁸Directive 91/156/EEC on waste modifying Directive 75/442/EEC, OJ (1991) L 78/32.

¹⁴⁹Case C-155/91 *Commission versus Council (Waste Directive)* paragraph 15, judgement of 17 March 1993, nyr.

¹⁵⁰See also the Court's reference to this judgement in Case C-2/90 *Commission versus Belgium (Walloon Waste Case)* [1992] ECR 4431.

¹⁵¹*Becker*, *Der Gestaltungsspielraum* (1991) 71 with many references.

¹⁵²As indicated by the Court e.g. in Case 113/80 *Commission versus Ireland* [1981] ECR 1625.

¹⁵³See chapter 3.2.4.

States to take provisional measures if they think that a product which conforms in general to Community rules, presents a risk for man or the environment.¹⁵⁴ The Member States must, however, inform the Commission which will start a procedure by which either the national measure is made applicable generally or the Member State is asked to lift its measures. Until the Community decision is taken, the provisional national measure may remain in force.¹⁵⁵

An example is Directive 75/716 modified by Directive 87/219 fixing the *maximum content of sulphur for liquid fuels*. The maximum level is 0.3 percent but the Directive allows Member States to apply a maximum level of up to 0.2 percent if this is required for reasons of environmental protection or protection of the cultural heritage.¹⁵⁶ Another example is Directive 91/414/EEC on *car emissions*¹⁵⁷, based on Article 100 a containing specific provisions on national fiscal incentives for equipment for "clean cars". It allows Member States to apply fiscal incentives for compliance with the prescribed Community standards. They must be significantly less high than the real cost for the pollution reduction equipment and their fixing. Once the Community introduces its own fiscal standards they must cease to exist.¹⁵⁸

3.3.4 Article 100 a (4): Systematic Diverging National Measures

Article 100 a (4) of the Treaty allows Member States "to apply national provisions on grounds of major needs referred to Article 36, or relating to the protection of the environment or the working environment", despite an existing harmonization under Article 100 a (1) of the Treaty¹⁵⁹ and the absence of a specific safeguard clause. If a Member State deems such provisions necessary it shall notify these provisions to the Commission. The notion of "complete harmonization" of an area, which is very important under Article 100¹⁶⁰, is less important under Article 100 a as it provides explicitly for the application of diverging national measures.¹⁶¹

¹⁵⁴A possible example could be a safeguard clause for the outbreak of disease in animals; see *Kapteyn/VerLoren van Themaat*, Law of the European Communities (1988) 475; see for fish movements *Howarth*, The Single European Market and the Problem of Fish Movements, ELRev (1990) 34 at 36.

¹⁵⁵See *Krämer*, Community Environmental Law, YEL (1991) 151 at 180, with reference e.g. to Article 16 of Directive 90/220/EEC on the deliberate release of genetically modified organisms, OJ (1990) L 117/15.

¹⁵⁶Directive 75/716 on the approximation of laws of the Member States relating to the sulphur content of certain liquid fuels, OJ (1975) L 307/22, based on Article 100 modified by Directive 87/219, OJ (1987) L 91/19 based on Article 100 and 235.

¹⁵⁷Directive 91/414/EEC, OJ (1991) L 242/1.

¹⁵⁸For details and on the question whether this directive should have been rather based on Article 99 see *Krämer*, Environmental protection, CMLRev (1993) 111 at 141, 142.

¹⁵⁹Compare the similar provisions of Article 118 a (3) and Article 130 t of the Treaty.

¹⁶⁰See chapter 3.2.

¹⁶¹See *Scheuing*, Umweltschutz auf Grundlage, EuR (1989) 152 at 167.

This new concept which allows diverging national measures after a comprehensive harmonization of rules¹⁶² has been widely criticized. Certain legal writers consider it to be a retreat from the former legal situation in the Community¹⁶³ and therefore that it seriously endangers the Common Market.¹⁶⁴ While the complete harmonization of environmental rules on the basis of Article 100 of the Treaty did not, in principle, allow any differing national provisions, the new Article 100 a of the Treaty allows them explicitly under certain conditions. The reasons laid down in Article 36 as well as the national protection of the environment and the working environment are explicitly recognized as having a permanent character even after the harmonization. These legitimate exceptions coincide, however, with the principles established by the Court in its case law on Article 30 in connection with Article 36 of the Treaty and the rule of reason.¹⁶⁵

3.3.5 *The Controversial Application of Article 100 a (4)*

In view of the current discussion in the Community on terms such as subsidiarity, competition of regulatory systems, decentralization, harmonization versus pluralism, etc. the interpretation of the substantive elements of Article 100 a (4) is still very controversial.¹⁶⁶ There are several open questions to the limits and the scope of this provision.¹⁶⁷ Without giving any details the main problem areas can be summarized in the following points:

a) The Application of More Stringent National Measures

The wording of Article 100 a (4) refers to "*grounds of major needs referred to in Article 36,*

¹⁶²See the case law of the Court of Justice concerning national measures harmonized under Article 100 of the Treaty, e.g. Case 5/77 *Tedeschi Denkavit* [1977] ECR 1555 at 1576, 35; Case 251/78 *Denkavit Futtermittel* [1979] ECR 3369 at 3388.

¹⁶³See *Kapteyn/VerLoren van Themaat*, *Law of the European Communities* (1988) 474; *Mertens de Wilmars*, *Het Hoof van Justitie*, SEW (1986) 601-619.

¹⁶⁴See *Pescatore*, *Die "Einheitliche Europäische Akte"*, EuR (1986) 153-169.

¹⁶⁵Compare the explicit reference to Article 36 in Article 100 a (4) of the Treaty; on the relevance of the case law for Article 100 a (4) see *Krämer*, *Environmental Protection*, CMLRev (1993) 111 at 124; *Müller-Graff*, *Rechtsangleichung*, EuR (1989) 147; *Glaesner*, *EEA*, EuR (1986); *Langeheine*, *Rechtsnagleichung*, EuR (1988) 235 at 252; *Montag*, *Umweltschutz*, RIW (1987)935 at 942.

¹⁶⁶See for an extensive discussion: *Palme*, *Nationale Umweltpolitik* (1992) 96-175; *Schröer*, *Kompetenzverteilung* (1992) 226-245; *Epiney/Möllers*, *Freier Warenverkehr* (1992) 51 to 60; *Becker*, *Der Gestaltungsspielraum* (1991) 109 to 118; *Vorwerk*, *Die umweltpolitischen Kompetenzen* (1990) 108-145.

¹⁶⁷For a detailed discussion see *Schröer*, *Kompetenzverteilung* (1992) 226-245.

or relating to the protection of the environment or the working environment". It seems therefore to indicate a clear link with the principles developed by the European Court of Justice concerning measures justified under Article 30 (rule of reason) and 36 concerning the protection of the environment.¹⁶⁸ By reference to Article 36 it is also intended that the diverging national measures comply with the other requirements of Article 36; that is, mainly, they must be justified in the public interest, may not be taken as disguised protectionist measures, and must not be applied in a discriminatory way.¹⁶⁹

This indicates that diverging national measures must be more stringent than those introduced by the Community under Article 100 a of the Treaty. Only more severe measures which guarantee the protection of the environment on a higher level are justified under Article 100 a (4) of the Treaty. Another consequence of the reference to Article 36 is that the measures under Article 100 a (4) have to be proportionate in the sense of the jurisdiction of the Court of Justice. As in the case of national measures under the rule of reason or Article 36 of the Treaty, diverging national measures in the sense of Article 100 a (4) of the Treaty must correspond to the requirements of the proportionality test as applied by the Court.¹⁷⁰

b) The Introduction of New Diverging National Measures

Another fundamental question concerning the limits of Article 100 a (4) is whether it allows Member States to take new measures once an area has been harmonized under Article 100 a (1) or whether this article covers only the maintenance of already existing legislation. The term "to apply" and its literal meaning have been invoked by certain authors to underline that Article 100 a (4) of the Treaty allows existing diverging national measures but does not allow new ones after the harmonization.¹⁷¹ This limitation for the introduction of new

¹⁶⁸See *Epiney/Möllers*, *Freier Warenverkehr* (1992) 58 with many references.

¹⁶⁹See *Zuleeg*, *Vorbehaltene Kompetenzen*, *NVwZ* (1987) 280 at 284 and *Scheuing*, *Umweltschutz auf Grundlage*, *EuR* (1989) 152 at 170.

¹⁷⁰See *Epiney/Möllers*, *Freier Warenverkehr* (1992) 58 and 59 with many references.

¹⁷¹See *Krämer*, *Focus* (1993) 78 *seq.*, *Langeheine*, *Rechtsangleichung*, *EuR* (1988) 235; *Ehlermann*, *The internal market*, *CMLRev* (1987) 360 at 392, *Grabitz/Zacker*, *Umweltkompetenzen*, *NVwZ* (1989) 297 at 300.

measures has been rejected by many others.¹⁷² They declare that the wording "to apply"¹⁷³ can be interpreted as maintaining existing rules and introducing new measures.¹⁷⁴ The wording in several languages does not, however, lead to a concrete solution.¹⁷⁵ It can only be summarized that the term "to apply" might theoretically include "to maintain" and "to introduce",¹⁷⁶ so that the wording gives no clear indication as to the correct interpretation. A analysis of the use of the term "apply" in the jurisdiction of the Court might eventually strengthen the arguments of a broad interpretation.¹⁷⁷

Others argue that the objective of an internal market as mentioned in Article 8 a of the Treaty would be jeopardized if the Member States could introduce permanent new diverging measures for the protection of the environment and the other mentioned grounds.¹⁷⁸ Several authors see in the historical development of Article 100 a another reason for the prohibition of new measures or at least for a limited transition period.¹⁷⁹

Another argument is the analogy to Article 130 t, which states that in the field of the environment "*the protective measures adopted in common pursuant to Article 130 s shall not prevent any Member State from maintaining or introducing more stringent protective*

¹⁷²See for details: *Hailbronner*, Der "nationale Alleingang", EuGRZ (1989) 101 at 108 *seq.*, also *Forwood/Clough*, The Single European Act, ELRev (1986) 383 at 389 *seq.*; *Epiney/Möllers*, Freier Warenverkehr (1992) 52; *Vorwerk*, Die umweltpolitischen Kompetenzen (1990) 115 *seq.*; *Scheuing*, Umweltschutz auf Grundlage, EuR (1989) 152 at 170 *seq.*; *De Ruyt*, L'acte unique européen (1989) 171; *Pernice*, Kompetenzordnung, DV (1989) 1 at 10; *Møller*, Binnenmarkt und Umweltschutz, EA (1987) 497 at 503; *Zuleeg*, Vorbehaltene Kompetenzen, NVwZ (1987) 280 at 284.

¹⁷³In French: *appliquer*, in German: *anwenden*, in Italian: *applicare*, in Spanish: *aplicar* etc.

¹⁷⁴See *Hailbronner*, Der "nationale Alleingang", EuGRZ (1989) 101 at 109 *seq.*; *De Ruyt*, L'acte unique européen (1989) 171.

¹⁷⁵See *Palme*, Nationale Umweltpolitik (1992) 126-128.

¹⁷⁶See *Becker*, Der Gestaltungsspielraum (1991) 114; *Hailbronner*, Der "nationale Alleingang", EuGRZ (1989) 101 at 109; *Müller-Graff*, Rechtsangleichung, EuR (1989) 107 at 148.

¹⁷⁷See *Furret*, Sperrwirkung (1994) 240-241 with reference to Case 53/86 *Romkes* [1987] ECR 2691 paragraph 5.

¹⁷⁸See *Krämer*, Einheitliche Europäische Akte (1988) 137 at 155; *Langeheine*, Rechtsangleichung, EuR (1988) 235 at 249; the same tendency *Dausen*, Die rechtliche Dimension, EuZW (1991) 8 at 9.

¹⁷⁹See *Krämer*, Environmental Protection, CMLRev (1987) 659; *Krämer*, Community Environmental Law, YEL (1991) 151 at 164; *Langeheine* Art. 100 a, paragraph 65 in *Grabitz*: Kommentar EWGV; *Langeheine*, Rechtsangleichung, EuR (1988) 235 at 248, more equilibrated *Piepkorn*, Art. 100 a, 110 *seq.* in: *Groeben/Boeckh/Thiesing/Ehlermann*, Kommentar EWGV.

measures". The supporters of a broad interpretation state that Article 100 a (4) has to be interpreted in the light of Article 130 s, as the drafters did not want to exclude the adoption of new diverging protection measures in the framework of the important Article 100 a (4) if they stated this possibility explicitly in Article 130 t for the field of environmental policy.¹⁸⁰ On the other hand those authors who object to such an interpretation of the Treaty invoke the different wording of Article 130 t and also 118 a (3) of the Treaty¹⁸¹ as proving the different intention of the drafters.¹⁸²

Probably the most striking argument in favour of a competence without any time-limit for the introduction of new protection measures is the interpretation in the light of the general objectives of the Single European Act. Considering the lack of explicit references to the protection of the environment in the Treaty of Rome, the Single European Act has introduced several strong provisions to implement a far reaching environmental policy of the European Community. The Articles 100 a (3) - a high level of protection for Community environmental measures -, 130 r (1) - the objectives of the Community environmental policy - and Article 130 r (2) second sentence of the Treaty - principles of the Community environmental policy - indicate the general desire for high-standard effective protection of the environment.¹⁸³

Certain authors derive from the mentioned set of environmental provisions of the Single European Act the "principle of the best possible environmental protection"¹⁸⁴. It is, however, arguable whether this high level of protection provides only a guideline for the environmental

¹⁸⁰See Hailbronner, Der "nationale Alleingang", EuGRZ (1989) 101 at 112.

¹⁸¹Article 118 a (3) EEC Treaty states: "The provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty."

¹⁸²Krämer, Environmental Protection, CMLRev (1993) 111; Ehlermann, The internal market, CMLRev (1987) 361 at 392.

¹⁸³See Epiney/Möllers, Freier Warenverkehr (1992) 53 seq.; Pernice, Auswirkungen, NVwZ (1990) 201; Hailbronner, Der "nationale Alleingang", EuGRZ (1989) 101 at 113 seq.; Scheuing, Umweltschutz auf Grundlage, EuR (1989) 152 at 170; Krämer, Grundrecht, EuGRZ (1988) 285 at 288.

¹⁸⁴"Grundsatz des bestmöglichen Umweltschutzes" see Zuleeg, Vorbehaltene Kompetenzen, NVwZ (1987) 280 at 283. Positive: Vorwerk, Die umweltpolitischen Kompetenzen (1990) 33; Pernice, Auswirkungen, NVwZ (1990) 201 at 203; Scheuing, Umweltschutz auf Grundlage, EuR (1989) 152 at 176; Hailbronner, Der "nationale Alleingang", EuGRZ (1989) 101 at 104; Krämer, Grundrecht, EuGRZ (1988) 285 at 288; Krämer, Das Verursacherprinzip, EuGRZ (1989) 353 at 356.

measures taken by the Community or whether it implicitly justifies the introduction of new diverging domestic measures. Only if the introduction of diverging national measures is considered to be an incentive for an efficient Community environmental policy and necessary in order to reach a high level of protection in general, is this solution preferable under the aspect of environmental protection.¹⁸⁵ Such an interpretation undoubtedly only allows the introduction of new measures if they are more stringent than the Community standard.

A further argument in favor of the introduction of new more stringent measures might be that only the introduction of new national measures allows a Member State to react to new scientific evidence or a change in its regional or national conditions¹⁸⁶ by introducing appropriate new measures.¹⁸⁷

c) No Limited Period for Application

Most authors argue that the application of diverging national measures under Article 100 a (4) is not subject to a limited period of application.¹⁸⁸ Although Article 100 a of the Treaty was introduced for the accomplishment of the internal market as mentioned in Article 8 a of the Treaty, this did not prevent the further application of the explicitly provided exceptions after January 1st 1993. Although the application of diverging national measures can hinder the establishment of a homogenous internal market,¹⁸⁹ Article 100 a (4) provides a legal basis for the unlimited application of diverging national measures after 1993.¹⁹⁰

d) Application in Spite of Non-Objection on Occasion of the Adoption

Very controversial is the question of who may apply divergent measures according to Article

¹⁸⁵See *Hailbronner*, Der "nationale Alleingang", EuGRZ (1989) 101 at 115; also *Epiney/Möllers*, Freier Warenverkehr (1992) 54.

¹⁸⁶Apart from eventual specific safeguard clauses as provided for e.g. in Article 100 a (5) of the Treaty.

¹⁸⁷See *Epiney/Möllers*, Freier Warenverkehr (1992) 56; *Becker*, Der Gestaltungsspielraum (1991) 115; *Zuleeg*, Vorbehaltene Kompetenzen (1987) 280 at 284.

¹⁸⁸See *Becker*, Der Gestaltungsspielraum (1991) 116 with more references.

¹⁸⁹See *Krämer*, Focus (1993) 77 and 78.

¹⁹⁰See also *Guhlmann*, The Single European Act, CMLRev (1987) 31 at 36; *Langeheine*, Rechtsangleichung, EuR (1988) 235 at 256.

100 a (4). Some legal writers have suggested that the logic of this provision allows only those Member States which have been outvoted on the adoption of a measure under Article 100 a (1) to invoke Article 100 a (4) of the Treaty. They interpret 100 a (4) as a necessary safeguard clause for the outvoted Member States and as a consequence of the introduced qualified majority requirement.¹⁹¹ Voting in favour of the adoption of a measure under Article 100 a or abstention would thus preclude the invocation of Article 100 a (4).¹⁹² The same reasoning lies behind the opinion that a unanimous adoption of a measure under Article 100 a of the Treaty prevents any Member State from relying on the provision of Article 100 a (4) of the Treaty.¹⁹³

Others argue that Article 100 a of the Treaty has been introduced to make the decision making in the Community easier.¹⁹⁴ Concerning the safeguard clause of Article 100 a (4) they refer to the possible situation where a Member State prefers the proposed new Community legislation to the existing rules but would still like to apply higher standards in its own territory. A country in this situation would vote in favour of the new legislation, knowing that Article 100 a (4) of the Treaty will then allow it to apply more stringent national rules. If this country was not allowed to apply its higher standard if it consented to the relevant measure it would never consent, since consent would mean being unable to apply higher standards. This would mean the paralyzation of the harmonization of environment related

¹⁹¹See *Mertens de Wilmars*, *Het Hoof van Justitie*, SEW (1986) 601; *Kapteyn/VerLoren van Themaat*, *Law of the European Communities* (1988) 475; *Krämer*, *Einheitliche Europäische Akte*, in *Rengeling*, *Europäisches Umweltrecht* (1988) 137 at 154, *Langeheine*, *Art. 100 a*, 62, in: *Grabitz*, *Kommentar EWGV*; *Meier*, *EEA* (1987) 537 at 540; *Dausés*, *Die rechtliche Dimension*, *EuZW* (1991) 8 at 9; *Piepkorn*, *Art. 100 a*, 98 *seq.*, in: *Groeben/Boeckh/Thiesing/Ehlermann*, *Kommentar EWGV*.

¹⁹²See *Jacqué*, *L'acte unique européen*, *RTDE* (1986) 575 at 600; *Ehlermann*, *The internal market*, *CMLRev* (1987) 360 at 394.

¹⁹³See *Krämer*, *Focus* (1993) 76; *Meier*, *EEA*, *NJW* (1987) 537 at 539; *Langeheine*, *Rechtsangleichung*, *EuR* (1988) 235 at 246; *Dausés*, *Die rechtliche Dimension*, *EuZW* (1991) 8 at 9; *Piepkorn*, *Artikel 100 a*, 98, in: *Groeben/Boeckh/Thiesing/Ehlermann*, *Kommentar EWGV*.

¹⁹⁴*Hailbronner*, *Der nationale Alleingang*, *EuGRZ* (1989) 101 at 109 considers such an interpretation to be a consequence of the general principle governing the interpretation of Community law, the "effet utile"-interpretation. In his view even a unanimous decision can be reached although certain countries want to apply higher national standards; see also *Epiney/Möllers*, *Freier Warenverkehr* (1992) 57; *Becker*, *Der Gestaltungsspielraum* (1991) 111 *seq.*

rules.¹⁹⁵ Referring again to the objective of a generally high level of environmental protection within the Community as a whole, this interpretation seems to be in the interest of the efficient protection of the environment.¹⁹⁶

3.3.6 *Procedural Requirements*

Once a State has notified a divergent measure, according to the second paragraph of Article 100 a (4) of the Treaty the Commission may only check that they are not means of arbitrary discrimination or disguised restrictions on trade between Member States.¹⁹⁷ The Commission is not able to examine the justification of the level of protection.¹⁹⁸ The examination must, however, include checking whether these measures fall within the scope of Article 36 or the rule of reason under Article 30. If the Commission or another Member State consider that a Member State makes improper use of this provision it may bring the matter directly before the Court without observing the procedural requirements of Article 169 and 170 of the Treaty. It has been suggested that the judicial control over whether a Member State makes "improper use" of Article 100 a (4) should include an evaluation of the objective involved (in the sense of a broad interpretation of Article 100 a (4) paragraph 3).¹⁹⁹

The only reported example of a procedure under Article 100 a (4) to date is the 1992 German ban on pentachlorophenol (PCP), a chemical substance principally used as a wood preservative and considered dangerous for man and the environment. In 1987, Germany had notified the Commission of its intention to severely restrict the use of PCP. Since the Community itself intended to introduce regulations on this substance, it asked Germany to withhold its project, as it is provided for by Directive 83/189.²⁰⁰ In 1989, however, Germany adopted the national regulation in question²⁰¹, which contained a total ban of PCP. Later in the same year the

¹⁹⁵See Klein, Art. 100 a, 14 in: *Hailbronner/Klein/Magiera/Müller-Graff*: Handkommentar (1991); *Becker*, Der Gestaltungsspielraum (1991) 109; *Scheuing*, Umweltschutz auf Grundlage, EuR (1989) 152 at 171; *Vorwerk*, Die umweltpolitischen Kompetenzen (1990) 108.

¹⁹⁶See *Epiney/Möllers*, Freier Warenverkehr (1992) 55; *Becker*, Der Gestaltungsspielraum (1991) 110 and 112; *Soell*, Überlegungen zum Europäischen Umweltrecht, NuR (1990) 155 at 160; *Hailbronner*, Der "nationale Alleingang", EuGRZ (1989) 101 at 117; *Scheuing*, Umweltschutz auf Grundlage, EuR (1989) 152 at 171; *Grabitz/Zacker*, Umweltkompetenzen, NVwZ (1989) 297 at 300; *Pernice*, Kompetenzordnung, DV (1989) 1 at 11; *Montag*, Umweltschutz, RIW (1987) 935 at 942; *Joerges/Falcke/Micklitz/Brüggemeier*, Sicherheit von Konsumgütern (1988) 369 seq.

¹⁹⁷Article 100 a (4) second sentence, referring to Article 36 second sentence.

¹⁹⁸*Kapteyn/VerLoren van Themaat*, Law of the European Communities (1988) 475.

¹⁹⁹See *Kapteyn/VerLoren van Themaat*, Law of the European Communities (1988) 475.

²⁰⁰Directive 83/189/EEC, OJ (1983) L 109/8, see chapter 3.2.6.

²⁰¹Regulation of 12 December 1989, Bundesgesetzblatt I of 22.4.1989.

Community adopted a directive²⁰² which contained severe restrictions on the use of PCP, but not a total ban as in the German legislation. Furthermore, in 1991 the Community, in its Directive 91/173/EEC²⁰³, adopted new provision concerning the use of PCP. In the same year Germany notified the Commission under Article 100 a (4) of the Treaty that it intended to maintain its regulation. This decision was confirmed by the Commission in 1992, as provided for by Article 100 a (4).²⁰⁴ This decision by the Commission has been taken to Court by France asking for an annulment of the decision.²⁰⁵

²⁰²Directive 89/678, OJ (1989) L 398/24.

²⁰³Directive 91/173/EEC, OJ (1991) L 85/34.

²⁰⁴Communication by the Commission, OJ (1992) C 334/4, reported by *Furrer*, *Sperrwirkung* (1994) 267; *Krämer*, *Environmental Protection*, *CMLRev* (1993) 111 at 125 and 133.

²⁰⁵Case C-41/93 *France versus Commission (PCP Decision)*, OJ (1992) C 334/9 and OJ (1993) C 70/11; currently before the Court of Justice, see *Furrer*, *Sperrwirkung* (1994) 267.

4 The Approximation of Laws in Particular Areas

4.1 Summary

While Article 100 and 100 a provide the possibility of eliminating step by step diverging national rules and regulations which might hinder the establishment of the Common Market and the internal market respectively, the Treaty contains certain provisions which allow the Community to develop a common policy in specific areas. In the field of environmentally relevant policies these are mainly the protection of the environment itself (Article 130 r seq.), the common agricultural policy (Article 43 seq.), and the common transport policy (Article 75 seq.). In these areas have been developed uniform Community rules to establish the Common Market. While the general approximation of laws allows the establishment of one market and thereby integration through economic factors, the approximation of laws in particular areas can be seen as an additional element for the integration of certain particularly important areas of regulation. These are based on special provisions in relation to Article 100 and 100 a, which in general prevail in their application for the adoption of specific regulations. The case law of the European Court of Justice, however, shows that the distinction can be rather difficult and is not always clear.

Since the coming into force of the Single European Act Articles 130 r to t have finally introduced an explicit environmental policy into the Treaty. In spite of a harmonization of environmental measures under Article 130 s the Member States may apply or introduce more stringent national measures under Article 130 t. These must be notified to the Commission. If deemed appropriate Community measures under Article 130 s include specific safeguard clauses allowing diverging national measures, subject to a Community inspection procedure (Article 130 r (2)).

Article 43 is the appropriate legal basis for environment related Community measures concerning the production and marketing of agricultural products. The creation of a uniform agricultural policy has also effects for the national regulation of product and production requirements. If a Community measure adopted under Article 43 does not completely cover an area the Member States keep the competence for national measures compatible with the

Treaty. Specific safeguard clauses and minimum requirements are possible.

The common transport policy under Article 75 and 84 (2) of the Treaty includes certain measures regulating environmental aspects of traffic. As long as an area is not completely covered by Community measures the Member States remain free to adopt their own measures including prohibitions and restrictions of use, charges and subsidies. The measures must respect the general rules of the Treaty and may not change unilaterally the situation for foreign carriers (Article 76).

The measures taken for the improvement of the working environment under Article 118 a of the Treaty are not to be considered environmental measures but rather as serving objectives of social policy. The Community research policy (Article 130 o) has practically no impact on the Member States' competence for environmental programmes and state aids in the field.

4.2 Community Action Relating to the Environment (Article 130 r seq.)

4.2.1 General Observations

Since the coming into force of the Single European Act, in 1987, the Community has been entrusted under the general system of the Treaty, with the protection of the environment. Its objectives closely resemble the Community practice developed since the UN Environment Conference in Stockholm 1972.²⁰⁶ Article 130 r (2) sets out the principles Community action is to be based on. These principles are: the principle of preventive action, the principle of rectification of environmental damage at the source, and the polluter pays principle. The second sentence states that environmental protection requirements shall be a component of the other Community policies.²⁰⁷ These principles shall lead the environmental policy of the Community in general.²⁰⁸

²⁰⁶See Kapteyn/VerLoren van Themaat, *Law of the European Communities* (1988) 650.

²⁰⁷Referred to as *integration clause*, in German as: *Querschnittsklausel*.

²⁰⁸See Kapteyn/VerLoren van Themaat, *Law of the European Communities* (1988) 651; a possible consequence could therefore be that the Community does not approve certain state aids for environmental purposes if the polluter pays principle is not observed; see for details chapter 5.

Article 130 r (4) states that Community environmental policy shall be of subsidiary nature. The Community shall only take measures "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 State." The term "individual Member State" does not, however, preclude the cooperation of several Member States to achieve efficient protection of the environment. Environmental protection typical of areas where cooperation is particularly important.²⁰⁹ Article 130 r (5) provides that within their relevant sphere of competence the Community and the individual Member States shall cooperate with third countries and with the relevant international organizations.²¹⁰

While Article 130 r to 130 t were introduced in the Treaty only with the coming into force of the Single European Act, the Treaty on the European Union has not substantially changed the framework of the Community's environmental policy under these provisions.²¹¹ The main changes are the new procedural requirements in Article 130 s for the adoption of measures.²¹² Furthermore the Treaty now explicitly states the objective of a high level of protection and the importance of taking into account the diversity of situations in the various regions of the Community - new Article 130 r (2).²¹³

4.2.2 *Article 130 s and Other Provisions for Environmental Action*

On the whole it seems that Articles 130 r to 130 t of the Treaty provide the Community with a very extensive explicit power to regulate environmental areas.²¹⁴ Nevertheless its

²⁰⁹Kapteyn/VerLoren van Themaat, *Law of the European Communities* (1988) 652; Krämer, *Community Environmental Law*, YEL (1992) 151 at 152.

²¹⁰See in detail chapter 6.

²¹¹See for details: Wilkinson, *Maastricht and the Environment*, JEnvL (1993) 221-239 and Epiney/Furrer, *Umweltschutz nach Maastricht*, EuR (1992) 369-408.

²¹²Article 130 s of the Treaty provides now for an adoption of legislation by majority vote. Everling, *Durchführung, NVWZ* (1993) 209 at 216 indicates the possible development for the choice of legal basis (Article 100 a or 130 s).

²¹³The requirement of a high level of environmental protection, first included in Article 100 a (3) is thereby extended to all aspects of Community policy because of the horizontal effect of Article 130 r (2) on all Community policies. see Wilkinson, *Maastricht and the Environment*, JEnvL (1992) 221 at 223.

²¹⁴See Krämer, *Environmental Protection*, CMLRev (1993) 111 at 112 and the Cases C-300/89 *Council versus Commission (Titanium Dioxide)* [199] ECR 2867 and Case C-155/91 (*Waste Directive*), judgement delivered on 17 March 1993, nyr; for a detailed analysis see Epiney/Möllers, *Freier Warenverkehr* (1992) 7, see

introduction does not preclude the adoption of Community legislation under other relevant articles. This follows particularly from the principle of Article 130 r (2), the so called "*integration clause*", which states that the protection of the environment shall be a component of the Community's other policies. What has been discussed for the relation of Article 130 r and Article 100 a²¹⁵ is also relevant for the relation between Article 130 r and the other possible provisions entailing environmental effects.

In cases where the content of a legal action can find its legal basis in two different provisions of the Treaty the Court demands that in principle the corresponding act be based on both provisions.²¹⁶ This is not, however, possible if these provisions provide for different procedures such as do Article 130 s and Article 100 a. The Court of Justice has therefore stated that the mere fact that a Community measure is aimed at the protection of the environment does not automatically lead to the application of Article 130 s.²¹⁷ The Court initially declared that a regulation was to be based on Article 100 a instead of Article 130 s whenever it had any impact on the Internal Market, e.g. the establishment of uniform conditions for production and competition.²¹⁸ In a recent decision²¹⁹ the Court added, however, that Article 130 r was to be chosen whenever the harmonization of competition conditions within the internal market was only of accessory importance in relation to the environmental objective of a regulation.²²⁰

Thus, the Court treats Articles 130 r and 130 s as specific provisions which leave intact the Community powers under other provisions of the Treaty. The Court refers particularly to

also chapter 3.3.6.

²¹⁵See chapter 3.3.2.

²¹⁶Case 165/87 Commission versus Council [1988] ECR 5545.

²¹⁷Case C-300/89, Commission v. Council (*Titanium Dioxide*) [1991] ECR 2867; see *Krämer*, Community Environmental Law, YEL (1992) 151 at 154.

²¹⁸Case C-300/89 Commission versus Council (*Titanium Dioxide*) [1991] 2867 at paragraph 15.

²¹⁹Case C-155/91 Commission versus Council (*Waste Directive*) paragraph 19, judgement delivered on 17 March 1993, nyr.

²²⁰For a detailed discussion of the question see *Somsen*, Case C-300/89, CMLRev (1992) 140-151; *Epiney*, Gemeinschaftsrechtlicher Umweltschutz, JZ (1992) 564; *Epiney/Möllers*, Freier Warenverkehr (1992) 7 seq.

Article 130 r (2).²²¹ This supports the Community's practice under the SEA of basing environment-related measures on other Treaty provisions if they are considered to be more specific: Article 100 a (Internal Market)²²², Article 43 (Agriculture)²²³, Article 75 and 84 (2) (Transport)²²⁴, Article 99 (Fiscal Measures)²²⁵, 113 (Common Commercial Policy)²²⁶, or 130 o (Research)^{227, 228}.

The main area where Article 130 s is to be applied in the adoption of Community actions might therefore be defined as where the protection of the environment is so predominant over the other effects of a regulation that these others become secondary and do not allow the adoption under any of the other more specific provisions.²²⁹ This is definitely the case for areas whose regulation was based on Article 235 before the introduction of the SEA²³⁰ The exact definition of such areas remains difficult, even considering the above described principles of the jurisdiction.²³¹ Therefore, the question of which legal basis environment-related measures have to be adopted on cannot be generally answered²³². There are, however, important consequences, as the procedures for the adoption differ. The same is true for the possibilities of the Member States to apply diverging national measures.

²²¹Case C-62/88 Greece versus Council (*Chernobyl I*) [1990] ECR 1545, which concerned the different application of Article 113 and Article 130 r (5) of the SEA, now 130 r (4). See for details chapter 6.

²²²E.g. Directive 91/441/EEC on the limitation of air pollution from motor vehicles, OJ (1991) L 241/1.

²²³E.g. Directive 91/414/EEC on the putting into circulation of pesticides, OJ (1991) L 230/1.

²²⁴E.g. Directive 89/629/EEC on the limitation of noise emissions from subsonic aircraft, OJ (1989) L 363/27.

²²⁵E.g. Proposal for a Directive on the introduction of an energy tax in order to limit carbon dioxide emissions, OJ (1992) C 216/4.

²²⁶E.g. Proposal for a regulation on the transport including export and import of dangerous waste (also based on Article 100 a), OJ (1990) C 289/9, still based on Article 130 q.

²²⁷E.g. Decision of 7 June 1991 to adopt a specific programme on research and technological development in environmental measures, OJ (1991) L 192/29.

²²⁸All references from *Krämer*, Community Environmental Law, YEL (1992) 151 at 155.

²²⁹*Henke*, EuGH (1992) 97 referring to explicit examples.

²³⁰*Henke*, EuGH (1992) 97.

²³¹Case 300/89 Commission versus Council (*Titanium Dioxide*) [1991] ECR 2867 at paragraph 15 and Case 155/91 Commission versus Council (*Waste Directive*) paragraph 19, judgement delivered on 17 March 1993, nyr.

²³²Should the measures concerning the trade in endangered species have been based on the Community's competence for environmental action (Article 130 s), the approximation of trade hindering national laws (Article 100 a) or even on the common commercial policy (Article 113)? The same question can be asked in the field of agricultural biotechnological products (Article 43 or Article 100 a).

4.2.3 Non-Harmonized Areas and Safeguard Clauses

As shown in the context of Article 100 and 100 a the Member States remain free to adopt their own environmental measures in areas which have not been completely harmonized by Community law. Furthermore, in many cases where harmonization has taken place the specific Community measure itself provides for national safeguard clauses for the application of diverging measures. Under the Single European Act (SEA) Article 130 r did not mention such specific safeguard measures. Now, after the coming into force of the Treaty on European Union, the new version of Article 130 r (2), second sentence, introduces the general inclusion of specific safeguard measures, as mentioned before under Article 100 a (5) and in practice existing for all Community harmonization.²³³ It states:

"In this context, harmonization measures answering these requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure."

Article 130 s (2), second paragraph corresponds in most aspects to the provision of Article 100 a (5). It differs, however, by mentioning environmental reasons instead of "major needs referred to in Article 36". Systematically this provision institutionalizes the Community practice in the field of the harmonization of laws to include safeguard clauses in specific measures if deemed appropriate.²³⁴

This strengthening of the possibilities for diverging national measures might be a further consequence of the procedural changes.²³⁵ While Article 130 s of the Single European Act provided for unanimous adoption, Article 130 r of the Union Treaty allows for the adoption with qualified majority. This leads to a similar situation to that of Article 100 a where individual Member States can be obliged to accept and implement EC environmental

²³³See particularly chapter 3.2.4 and 3.3.3.

²³⁴See Article 100 (chapter 3.2.4), Article 43 (chapter 4.3.3), Article 75, 84 (chapter 4.4.2), Article 113 (chapter 6), for Article 100 a (5) (see chapter 3.3.3).

²³⁵Wilkinson, Maastricht and the Environment, JEnvL (1992) 221 at 231.

measures to which they are opposed. The new Article 130 s (5) provides for temporary derogations and/or financial support from a new cohesion fund. This should allow the Member States with a lower environmental level to incorporate the minimum standards of the Community, while more progressive countries are, as before, allowed to take more stringent measures.

4.2.4 Systematic Diverging National Measures (Article 130 t)

The mere existence of Article 130 r to 130 t does not preclude the Member States from taking legal action related to the environment. The adoption of Community action is restricted by the subsidiarity principle as provided for by Article 130 r (4). Not even the adoption of completely harmonizing measures in a particular field excludes the Member States from taking their own measures in the regulated field. Similar to the provision in Article 100 a (4) of the Treaty Article 130 t provides that the protective measures of the Community based on Article 130 r of the Treaty "*shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with the Treaty.*"

This provision seems to be the logical result of the subsidiarity principle stated in Article 130 r (4) of the Treaty. When a Community action is based on Article 130 s a Member State may invoke Article 130 t to maintain or introduce more stringent environmental measures. In comparison to Article 100 a (4) this provision is much less controversial. It is clearly stated that the Member States are also allowed to introduce new measures and that these have to be more stringent for being legitimized under Article 130 t.²³⁶

The only limit to diverging national measures under Article 130 t, apart from their necessarily more stringent character, is the obligation of observance of the Treaty as a whole. This is explicitly repeated in Article 130 t, second sentence but is also a general principle of the Treaty.²³⁷ This relates only to the provisions of the Treaty and not to secondary

²³⁶See the different wording of Article 130 t and 118 a in comparison to Article 100a (4).

²³⁷Article 5 of the Treaty.

legislation²³⁸. Apart from the basic freedoms, these are first and foremost the general principle of non-discrimination and the principle of proportionality.²³⁹

Some authors fear that the explicit provisions for diverging domestic environmental measures, Article 130 t and Article 100 a (4) of the Treaty respectively, might lead to a circumvention by the Community. This is possible by simply choosing a different legal basis which does not provide a possibility for the adoption of diverging national measures.²⁴⁰

A possible solution, it has been suggested, would be to give Article 130 t a general character which allows Member States to take more stringent national measures whenever the environment is concerned.²⁴¹ This should be rejected²⁴², as Article 130 t concerns only measures adopted under Article 130 s of the Treaty,²⁴³ while Article 100 a (4) is applicable for measures adopted under Article 100 a of the Treaty. The risk that the Community might circumvent the provisions of Article 130 t and 100 a (4) of the Treaty by choosing a different legal basis has to be dealt with within the legal procedures provided for by the Treaty.²⁴⁴ The case law of the Court has developed the principles for the choice of the correct legal basis.²⁴⁵

4.2.5 Notification Requirements

Since the coming into force of the Union Treaty Article 130 t, second sentence provides for a specific mandatory notification of diverging national measures by the Member States to the Commission. This development follows the general Community system of notification of national draft legislation, as under Article 100 a (4) and (5) and more generally under

²³⁸See *Epiney/Möllers*, Freier Warenverkehr (1992) 59; *Zuleeg*, Vorbehaltene Kompetenzen, NVwZ (1987) 280 at 284; *Grabitz*, Art. 130 t, paragraph 8 in: *Grabitz*, Kommentar EWGV.

²³⁹See chapter 2.

²⁴⁰See *Epiney/Möllers*, Freier Warenverkehr (1992) 61.

²⁴¹See *Epiney/Möllers*, Freier Warenverkehr (1992) 61.

²⁴²See for details *Epiney/Möllers*, Freier Warenverkehr (1992) 60 *seq.*

²⁴³See *Krämer*, Community Environmental Law, YEL (1991) 151 at 164.

²⁴⁴First and foremost Article 173 of the Treaty.

²⁴⁵See Case C-300/89 Commission versus Council (*Titanium Dioxide*) [1991] ECR 2867; Case C-155/91 Commission versus Council (*Waste Directive*), judgement delivered on 17 March 1993, nyr.

Directive 83/189/EEC.²⁴⁶

4.3 The Common Agricultural Policy and the Environment (Art. 43)

4.3.1 General Observations

Under Articles 38 to 47 of the Treaty, the Community has, since the beginning, had a general competence to regulate areas concerning agriculture and trade with agricultural products.²⁴⁷ Article 43 provides a sufficient legal basis for the development of a proper Community agricultural policy as well as for the approximation of rules concerning production and product requirements. As the notion "agricultural products" is supposed to include products of fisheries²⁴⁸ as well, the Community bases its legal acts concerning the common fishery policy on Article 43. In doing so the Community has to observe the general objectives of Article 39 of the Treaty.

Agricultural measures can have an enormous environmental impact²⁴⁹. This is mainly the case when production and process standards as well as product standards for agricultural products are defined.²⁵⁰ It is also true for the regulation of products which are used for agricultural production, such as pesticides²⁵¹ or hormones²⁵² directly affect the environment and animals. In its decision on the first Community directives on pesticides and foodstuff containing residues of pesticides the Court stated,

²⁴⁶See chapter 3 on the notification procedure and its role in the system of the Treaty.

²⁴⁷For a general survey on the Community's agricultural policy see *Snyder*, Law of the Common Agricultural Policy (1985).

²⁴⁸Article 38 (1) second sentence of the Treaty.

²⁴⁹See e.g. *Schröer*, Kompetenzverteilung (1992) 140 and *Howarth*, Problems of Fish Movements, ELRev (1990) 34 at 35.

²⁵⁰See *Henke*, EuGH (1992) 73; *Pernice*, Kompetenzordnung, DV (1989) 1 at 23; *Breuer*, Orientierung, UTR (1989) 43 at 101; *Krämer*, vor Artikel 130 r, paragraph 77 seq, in: *Groeben/Boeckh/Thiesing/Ehlermann*, Kommentar EWGV.

²⁵¹E.g. Directive 91/414 concerning the authorization of pesticides, OJ (1991) L 230/1.

²⁵²E.g. Directive 85/358/EEC concerning the prohibition of certain substances with hormonal effect, OJ (1985) L 362/8 or Directive 79/117/EEC prohibiting the placing on the market and use of plant protection products containing certain active substances, OJ (1979) L 33/36, amended in OJ (1987) L 71/33.

*"[i]t is not disputed that pesticides constitute a major risk to human and animal health and to the environment; this has moreover been recognized at Community level...."*²⁵³

Community regulations have a very important environmental effect in the field of the common fishery policy. A basic element of the management of fisheries is the preservation of the existing fishery resources. This is governed by purely internal regulations²⁵⁴ as well as by concluding international agreements on the preservation of fishery resources.²⁵⁵

4.3.2 The Appropriateness of Article 43

The close link between certain agricultural harmonization measures and environmental protection concerns also raises the question of the appropriateness of Article 43 for such legal acts. The approximation of laws concerning the common agricultural policy finds a sufficient legal basis in Article 43, even if such approximation covers environmentally important aspects which have a certain relation to Article 130 s. Article 43 no longer needs to rely on the more general Article 100 of the Treaty, as it has, in the meanwhile, been confirmed by the Court of Justice²⁵⁶, in spite of the former practice²⁵⁷ and its own differing earlier jurisdiction²⁵⁸.

"Article 43 of the Treaty is the appropriate legal basis for any legislation concerning the production and the marketing of agricultural products listed in Annex II to the Treaty which contributes to the achievement of one or more of

²⁵³Case 94/83 Criminal proceedings against Hejin (*Pesticides on Apples*) [1984] ECR 3263 at 3280.

²⁵⁴E.g. Regulation 170/83/EEC on the introduction of a common regulation for the preservation and management of fishery resources, OJ (1983) L 24/1 or Commission Regulation 93/25/EEC on the issuing of import documents for preserved tuna and bonito of certain species from certain third countries, OJ (1993) L 5/7.

²⁵⁵See Convention on the conservation of salmon in the North Atlantic, OJ (1982) L 378/25 or Convention on fishing and conservation of the living resources in the Baltic Sea, OJ (1983) L 237/5; see also the Court's decision in case 3,4, and 6/76 Cornelis Kramer et al. (*Biological Resources of the Sea*) [1976] ECR 1279 at 1311.

²⁵⁶Case 68/86 United Kingdom versus Council (*Substances Having Hormonal Action*) [1988] ECR 855 at 896 and Case 131/86 United Kingdom versus Council (*Laying Hens*) [1988] ECR 905 at 930.

²⁵⁷See e.g. *Offermann-Clas*, *Kompetenzen*, ZfU (1983) 56 at 58.

²⁵⁸Case 5/77 *Denkavit* [1977] ECR 1555.

*the objectives of the common agricultural policy set out in Article 39 of the Treaty.*²⁵⁹

It seems that in these cases the primary purpose or main objective of the directive was of little relevance, although it dealt first with the protection of human health (substances having a hormonal action) and second with the protection of the well-being of animals (protection of laying hens kept in battery cages). It therefore seems from the Court's jurisprudence that Article 43 is a perfectly appropriate legal basis for environmental regulations provided they cover the products and areas mentioned in Article 39 of the Treaty.²⁶⁰ In a recent decision the Court has reconfirmed that Article 43 rather than Article 100 is the more special provision (*lex specialis*) for the approximation of laws in the area of the common agricultural policy.²⁶¹ The doctrine now shares this view.²⁶² The same principle governs the relation between Article 43 and Article 100 a after the introduction of the latter in the framework of the Single European Act.²⁶³

In the *Hormone Case*²⁶⁴ the Court was concerned with the validity of Council Directive 81/102 prohibiting the use of hormonal and thyrostatic substances in livestock farming. In the *Laying Hens Case*²⁶⁵ Directive 86/113 had been adopted to comply with the Council of Europe's Convention for the Protection of Animals Kept for Farming Purposes.²⁶⁶ The Council adopted the Directive on the basis of Article 43 by qualified majority. The United Kingdom had argued for the adoption on the basis of Article 100. The United Kingdom supported by Denmark sought the annulment of this Directive on grounds of insufficient legal basis and procedural irregularities. The United Kingdom argued that the contested directives should have been based on Article 100 in addition to Article 43. They argued that the primary purpose of

²⁵⁹Case 68/86 United Kingdom v. Council (*Substances Having a Hormonal Action*) [1988] ECR 855 at 896 and Case 131/86 United Kingdom v. Council (*Laying Hens*) [1988] ECR 905 at 930.

²⁶⁰Krämer, Community Environmental Law, YEL (1992) 151 at 153 referring to a Commission proposal on animal welfare in zoos, OJ (1991) C 300/7.

²⁶¹Case C-131/87 Commission versus Council (*Trade in Animal Glands*) [1989] ECR 3473 at 3770; for the *lex specialis* argument see Case 83/78 Pigs Marketing Board versus Redmond [1978] ECR 2347.

²⁶²See Becker, *Der Gestaltungsspielraum* (1991) 100; Epiney/Möllers, *Freier Warenverkehr* (1992) 20; Oppermann, *Europarecht* (1991) 420 and 492; Rehlinger/Stewart *Environmental Protection* (1985) 19.

²⁶³Epiney/Möllers, *Freier Warenverkehr* (1992) 20; Becker, *Der Gestaltungsspielraum* (1991) 100; Henke, *EuGH* (1992) 75.

²⁶⁴Case 68/86 United Kingdom versus Council [1988] ECR 855.

²⁶⁵Case 131/86 United Kingdom versus Council [1988] ECR 905.

²⁶⁶Approved by the Council on behalf of the Community by a Decision of 19 June 1978, OJ (1978) L 323/12.

these directives was the approximation of laws to safeguard health and consumer interests.²⁶⁷ In both cases the Court held Article 43 to be the appropriate legal basis as the directives concerned the regulation of production and marketing of agricultural products in the sense of the Treaty.

As long as unanimity was required for the approximation of laws under Article 100, the choice of Article 43 allowed objecting Member States to be outvoted, as it only required a qualified majority for the adoption of Community acts. Now, with the introduction of Article 100 a, the choice of Article 43 or 100 a is no longer relevant for the required majority, but is for other procedural aspects and particularly for the application of Article 100 a (4).

In relation to Article 130 s there is no existing case law but it seems again appropriate to consider Article 43 applicable in cases where the purely ecological aspect of a measure is secondary to the objective of harmonization.²⁶⁸ Some authors suggest that the introduction of Article 130 r, Section 2, second sentence leads to a transposition of environmental concerns on all the relevant Treaty provisions and therefore definitely renders Article 43 appropriate for environmental purposes.²⁶⁹

4.3.3 Article 43 and the Preservation of Fishery Resources

In the field of common fishery policy the Community has adopted several measures for the protection of fishery resources. The instruments used are mainly: a) the creation of special zones where fishing is prohibited or restricted, b) the regulation of fishing methods, c) the regulation of the minimal size and weight for specific fish species, and d) a quota system for the total allowable catch (TAC).²⁷⁰ The relevant legal acts are based on Article 43 although it does not explicitly mention the field of a common fisheries policy.²⁷¹

It seems that the original purpose of the introduction of such measures was mainly the

²⁶⁷For comments on these two cases see *Bridge*, Case 68/86, CMLRev (1988) 733-742 or *Goetz*, Anmerkungen zu Rs 68/86 und 131/86, EuR (1988) 298-301.

²⁶⁸See also *Schröer*, Kompetenzverteilung (1992) 143.

²⁶⁹Mainly *Pernice*, Kompetenzordnung, DV (1989) 1 at 15; followed by *Henke*, EuGH (1992) 75.

²⁷⁰Article 2 of Regulation 170/83, OJ (1983) L 24/1.

²⁷¹For details see *Schneider*, Erhaltung und Bewirtschaftung, RIW (1989) 873 seq.

economic fear that the constant over-fishing of the Community waters would endanger the prosperity of the European fishing industry. Therefore a Community regulation was supposed to be in the interest of the industries concerned.²⁷² Nevertheless, today these measures are considered to have a very important environmental effect. The preservation of fishery resources is also internationally regulated in international environmental agreements²⁷³. The Community takes purely internal measures and concludes external agreements²⁷⁴ under Article 43 and thereby fulfills important environmental tasks

4.3.4 *Diverging National Measures*

The approximation of rules based on Article 43 can lead to a complete regulation in certain areas. This means that measures can be adopted with a qualified majority and there is no possible application of any general safeguard provision such as in Article 100 a (4) or Article 130 t. If a legal act based on Article 43 regulates a specific area in great detail the Member States retain no possibilities for the application of diverging national measures.²⁷⁵

An interesting example is Directive 91/414/EEC on the authorization of pesticides. It is based on Article 43 of the Treaty, as it was suggested that the commerce in pesticides and their use mainly concerns the competitive situation in agriculture. In annex A it provides for the elaboration of a list containing all the allowed effective substances which may form pesticides in the Community. If such a list should contain e.g. *atrazina*, a substance currently forbidden in Germany and the Netherlands, these countries would have to allow this substance back on to the market.²⁷⁶

On the other hand, this also means also that if the legislation in question provides for explicit options for the Member States²⁷⁷, the latter remain free to take their own measures. They

²⁷²See e.g. Article 1 of Regulation 170/83, OJ (1983) L 24/1.

²⁷³Convention for the protection of the Mediterranean against pollution (Barcelona Convention), OJ (1977) L 240/3 or Convention on fishing and conservation of the living resources in the Baltic Sea and the Belts, OJ (1983) L 237/5 or Agreement for cooperation in dealing with the pollution of the North-Sea by oil and other harmful substances (Bonn Agreement), OJ (1984) L 188/9.

²⁷⁴Joint cases 3,4, and 6/76 Cornelis Kramer et al. (*Biological Resources of the Sea*) [1976] ECR 1279 at 1311.

²⁷⁵Henke, EuGH (1992) 76; *Gilsdorf/Sack* Art. 43, paragraph 37, in: *Grabitz, Kommentar EWGV*, referring to the relevant case law.

²⁷⁶See *Krämer*, Environmental Protection, CMLRev (1993) 111 at 134.

²⁷⁷See e.g. Directive 76/895/EEC on the fixing of maximum levels of pesticides residues in and on fruit and vegetables, OJ (1976) L 340/26 and Directive 76/117/EEC prohibiting the placing on the market and use of plant products containing certain active substances, OJ (1979) L 33/36.

must, however, keep in mind the other Treaty obligations. This also applies in the absence of any relevant Community regulation.²⁷⁸ In relation to Article 43 this has been repeatedly stated by the Court in several cases²⁷⁹ concerning pesticides and agricultural products containing residues of pesticides.²⁸⁰

4.4 The Common Transport Policy (Article 75, 84 (2))

4.4.1 General Observations

Article 75 provides the Community with an explicit competence to enact a common transport policy. According to Article 84 (1) of the Treaty the common transport policy includes transport by rail, road and inland waterway. Nevertheless Article 84 (2) of the Treaty allows an enlargement to sea and air transport. In spite of its general competence the Community has not yet adopted a coherent transport policy but has, rather, taken some specific measures in certain areas.²⁸¹ It is clear from the area itself that transport measures can have important environmental effects, as can easily be seen in the field of car traffic and air pollution²⁸². Traffic and transport issues in general have become one of today's main factors in environmental policy. In particular, the introduction of tax incentives and related economic instruments for the reduction of air pollution, noise emissions or environmental harm in general have given the transport issue a special weight in today's discussion.²⁸³

4.4.2 The Appropriateness of Articles 75 and 84 (2)

Over the past few years traffic regulation for environmental reasons has indeed become more

²⁷⁸Case 272/80 Criminal procedure against FNMBP (*Plant Protection Products*) [1981] ECR 3277 at 3290.

²⁷⁹Case 94/83 Criminal proceedings against Hejin (*Pesticides on Apples*) [1984] ECR 3263 at 3279; Case 54/85 Mirepoix (*Pesticides I*) [1985] ECR 1067, Case 125/88 Criminal proceedings against Nijman (*Pesticides*) [1989] ECR 3277.

²⁸⁰See e.g. Krämer, *Environmental Protection*, CMLRev (1993) 111 at 115 referring to possible restrictions in use of pesticides under Directive 91/414/EEC, OJ (1991) L 230/1.

²⁸¹Oppermann, *Europarecht* (1991) 531; e.g. Directive 89/629/EEC on the limitation of noise emissions from subsonic aircrafts, OJ (1989) L 363/27.

²⁸²See Schröer, *Kompetenzverteilung* (1992) 151.

²⁸³See for the environmental impact of transport: A Community Strategy of Sustainable Mobility, COM (92) 46 (final) of 20 February 1992.

and more important in the Community and its Member States.²⁸⁴ The Community measures to regulate transport issues²⁸⁵ in most cases involve environment related aspects. In the framework of the common transport policy the Community pursues the objectives of the Treaty in general (Article 74) which obviously include the adequate protection of the environment^{286, 287}.

In relation to Article 100, 100 a and 130 of the Treaty Article 75 is the more specific provision (*lex specialis*) in those cases where a measure aims mainly at the regulation of traffic issues in the sense of Article 75.²⁸⁸ Yet as far as the harmonization of technical standards and norms in the transport sector is concerned the Community has based certain Directives on Article 100 and 100 a respectively. The Commission has also been seeking for some time a regulation for a community-wide speed limit on highways, but so far with no success.²⁸⁹ The legal basis for such a regulation is disputed; several options seem possible.²⁹⁰

The use of economic incentives and disincentives for the promotion of certain means of certain vehicles or technical equipment which help to reduce energy consumption or noise and pollution have become very important in the discussion among economists and politicians.²⁹¹ The harmonization of car taxes or other tax instruments in the transport area for

²⁸⁴E.g. Council Directive 80/51/EEC on noise levels of certain airplanes. OJ (1980) L 18/26 or Council Directive 79/116/EEC concerning minimum requirements for certain tankers entering or leaving Community ports. OJ (1979) L 33/33.

²⁸⁵For a discussion on the effective competence see *Lütkes*, Kompetenzen der EG, EuZW (1991) 277 to 281.

²⁸⁶E.g. Case 240/83 Association de défense des brûleurs d'huiles usagées (*ADBHU*) [1985] 532.

²⁸⁷Same opinion *Henke*, EuGH (1992) 76, *Becker*, Der Gestaltungsspielraum (1991) 101; *Pernice*, Kompetenzordnung, DV (1989) 1 at 25.

²⁸⁸Compare the jurisdiction of the Court on the relation between Article 100 and Article 43, chapter 3 and *Henke*, EuGH (1992) 77; *Langeheine*, Art. 100 a, paragraph 15, in: *Grabitz*, Kommentar EWGV.

²⁸⁹See for details *Lütkes*, Geschwindigkeitsbeschränkungen (1990) 27 *seq.*; *Lütkes*, Kompetenz der EG, EuZW (1991) 277 *seq.*

²⁹⁰*Lütkes*, Geschwindigkeitsbeschränkungen (1990) 89 *seq.* and also *Lütkes*, Kompetenz der EG, EuZW (1991) 277. He argues mainly for Article 130 s, while *Henke*, EuGH (1992) 77 or *Behrens*, Rechtsgrundlagen (1976) 125 could imagine such measures under Article 75 *seq.*

²⁹¹E.g. *Stähler*, Eine Analyse möglicher Instrumente zur Reduktion von CO₂-Emissionen in der Bundesrepublik Deutschland. Zeitschrift für Energiewirtschaft (1990) 273 to 284 or *Heister/Michaelis/Mohr*, The Use of Tradable Emission Permits For Limiting CO₂-Emissions, European Economy, The Economics of Limiting CO₂-Emissions, special ed. (1992) 27 to 61.

a coherent application of the "*polluter-pays-principle*" might be based on Article 75 in spite of the specific tax provisions under Article 99²⁹². On the whole, Article 75 and Article 84 (2) respectively will probably become more and more important for the adoption of environment related measures of the Community. Provided these measures aim principally at the regulation of traffic issues, Article 84 is the correct legal basis even if they also have an important environmental impact.²⁹³

4.4.3 *National Transport Measures*

As described above, the Community has adopted only very few specific regulations in the field of traffic. Therefore, inspired by the current discussion many Member States have introduced or are trying to introduce specific duties, taxes and subsidies for the promotion of environmentally friendly means of transport and technical equipment such as catalytic converters or certain types of fuel. Here again, in principle, such measures are lawful if they respect the obligations of the Treaty and do not interfere with any Community regulation that covers the field entirely and does not provide particular options for the Member States.²⁹⁴

As far as the use of economic instruments in transport/environment issues is concerned a close link exists between the provisions of Article 92 (state aids), 95 (taxes) and the specific transport provisions of Articles 75 and 84 (2). As far as subsidies are concerned, Article 77 amends Article 92's general rules on state aids. It explicitly allows state aids to be granted for the purpose of the coordination of transport or as a reimbursement for the discharge of certain obligations, inherent in the concept of public service. This obviously also includes subsidies for public transport for environmental considerations.²⁹⁵ Nevertheless, the general provisions of Article 92 *seq.* and, particularly, the procedural requirements and the non-

²⁹²This opinion is followed by *Henke*, EuGH (1992) 78 who refers to *Behrens*, *Rechtsgrundlagen* (1976) 122 *seq.*

²⁹³See *Pernice*, *Kompetenzordnung*, DV (1989) 1 at 25. See, however, for the limitations as far as environmental issues are concerned: *Lütke*, *Kompetenz*, EuZW (1991) 277 at 278.

²⁹⁴For examples, see *Krämer*, *Environmental Protection*, CMLRev (1993) 111 at 114.

²⁹⁵*Henke*, EuGH (1992) 79; *Behrens*, *Rechtsgrundlagen* (1976) 123; *Hochleitner*, *Kompetenzen* (1990) 79; *Frohnmeier*, Art. 77, paragraphs 4 and 9, in: *Grabitz*, *Kommentar EWGV*.

discrimination principle remain applicable.²⁹⁶

The introduction of particular duties and taxes for cars in general, the lack of certain technical equipment or even the use of particular roads²⁹⁷ remain in the competence of the Member States provided there is no complete harmonization under Articles 99²⁹⁸ or 75 and 84 (2). They have to observe the rules of Article 95 and , possibly, Article 30.²⁹⁹ The same is true for product standards and production or process measures as well as related regulations³⁰⁰ concerning means of transport.

Most countries now differentiate taxes on different types of fuel, usually favouring lead-free fuel and diesel. It is also lawful to introduce different taxes for cars according to ecological evaluation, such as lower taxes for diesel cars³⁰¹ and small cars³⁰² or tax incentives for cars with catalytic converters³⁰³. When these cases have caused problems in recent years this has mainly concerned their discriminatory application under Article 95.³⁰⁴

4.4.4 The Stand-Still Obligation (Article 76)

The Member States thus remain relatively free to adopt their own measures as long as the Community has not adopted any relevant measures. For the time prior to the adoption of such measures Article 76 contains a *stand-still* requirement for national measures³⁰⁵. It prohibits the introduction of discriminatory³⁰⁶ transport regulations³⁰⁷, which are in contradiction with

²⁹⁶Case 156/77 Commission versus Belgium [1978] ECR 1881 at 1895; see: *Henke*, EuGH (1992) 78; v. *Wallenberg*, Art. 92, paragraph 34, in: *Grabitz*, Kommentar EWGV.

²⁹⁷Such as motorways or urban traffic ways.

²⁹⁸See, however, the recently adopted Council Directive 93/89/EEC on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures, OJ (1993) L 279/32, based on Articles 75 and 99.

²⁹⁹See Case 195/90 Commission versus Germany (*Charge on Heavy Goods Vehicles*) [1992] ECR 3141, described below, where the charge is, however, mainly treated under the aspect of Article 76.

³⁰⁰Such as national speed limits or temporary prohibition of certain transport means on grounds of smog, for details: *Moench*, Fahrverbotsregelung, NVwZ (1989) 335 seq.; *Heinz*, Nochmals, NVwZ (1989) 1035 seq.; *Hailbronner*, Der nationale Alleingang, EuGRZ (1989) 101 seq.

³⁰¹Case 200/85 Commission versus Italy (*Differential VAT for Diesel Cars*) [1986] ECR 3954; commented in RIW (1987) 633; see the relevant case law on Article 95.

³⁰²Case 132/88 Commission versus Greece [1990] ECR 1567 at 1591 and 1592.

³⁰³See e.g. Case C-105/91 Commission versus Greece [1992] ECR 5871 at 5897.

³⁰⁴All three quoted national regulations have been attacked by the Commission on grounds of a presumed discriminatory application.

³⁰⁵For details: *Bleckmann*, Europarecht (1990) paragraph 1730 seq.

³⁰⁶Apart from the general non-discrimination requirements of Article 5, 30 seq., 92, and 95 of the Treaty.

the various provisions governing the transport policy between the Member States before the coming into force of the Treaty. National transport measures become unlawful if the existing situation is changed in a way which makes it less favourable for carriers from other Member States than for nationals.³⁰⁸ It becomes clear from the case law that Article 76 does not preclude national measures justified for the protection of the environment and applied in a non-discriminatory way. These measures are, however, no longer lawful under Article 76, if they lead to a deterioration of the situation for non-domestic carriers in comparison to the domestic carriers.

Such a discrimination may also be created by new duties or requirements which indirectly burden non-domestic car-holders more than domestic car-holders. This may be the case if, for example, they use a foreign highway system very seldom and still have to pay the same amount as a national.³⁰⁹ This is not the case, however, if the toll or duty is in strict relation to the use of the motorway system³¹⁰ or the pollution produced.³¹¹ Measures that have an influence on the use of certain vehicles may, apart from their non-discriminatory application, pose certain problems under Article 30 to 36.³¹²

In the *Case C-196/90 Commission versus Germany (Charge on Heavy Goods Vehicles)* before the European Court of Justice the Commission claimed that Germany had neglected its Treaty obligations by introducing a special charge for heavy goods vehicles. As a matter of fact,

³⁰⁷This covers also a stricter application of existing regulations or a change in the administrative practice. See joint cases C-184 and 221/91 *Christof Oorburg and Serge van Meesem*, judgement delivered by the Court on 31 March 1993, nyr.

³⁰⁸*Case C-196/90 Commission v. Germany (Charge on Heavy Goods Vehicles)* [1992] ECR 3141 at 3183. For comments: *Basedow*, *Anmerkungen*, JZ (1992) 868 *seq.*; for a critical approach and the relation between Article 76 and Article 95 see *Heselhaus*, *Gemeinschaftsrechtliche Vorgaben*, EuZW (1993) 311 at 312.

³⁰⁹This is discussed in detail by *Brauns/Riedel*, *EG-Verträglichkeit*, RIW (1991) 224 at 226.

³¹⁰Such as the duties for the use of certain motorway tracks in Spain, France, or Italy. The new Article 7 g of the Community Directive allowing the facultative introduction of motorway tolls goes: "*User charges rates shall be in proportion to the duration of the use made of the infrastructure.*", Directive 93/89/EEC, OJ (1993) L 279/34; see also COM Doc (92) 405 final OJ (1992) C 311/63, see *Schmitt* *Harmonisierung*, EuZW (1993) 305 at 309.

³¹¹Such as specific duties on petrol or a tax differentiation between different car types on ground of their emissions.

³¹²E.g. the prohibition on the use of certain vehicles which do not fulfil national requirements in spite of existing Community legislation, such as the German prohibition on the use of cars without catalytic converters in the case of smog, see *Moench*, *Fahrverbotsregelung*, NVwZ (1989) 325 at 335 and *Heinz*, *Nochmals*, NVwZ (1989) 1035-1039.

Germany had introduced in 30 April 1990 a new law which required the payment of a special charge for heavy goods vehicles using federal roads and highways. This charge was to be paid by all heavy goods vehicles regardless of their place of registration. At the same time the law governing the general motor vehicle tax for German vehicles was changed in a way which entailed a reduction of the tax for certain heavy goods vehicles. In the Commission's view this led to a kind of compensation for the German heavy goods vehicle owners. Furthermore there were Community intents to harmonize such charges at Community level.³¹³ The German government justified its new legislation *inter alia* with the environmental effect which a general charge on trucks using the highways would have, as this led to a more frequent use of other, more ecological, means of transport. The Court held that this special treatment and the combination of the two measures had the effect of giving rise to discrimination contrary to Article 76 of the Treaty between carriers registered in Germany and those from other Member States.³¹⁴ The Court stated that the measures in question affected the position of the carriers from other Member States in a way which would make it more difficult for the Council to introduce a common transport policy (Article 76). The Court underlined that the protection of the environment was one of the main objectives of the Community but that the German measure was not justified for environmental reasons, as the quasi-compensation of German carriers clearly showed the discriminating effect.³¹⁵

The *Belgian Government* had already in 1967 presented projects to introduce a special duty in the form of a particular car sticker (*vignette*) for the use of its highways. Instead of such a sticker the Belgian government introduced in 1973 a particular tax of one Belgian Franc on petrol and in 1979 raised general car-taxes. In 1987 it was proposed that a special sticker be introduced for the use of Belgian highways. It was planned that Belgian car-holders should receive it without any further payment as they paid car taxes in Belgium.³¹⁶ Foreign car-holders would have had to buy it. After heavy criticism from the other Member States and the initiation of an inquiry procedure by the Commission the project was abandoned. The Commission had warned that the proposal discriminated against non-nationals and jeopardized the free circulation of goods and persons.³¹⁷

4.5 Environment Related Social Policy (Article 118 a)

The Single European Act has introduced a new specific legal basis for the harmonization of laws concerning the health and safety of workers. Article 118 a mentions the improvement

³¹³In the meantime, has been adopted Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures, OJ (1993) L 279/32.

³¹⁴Case C-196/90 *Commission v. Germany (Charge on Heavy Goods Vehicles)* [1992] ECR 3141 at 3183.

³¹⁵Case C-195/90 *Commission versus Germany (Charges for Heavy Goods Vehicles)* [1992] ECR 3142, comments in: *EuZW* (1992) 390 to 392. See also *Ebenroth et al., Vereinbarkeit*, BB (1990) 2125 at 2126 *seq.* who argued that the reimbursement of the duty by lowering the applicable tax rate was not discriminatory as it reflected the result of the existing tax differences within the Community.

³¹⁶Switzerland knows such a motorway duty in the form of a special sticker (*vignette*) since 1985, but all users have to buy it, i.e. Swiss car-holders and foreigners, irrespective of the total use of the motorway system.

³¹⁷See *Brauns/Riedel, EG-Verträglichkeit*, RIW (1991) 224 at 226 with more references.

of the "working environment" as an objective which shall be attained by adopting Community measures. The working environment could be considered as a particular, more specific aspect of the protection of the environment in general. But Article 118 a aims more specifically at the improvement of working conditions in the framework of the Community social policy.³¹⁸ In spite of the existing connection between the two areas Article 118 a has a different objective to Article 130 s and is more specific than Article 100 a.³¹⁹ It is, however, possible to conceive certain measures adopted under Article 118 a aiming at the protection of the health and safety of workers as environmental measures.³²⁰ This seems, however, only to be useful for a systematic view of the Treaty and not very helpful in practice.

If the Community adopts a measure under Article 118 a the Member States are still able to maintain or introduce their own national measures in the field (Article 118 a (3)). The only requirements from the Treaty are that they must be more stringent and that they must be compatible with the other Treaty provisions. Their more stringent character is a logical consequence of the Community competence to elaborate minimum requirements (standards) under this provision: Article 118 a (2). As has been shown before, the compatibility of national measures with the Treaty is a systematic requirement for all national measures under the law of the Treaty.

4.6 Environmental Research Policy (Article 130 o)

Article 130 o of the Treaty of the European Union systematically replaces Article 130 q (2) of the SEA. Without giving any details it aims roughly at the establishment of a Community

³¹⁸Krämer, Community Environmental Law, YEL (1992) 151 at 153 stresses that measures concerning the noise level at working places etc. are rather to be considered as social policy measures than as environmental measures in the view of the Commission.

³¹⁹For a detailed study on the differences between the application of Article 130 s and 118 a see Schröer, Kompetenzordnung (1992) 249.

³²⁰E.g Directive 80/1107/EEC concerning the protection of workers against certain dangerous substances, OJ (1980) L 327/8 or the proposal for a new Directive on dangerous biological substances at work, OJ (1989) L 183/1.

research policy consisting mainly of the establishment of joint undertakings and other structures for Community research and technical development (Article 130 n). Environmental research has been part of the Community's policies since the early 1970s³²¹. It can be considered an environment related measure.³²² Before the coming into force of Treaty on European Union, certain environmental research programmes with environmental objectives were based on the old Article 130 q (2).³²³

In the framework of the present analysis Article 130 o will not be treated in detail, as it does not lead to any restriction of the Member States concerning their own environmental policy. In the field of environmental research the Community as well as the Member States have their own policies which may lead to a certain coordination of programmes and projects.

³²¹*Schröer*, Kompetenzverteilung (1992) 191; *Fülgraff*, Forschung für die Umwelt, in *Gündling/Weber*, Dicke Luft in Europa (1988) 99.

³²²At the same time Article 130 r may include environmental research. For a comparison on the use of the appropriate legal basis see *Schröer*, Kompetenzverteilung (1992) 191.

³²³Council Decision 89/625/EEC on two specific programmes related to research and technological development in the field of the environment: STEP and EPOCH (1989-1992), OJ (1989) L 359/9.

5 The Harmonization of Economic Instruments

5.1 Summary

Pricing instruments for the establishment of incentives and disincentives concerning ecological behaviour are becoming more and more important in today's environmental policy. Economic literature recommends the use of such instruments, while they are rather skeptical towards the use of prohibitions, restrictions of use and fixed standards. In the current discussion the proposed instruments are mainly taxes and emission charges, while state aids do infringe to a certain extent with the polluter-pays-principle. The Community itself may take such measures under the relevant Treaty provisions. Article 99 provides the Community with the competence to harmonize indirect taxation. Environmentally justified regional subsidies may, possibly, be introduced under Article 130 e (1).³²⁴

The Community has recently achieved a harmonization of the minimum standards for the value added tax (VAT). Apart from this there exist very few environmentally relevant indirect consumer taxes harmonized under Article 99. Certain fiscal measures have been adopted under Article 100 a of the Treaty. As these harmonization measures are very few and only imply minimum standards the Member States maintain the right to introduce emission charges, environmental taxes, or pollution duties. The other Treaty provisions which have to be observed are particularly Articles 9, 12, 30, and 95. The existence of Community subsidies in certain environmentally relevant areas does not preclude the Member States from granting their own state aids. Nevertheless the provisions under Article 92 also limit the Member States' use of environmental subsidies.

³²⁴For the research policy see the relevant section on the environmental research policy.

5.2 Indirect Taxation and the Environment (Article 99)

5.2.1 General Observations

Environmental taxes or "green taxes"³²⁵ have been extremely promoted during the last few years. Economic theory shows that these pricing instruments for environmental behaviour might be, in many cases, more effective than prohibitions or technical product or production requirements.³²⁶ Furthermore, they correspond to the polluter-pays-principle.³²⁷ The general principles of non-discrimination and non-protectionist use of internal taxes (Article 95) also apply to environmentally justified domestic taxes³²⁸.

The harmonization of indirect taxes (Article 99 of the Treaty) within the Community might limit a country in its possibilities for national environmental taxes.³²⁹ Since the coming into force of the Single European Act the newly formulated Article 99 of the Treaty entrusts the Community with the task to "*adopt provisions for the harmonization of legislation concerning turnover taxes, excise duties and other forms of indirect taxation.*" These provisions shall, however, only be taken "*to the extent that such harmonization is necessary to ensure the establishment and the functioning of the internal market*". In the field of "green taxes" this mainly concerns consumer taxes, i.e. taxes levied on products while taxes on the production³³⁰ itself should rather be based on Article 100 a as they concern the competitive conditions of the production of goods.³³¹ The appropriate legal basis may, however, be

³²⁵E.g. higher taxes for not environment friendly produced goods or special tax incentives for environment friendly produced products respectively.

³²⁶See e.g. *Stähler*, Eine Analyse möglicher Instrumente zur Reduktion von CO₂-Emissionen in der Bundesrepublik Deutschland, *Zeitschrift für Energiewirtschaft* (1990) 273 to 284, *Heister/Michaelis/Mohr*, The Use of Tradable Emission Permits for Limiting CO₂-Emissions, *European Economy, The Economics of Limiting CO₂-Emissions*, special ed. (1992) 27 to 61.

³²⁷Such as mentioned in Article 130 r paragraph 2 of the Treaty.

³²⁸Most cases of disputed environmental taxes before the Court of Justice concerned their discriminatory application. The Court supported them when they were applied in a non-discriminatory way and did not infringe with any Community harmonization. See e.g. Case 200/85 Commission versus Italy (*Diesel Vehicles*) [1986] ECR 3953 at 3971; Case 78-83/90 *Compagnie Commerciale de l'Ouest et al. versus Receveur principal des douanes de La Pallice Port* [1992] ECR 1847.

³²⁹*Schröder*, *Kompetenzverteilung* (1992) 157 considers Article 130 s as applicable for the introduction of environmental duties or taxes.

³³⁰Such as duties or levies for the production of sewage, waste or pollution, use of herbicides or fertilizers.

³³¹*Pernice*, *Auswirkungen*, *NVwZ* (1990) 201 at 204.

disputed.³³²

5.2.2 Existing Specific Environmental Taxes

Apart from the general harmonization of the minimum rates for value added tax (VAT) the Community has achieved the harmonization³³³ of certain specific consumer taxes³³⁴. In the field of environmentally relevant indirect taxation based on Article 99 there are only few Community measures in force.³³⁵ It concerns the harmonization of the minimum level of taxation for mineral oils. The recently adopted Directive 92/82/EEC³³⁶, sets the minimum level of taxation for certain mineral oils while Directive 92/80/EEC³³⁷ basically concerns the harmonization of their structure. Both are based on Article 99.

The second example for an harmonized tax with an important environmental impact is the recently adopted harmonization of the minimum standards for heavy goods vehicles and tolls and charges for the use of motorways and certain infrastructures.³³⁸ It is based on Article 75 and 99 jointly. The Directive contains only minimum standards. The application of different rates remains possible. The existing differences and the opposition by the Member States to a stringent harmonization seemed to exclude a harmonization which did not provide the Member States with considerable discretion.³³⁹ Here the Community seems to have followed

³³²See for Directive 91/414/EEC on car emissions and possible fiscal incentives, OJ (1993) L 242/1, *Krämer*, Environmental Protection (1993) 111 at 143 and also *Krämer*, L'environnement, RMC (1993) 45 at 60.

³³³See for details *Reicherts*, Art. 99, paragraph 31, in *Groeben/Boeckh/Thiesing/Ehlermann*, Kommentar EWGV.

³³⁴E.g. for alcohol: Directive 92/83/EEC on the harmonization of the structure of consumer taxes on alcohol and alcoholic beverages, OJ (1992) L 316/21 and Directive 92/84/EEC on the approximation of level of consumer taxes on alcohol and alcoholic beverages, OJ (1992) L 316/29 or in the case of tobacco: Directive 92/79/EEC on the approximation of consumer taxes on cigarettes, OJ (1992) L 316/8 and Directive 92/80/EEC on the approximation of consumer taxes on tobaccos other than cigarettes, OJ (1992) L 316/10..

³³⁵On the question of whether the Community is entrusted to adopt economic instruments for environmental purposes *Schröder*, Instrumente, UPR (1989) 49 at 58.

³³⁶Directive 92/82/EEC of 19.10.1992 on the approximation of the tax levels on mineral oils, OJ (1992) L 316/19.

³³⁷Directive 92/81/EEC on the approximation of the structure of consumer taxes on mineral oils, OJ (1992) L 316/12.

³³⁸Council Directive 93/89/EEC on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures, OJ (1993) L 279/32.

³³⁹For details *Schmitt*, Harmonisierung, EuZW (1993) 305 at 309.

the minimum standard approach as used in the directive on taxation of mineral oils.

Projects exist for further tax harmonization, e.g. the proposal for a directive on the introduction of an energy tax in order to limit carbon dioxide emissions.³⁴⁰ In its proposal for an energy tax the Commission based its directive on both, Article 99 and 130 s.³⁴¹ This might pose some problems as far as the application of the provision under Article 130 t is concerned. The proposal intends the introduction of a tax on carbon dioxide in order to rectify damage at its source and to encourage the use of clean production methods.³⁴² While certain Member States already have specific taxes or duties on environmental emissions (such as sewage, waste, air pollution emissions, or energy) most countries are reluctant to introduce of a CO₂-tax without a general harmonization by the EC or even among industrialized countries. The differences this would create in the competitive conditions in the Member States seem to prevent the national governments from taking any major individual step.³⁴³ This also reflects the heavy opposition by the European industry against the Commission proposal for the introduction of a CO₂-tax, as most non EC countries do not have such taxes.³⁴⁴

5.2.3 *National Environmental Taxes*

For the moment the limited extent of fiscal harmonization of indirect taxes under Article 99 leaves the Member States with a relatively large discretion to introduce their own environmental taxes.³⁴⁵ Only in the specific regulated fields are they restricted when adopting measures. Furthermore, in the case mentioned of the taxation of mineral oils the directive indicates only minimum standards and leaves the Member States free to introduce higher tax

³⁴⁰OJ (1992) C 216/4. For details on the introduction of the planned CO₂-tax or duty see *Breuer, Umweltrechtliche*, DVBl. (1992) 485-496; *Hilf, Umweltabgaben*, NVwZ (1992) 105; *Kloepfer, Rechtsprobleme*, DVBl. (1992) 195.

³⁴¹COM (92) 226 final; other possible provisions for the adoption might have been Article 100 a, 130 s or 201, dependent on the concrete construction of such a charge.

³⁴²See Fifth Environmental Action Programme, COM (92) 23 final, vol I of 27.3.1992, 71; for detail on the proposal for a tax on carbon dioxide: *Thieffry*, RTDE (1992) 669 at 676.

³⁴³See e.g. the declaration of the former Dutch Minister for Economics *Andriessen*, *Neue Zürcher Zeitung* 1/2 February 1992, No. 26, 35.

³⁴⁴See *Europareport*, EuZW (1992) 192.

³⁴⁵See for details *Krämer*, *L'environnement*, RMC (1993) 45 at 60.

rates for environmental reasons. The application of minimum standards for indirect taxes serves the principles of subsidiarity and allows differing preferences among the Member States. It reduces, however, the harmonization effects on the competitive situation and the elimination of fiscal differences in general. Nevertheless this minimum standard in the field of taxation seems to be the only way to reach consensus in the current situation of the Community.

Apart from an eventual restriction from the existing harmonization under Article 99 national fiscal measures have to be compatible with the other provisions of the Treaty. This is particularly important as far as the non-discrimination principle of Article 6 of the Treaty on European Union³⁴⁶ is concerned, particularly repeated for taxes under Article 95 and for duties and charges under Article 12. Further problems may arise under Article 30 when such charges or taxes are considered "measures having equivalent effect as quantitative restrictions" on trade.³⁴⁷

5.3 The Use of Environmental Subsidies

5.3.1 *Environmental Subsidies at Community Level*

As has been shown in the discussion of the Community's environmental policy under Article 130 r the Community is authorized to use different instruments and measures to attain the environmental objectives set out by the Treaty.³⁴⁸ Whether this includes environmental aids for the development of certain activities is, however, disputed.³⁴⁹ From the polluter-pays-principle, as mentioned in Article 130 r, it follows in principle that the Community should only use instruments which leave the burden of environmental degradation with the responsible polluters. Subsidies financed from the general funding of the Community,

³⁴⁶Before the introduction of the Treaty of the European Union: Article 7 of the EEC Treaty.

³⁴⁷For the case law see *Becker*, *Der Gestaltungsspielraum* (1991) 68; *Krämer*, *Environmental Protection*, *CMLRev* (1993) 111 at 141 and *Krämer*, *Community Environmental Law*, *YEL* (1992) 151 at 162.

³⁴⁸See *Schröer*, *Kompetenzverteilung* (1992) 157.

³⁴⁹See *Schröer*, *Kompetenzverteilung* (1992) 188.

however, allocate the costs of environmental protection with all contributors to the Community income and do not directly affect the polluters.

The Community has introduced environmental subsidies but only to a very limited extent.³⁵⁰ Regulation 2242/87/EEC on Community environmental action³⁵¹ based on Article 130 s has introduced a programme for the financing of measures for the protection of the environment. Another mechanism is the funding of environmental investment measures in certain regions, as established by the Community programme ENVIREG.³⁵² The programme aims at facilitating the implementation of Community environmental policy at regional level and includes loans and non-refundable subsidies.³⁵³

The second sentence of Article 130 r (4) indicates the burden sharing in relation to the financing of environmental measures. National measures should, in principle, be financed by the Member States. Nevertheless the range of environmental projects which are eligible under Article 2 of regulation 2242/87 is quite broadly drawn and allows the co-funding of all projects which are of interest to the Community in terms of protection of the environment and/or the management of natural resources. The purely national character of an environmental project is therefore not a bar to Community financing.³⁵⁴

5.3.2 *National Measures*

National subsidies or investment measures for the protection of the environment are not influenced by existing Community measures in this field. Much more important in this field is the general prohibition of certain state aids under Article 92 of the Treaty. There exists case law in abundance on the lawfulness of state aids and subsidies, which applies in

³⁵⁰Which may mainly be caused by the limited financial possibilities as indicates *Schröer*, *Kompetenzverteilung* (1992) 186 with reference to *Weinstock*, *Nur eine europäische Umweltpolitik?*, *ZfU* (1983) 1 at 31; *Glaesner*, *EEA*, *EuR* (1986) 119 at 144.

³⁵¹OJ (1987) L 207/8.

³⁵²Programme adopted by the Commission on 2.5.1990 according to Article 11 of Council Regulation 4253/88, OJ (1990) C 115/3.

³⁵³For details see *Krämer*, *Das Verursacherprinzip*, *EuGRZ* (1989) 353 at 358 and *Krämer*, *Community Environmental Law*, *YEL* (1992) 151 at 163.

³⁵⁴See *Kapteyn/VerLoren van Themaat*, *Law of the European Communities* (1988) 652.

principle also to environmental aids.³⁵⁵ Nevertheless their specific character has led to certain clarifications by the Commission concerning environmentally justified state aids and their compatibility with the Treaty.³⁵⁶ In all these cases, however, the restriction of national measures results not from an eventually existing Community harmonization but from the basic competition rules of the Treaty . The problem area shall therefore not be elaborated in detail.

³⁵⁵*Becker*, *Der Gestaltungsspielraum* (1991) 64-67.

³⁵⁶See communication by the Commission in its Sixteenth Report on Competition Policy (1987) 171 to 172.

6 External Relations and Environmental Harmonization

6.1 Summary

In relation to national environmental measures which concern third countries, the external competence and particularly international agreements concluded by the Community set important limits to national environmental action. Environmental protection requires in many cases multilateral cooperation and negotiations by international bodies. This cooperation can lead to multilateral environmental agreements (MEAs). The Community has concluded many of these MEAs, most often together with the Member States as so called "mixed agreements". Before the coming into force of the Single European Act all Council decisions to conclude international environmental agreements were based on Article 235 of the Treaty. Now Article 130 r (5), new Article 130 r (4) of the Maastricht Treaty provides a specific Community competence for international cooperation on the protection of the environment. MEAs, after their ratification by the Community, become an integral part of the Community environmental regulatory framework and thereby directly limit the application of certain national environmental instruments. Such international agreements are usually implemented internally by Community regulations to ensure a homogenous application. Most of these agreements or the respective implementing regulations allow Member States to adopt more stringent measures. If such measures are adopted under Article 130 s the application of Article 130 t is possible.

On the other hand, other agreements or unilateral action by the Community falling primarily in other areas, which have an important impact on national or Community environmental policy, exist. Apart from international fishery conventions (Article 43) and transport conventions (Article 75 and 84 (2)) they exist particularly in the fields of trade (Article 113) or general cooperation with third countries (Article 228).

In the field of the common commercial policy under Article 113 of the Treaty trade restrictions for environmental reasons have become more and more important. They are often referred to as Trade Related Environmental Measures (TREMs). The exclusive external competence of the Community in this field usually precludes the Member States from taking

their own measures. In the field of international agreements many minimum requirements which allow for more stringent measures exist. In the field of autonomous measures there exists specific Community secondary legislation which entitles the Member States to take their own action subject to a particular notification procedure and similar conditions to those under Article 36 of the Treaty. The cooperation agreements concluded by the Community on the basis of Article 238 also involve environmental obligations of the Member States which preclude them from applying certain environmental measures.

6.2 Multilateral Environmental Agreements (MEAs)

6.2.1 General Observations

Even before the coming into force of the Single European Act the Community had concluded several multilateral environmental agreements (MEAs). Their conclusion was mainly based on Article 235.³⁵⁷ As the Community's competence for nature conservation in general was controversial³⁵⁸, the conclusion of these agreements was also criticized.³⁵⁹ Apart from the specific competence for external relations in certain fields provided for by the Treaty itself, the general competence for the conclusion of international agreements was very controversial until the decision of the Court in the *ERTA* Case in 1971.³⁶⁰ The Court stated that the Community had the power to conclude agreements if a Treaty provision explicitly or implicitly provided such a power. Furthermore using the implied power theory³⁶¹

"[t]he 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 the authority to enter into the international commitments necessary for the

³⁵⁷See Krämer, Community Environmental Law, YEL (1992) 151 at 156.

³⁵⁸See above chapter 2.3.

³⁵⁹See for Denmark: Krämer, EEC Treaty (1990) 83; Pernice, Kompetenzordnung, DV (1989) 1 at 35.

³⁶⁰Case 22/70 Commission versus Council (*ERTA*) [1971] ECR 263.

³⁶¹See Kapteyn/VerLoren van Themaat, Law of the European Communities (1988) 772.

attainment of that objective even in the absence of an express provision in that connection."³⁶²

Although there might exist an expressly conferred or derived external competence this competence must not be exclusive.³⁶³ Later the ERTA jurisdiction was amended by the Court in several judgements. Particularly important was the enlargement to areas where the Community had not yet made any internal regulations but was allowed to adopt external regulations which seemed necessary to achieve an objective of the Community.³⁶⁴

6.2.2 Community Participation in MEAs: Article 130 r (5)

In the field of the environment the Community started very early to cooperate in the framework of multilateral environmental agreements (MEAs). Its own competence to do so and the autonomous possibilities for its Member States were clarified only later by the jurisprudence of the Court of Justice. The Court found that the international conclusion of MEAs was necessary for an effective protection of the environment as this is sometimes best reached through the establishment of a "*set of rules binding on all the States concerned, including non-Member States*".³⁶⁵ While most environmental agreements were concluded on the basis of Article 235, some were agreed under more specific provisions.³⁶⁶

The most important multilateral environmental agreements, still based on Article 235, to which the Community and its Member States are parties, are:

- Paris Convention of June 4, 1974 for the prevention of marine pollution from land-

³⁶²Opinion 1/76 [1977] ECR 741 at 755.

³⁶³*Kapteyn/VerLoren van Themaat*, Law of the European Communities (1988) 773. An example for an exclusive Community competence is the common commercial policy where the Court has confirmed the exclusiveness see e.g. Case C-62/88 Greece versus Council (*Chernobyl I*) [1990] ECR 1545.

³⁶⁴Opinion 1/76 of the Court [1977] ECR 741 at 756. For details on the development see *Schröder*, Kompetenzverteilung (1992) 278.

³⁶⁵Joint cases 3, 4 and 6/76 *Cornelis Kramer et al. (Biological Resources of the Sea)* [1976] ECR 1279 at 1311; also reported in CMLRev (1976) 469; comments by *Wyatt*, European Court Judgement of 14 July 1976, ELRev (1977) 41-45 and 47-51.

³⁶⁶*Krämer*, Community Environmental Law, YEL (1992) 151 at 156.

- based sources³⁶⁷
- Barcelona Convention of February 16, 1976, for the protection of the Mediterranean Sea against pollution³⁶⁸
 - Bonn Convention of December 3, 1976, for the protection of the Rhine against chemical pollution³⁶⁹
 - Bonn Convention of June 23, 1979, on the conservation of migratory species of wild animals³⁷⁰
 - Bern Convention of September 19, 1979 on the conservation of European wild life and natural habitats³⁷¹
 - Geneva Convention of November 13, 1979, on long-range transboundary air-pollution³⁷²

The Community's competence for the conclusion of external fishery agreements on basis of the Article 43 and the effect such agreements would have for the position of the Member States was initially disputed. In its decision in joint cases 3, 4, and 6/76 *Biological Resources of the Sea*³⁷³ in 1976 the Court of Justice declared that on the basis of Article 43 the Community had the power to take measures for the protection of the Community fishery resources. It underlined the fact that this competence also included the High Sea and that therefore the Community was also competent to conclude agreements with third parties if this served the interest of the common fishery policy.³⁷⁴

In the joint cases 3, 4, and 6/76 *Biological Resources of the Sea*³⁷⁵ the Court of Justice had to evaluate the validity of certain Dutch penal provisions concerning the protection of fishery resources in the North Sea. Several Dutch fishermen had been accused before a Dutch tribunal of having offended against the Dutch implementation measures for the Agreement on Fishery

³⁶⁷Decision of March 3, 1975, OJ (1975), L 194/5.

³⁶⁸Decision of July 27, 1977, OJ (1977) L 240/1.

³⁶⁹Decision of July 27, 1977, OJ (1977) L 240/37.

³⁷⁰Decision of December 3, 1981, OJ (1982) L 38/1.

³⁷¹Decision of June 24, 1982, OJ (1982) L 210/10.

³⁷²Decision of June 11, 1981, OJ (1981) L 171/11.

³⁷³Joint cases 3, 4, and 6/76 *Comelis Kramer et al. (Biological Resources of the Sea)* [1976] ECR 1279.

³⁷⁴See chapter 4.2.

³⁷⁵Joint cases 3, 4, and 6/76 *Comelis Kramer et al. (Biological Resources of the Sea)* [1976] ECR 1279.

in the North Atlantic. The fishermen argued that the Netherlands were no longer competent under the EEC Treaty to conclude international agreements on fishery or fishery resources protection. The Court of Justice held that Article 43 also entrusted the Community with the conclusion of external agreements on fisheries. As the Community had, however, taken no measures at that time the Member States were still competent to conclude agreements for the protection of biological resources of the Sea. They were lawful if they were necessary for this purpose even if they interfered with the provisions of Article 30 *seq.* of the Treaty.³⁷⁶

Since the coming into force of the Single European Act its Article 130 r (5) states that "[w]ithin their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the relevant international organizations." It now provides the Community with an explicit basis for its negotiations and the ratification of multilateral and bilateral environmental agreements. This is more or less a repetition of the relevant case law by the Court of Justice.³⁷⁷ It therefore seems reasonable for the Community³⁷⁸ from now on to conclude new environmental agreements on the basis of Article 130 r (5) and no longer on the basis of Article 235 of the Treaty.³⁷⁹ The wording of this provision, however, does not provide clear indications on the distribution of competence between the Community and the Member States. In a protocol adopted on the occasion of the closing conference on the Single European Act the following declaration³⁸⁰ was given by the Heads of State:

"The Conference considers that the provisions of Article 130 r (5), second subparagraph do not affect the principles resulting from the judgement handed down by the Court of Justice in the ERTA Case."

³⁷⁶This is one of the first decisions by the Court concerning the relation between environmental protection measures and the Treaty provisions on the free movement of goods. For details *Montag*, *Umweltschutz*, RIW (1987) 935-943; *Pernice*, *Auswirkungen*, NVwZ (1990) 201; *Becker*, *Der Gestaltungsspielraum* (1991) 77; *Epiney/Möllers*, *Freier Warenverkehr* (1992) 22; *Henke*, *EuGH* (1992) 170 and many others.

³⁷⁷Case 22/70 *ERTA* [1971] ECR 263; joint cases 3, 4 and 6/76 *Kramer et al. (Biological Resources of the Sea)* [1976] ECR 1279.

³⁷⁸*Krämer*, *EEC Treaty* (1990) 82; *Schröer*, *Kompetenzverteilung* (1992) 229-99; *Henke*, *EuGH* (1992) 110-115. e.g. the Council Decision for the ratification and the implementation of the Vienna Convention for the Protection of the Ozone Layer in 1988 has been based on Article 130 s, OJ (1988) L 297/8.

³⁷⁹This has happened even after the coming into force of the Single European Act. A few measures have still been adopted under this provision, e.g. Decision 89/557/EEC; OJ (1989) L 304/1 or Decision 89/558/EEC, OJ (1989) L 304/8; for details see *Grabitz*, *Artikel 130 s*, paragraph 26 in: *Grabitz*, *Kommentar EWGV*.

³⁸⁰See *Krämer*, *EEC Treaty* (1990) 82.

This declaration together with the wording of Article 130 r (5) of the Treaty make it clear that there is still no intention to confer an exclusive external competence for MEAs to the Community.³⁸¹ The principle of subsidiarity as stated in Article 130 r (4) underlines the fact that the Community has the power to act internally and externally only if the objectives can be better attained at Community level.³⁸²

6.2.3 Member States' Participation in MEAs

Whenever the Community has no exclusive power in a field, or has not yet used its power to conclude an international agreement the Member States are free to do so. If the Community, however, decides to use its competence in the field of the environment to conclude international agreements the Member States are limited in their autonomous possibilities.³⁸³ The existing information procedure between the Community and the Member States may facilitate the cooperation and even induce the Community itself to conclude an agreement instead of the Member States.³⁸⁴ They are only able to conclude agreements themselves under the conditions of general compliance with their Treaty obligations. This is especially important for the duties deriving from Member State's accession to such an international agreement which could jeopardize the objectives of the Community, particularly the establishment of the Common Market.³⁸⁵

As in other fields of external relations of the Community most MEAs have been concluded as mixed agreements.³⁸⁶ This allows both the Member States and the Community to negotiate and ratify international conventions. This is possible even if the Community has already taken internal measures in a relevant area.³⁸⁷ This practice has been continued since the

³⁸¹This is indicated in the same way by *Schröer, Kompetenzverteilung* (1992) 276; *Henke, EuGH* (1992) 119.

³⁸²See *Kapteyn/VerLoren van Themaat, Law of the European Communities* (1988) 786.

³⁸³See *Schröer, Kompetenzverteilung* (1992) 283.

³⁸⁴OJ (1973) C 9/1.

³⁸⁵Joint cases 3, 4 and 6/76 *Kramer et al. (Biological Resources of the Sea)* [1976] ECR 1273 at 1312. *Schröer, Kompetenzverteilung* (1992) 284.

³⁸⁶See *Kapteyn/VerLoren van Themaat, Law of the European Communities* (1988) 775, for the environment *Schröer, Kompetenzverteilung* (1992) 285.

³⁸⁷See *Krämer, Community Environmental Law, YEL* (1992) 151 at 165.

coming into force of the Single European Act. Examples for the use of mixed agreements are the Montreal Protocol on substances depleting the Ozone Layer³⁸⁸, the Vienna Convention³⁸⁹ and the London adjustments to the Montreal Protocol³⁹⁰. Since then the Member States have also participated in the drafting of the UNEP Convention on the transport of waste³⁹¹, although the Community had already adopted measures in this field³⁹².

6.2.4 National Duties under MEAs

Once the Community has ratified international conventions or treaties, they become part of Community law³⁹³ and have to be observed by the Member States as such.³⁹⁴ Although they rank below primary Community law they are above secondary legislation and therefore prevail over conflicting environmental directives.³⁹⁵ In the case where both the Community and the Member States are parties to an agreement, the observation of such an international treaty can also be derived from national law. The case may, however, be different when an environmental convention is not directly applied in a Member State or if certain Member States have not yet ratified a Convention which is already part of the Community legal order.³⁹⁶

While in general the Community takes its environmental measures in the form of directives

³⁸⁸Signed on 16.9.1987 and approved on 16.12.1988, entered into force on 16.3.1989; Council Decision 88/540/EEC, OJ (1988) L 297/8.

³⁸⁹Decision of October 14, 1988, OJ (1988) L 297/8.

³⁹⁰Approved on 20.12.1991, entered into force 10.8.1992. Council Decision 91/690/EEC, OJ (1991) L 377/28.

³⁹¹Basle Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, reprinted e.g. in 28, ILM (1989) 657 *seq.*

³⁹²Krämer, EEC Treaty (1990) 85 indicates Directive 84/631/EEC on the movement of waste within the Community and Directive 86/279/EEC on the export of waste from the Community; see also Kapteyn/VerLoren van Themaat, Law of the European Communities (1988) 653 and 656.

³⁹³See Krämer, Community Environmental Law, YEL (1992) 151 at 165.

³⁹⁴Article 228 of the Treaty.

³⁹⁵Certain commercial conventions contain also environmental aspects, see Krämer, Community Environmental Law, YEL (1992) 151 at 155.

³⁹⁶1989 two Member States had not yet ratified CITES: Ireland and Greece.

it mostly uses the form of regulations for the implementation of environmental conventions.³⁹⁷ The reason may be the need for a homogenous application of these international rules within the territory of the Common Market.³⁹⁸ Many of these regulations require the Member States to take appropriate legal or administrative measures internally where they find a breach of a treaty obligation transposed by an appropriate regulation.³⁹⁹

A new development seems to be the introduction of sanctions against breaches of the relevant regulations.⁴⁰⁰ The general Community principle that the Member States have to guarantee their compliance with Community rules implementing international law within their national jurisdiction has seldom led to a Commission procedure against a Member State. For a long time the question whether the obligations from environmental agreements were part of national law or of Community law was thus insignificant as the Community did not try to enforce Member States' compliance with those parts of EEC-ratified international conventions which came under Community competence.⁴⁰¹ Recently, however, there have been procedures against Member States which did not comply with their obligations under Community law implementing international environmental agreements.

One procedure concerned the Spanish sanctions for the breach of rules deriving from the Community Regulation on the implementation of the CITES Convention into the Community order.⁴⁰² Although the Community has not yet been allowed to become a signatory of the CITES-Convention it has adopted detailed regulations for its implementation. The main reasons were the problems which could have arisen for the common commercial policy from a non-uniform implementation of the trade instruments which CITES relies on. Furthermore the accession of only certain Member States (Greece and Ireland were not yet parties) could have posed problems in the intra-Community trade. The implementation of CITES by a

³⁹⁷E.g. Regulation 3322/88/EEC on substances which affect the Ozone Layer, OJ (1988) L 297/1; regulation 594/91 on substances which affect the ozone layer, OJ (1991) L 67/1; regulation 1734/88/EEC on the export of chemicals, OJ (1988) L 152/2; regulation 348/81/EEC on the import of whales and certain cetacean products, OJ (1981) L 39/1; regulation 3626/82/EEC on trade with endangered species, OJ (1982) L 384/1, references in *Krämer*, Community Environmental Law, YEL (1991) 151 at 157.

³⁹⁸*Krämer*, Community Environmental Law, YEL (1992) 151 at 157; *Jachtenfuchs*, Ozone Layer, JCMS (1990) 261 at 269.

³⁹⁹E.g. the Regulation 3322/88/EEC on substances which affect the ozone layer, OJ (1988) L 297/1.

⁴⁰⁰*Krämer*, Community Environmental Law, YEL (1992) 151 at 157, with reference to a Commission proposal for a new regulation replacing the regulation 3626/82 on the implementation of the CITES convention, COM (91) 448 final.

⁴⁰¹*Krämer*, Community Environmental Law, YEL (1992) 151 at 156 and 167.

⁴⁰²Regulation 3626/82, OJ (1982) L 384/1.

Community regulation allowed the Member States to avoid the controls which parties to CITES are normally bound to implement at their national borders.⁴⁰³ The procedure against Spain concerned the illegal import and use of chimpanzees, a protected species under the relevant Community regulation. The Commission raised the question of whether the Spanish customs legislation was sufficiently deterrent, but finally decided not to submit the case to the European Court of Justice because it felt that it would be difficult to prove the lack of seriousness of the Spanish regulation in question.⁴⁰⁴

The only case which was finally decided by the European Court of Justice also concerned the Community regulations for the implementation of the CITES-Convention.⁴⁰⁵ The Commission brought an action before the Court asking for a declaration that by issuing import permits for more than 6000 wild-cat skins of an endangered species under the CITES convention France had failed to fulfil its obligations under the Council regulation concerning the implementation of this convention. As a matter of fact the wild cats were listed in Appendix II of the Convention. The Community regulation went even further than the provisions of the CITES convention. The Court decided that France had failed to fulfil its obligations as the permits were not given according to all the requirements of the Community Regulation.

6.2.5 *National Options under MEAs*

Apart from the question of whether the Member State, the Community or both should conclude an international agreement under Article 130 r (5) there may be options for a national environmental policy in spite of existing external obligations. As in the case of an internal harmonization of laws, the international treaty itself or the implementing Community regulation may allow Member States to adopt more stringent measures. This is so particularly if such rules are constructed as minimum standards.⁴⁰⁶ Member States are able in many cases to adopt more stringent measures. On an individual basis most agreements provide explicitly for the Member States to take more stringent measures on imports from third countries. This is, for example, the case of the 1981 whales regulation and the 1982 CITES Regulation.⁴⁰⁷ In both regulations specific provisions allow Member States to take more stringent national measures concerning the trade with third countries and intra-community trade.

⁴⁰³*Demaret*, *Environmental Policy* (1993) 315 at 323, see also Preamble of Regulation 3626/82/EEC, OJ (1982) L 384/1.

⁴⁰⁴Unpublished procedure, reported by *Krämer*, *Community Environmental Law*, YEL (1992) 151 at 170.

⁴⁰⁵Case C-182/89 *Commission versus France (CITES)* [1990] ECR 4337.

⁴⁰⁶E.g. Article 10, Directive 76/464/EEC, OJ (1976) L 129/23 concerning the protection of the aquatic environment of the Community; see *Schröer*, *Kompetenzverteilung* (1992) 285 with reference to *Mastellone*, *External Relations*, ICLQ (1981) 106 at 113; *Noellkaemper*, *International Environmental Cooperation*, LIEI (1987) 55 at 73; *d'Oliveira*, *Das Rheinchloridabkommen*, RIW (1983) 322 at 328 and others.

⁴⁰⁷E.g. the 1982 CITES Regulation 3626/82, OJ (1982) L 367/1 or the 1981 whales regulation 348/81, OJ (1981) L 39/1; see *Demaret*, *Environmental Policy* (1993) 315 at 374; *Krämer*, *Environmental Policy*, CMLRev (1993) 111 at 137.

In the specific case of an adoption of an international obligation under Article 130 s the special provision of Article 130 t remains in principle applicable.⁴⁰⁸ This allows an identical application of the rules governing the use of more stringent national measures under Article 130 s in the internal relations. From a theoretical point of view the homogeneity in the Community's external relations implied by the compulsory character of Article 228 is corrected by the principle of diverging national measures in the interest of an optimal protection of the environment.⁴⁰⁹

Regulation 594/91 on the production and consumption of CFCs was based on Article 130 s of the Treaty although it deals mainly with trade matters.⁴¹⁰ This legal basis led Germany and Denmark to introduce more stringent national measures by invoking Article 130 t. They restricted the use of CFCs even further than was laid down in the regulation. Denmark limited the import of certain products containing CFCs and Germany started to prohibit certain substitutes for CFCs. The Commission did not take any action in these cases.⁴¹¹ The Netherlands and Luxembourg have also taken measures to prohibit products containing CFCs or substitute substances.⁴¹²

If a Community measure for the implementation of an MEA has not been adopted under Article 130 s the situation may be different. The other provisions do not provide for the systematic option of adopting diverging measures. Here again as under the relevant Articles internally, the adoption of a legal act by the Community precludes the Member States from taking or applying any diverging national measures. Provided the Community has not regulated a specific area the Member States may enter into international agreements and implement them with internal measures as long as they observe their Community duties.⁴¹³ The same applies for particular safeguard clauses.

⁴⁰⁸This becomes particularly clear if one takes into account that the provisional version of Article 130 t included an amendment "external competences apart" to exclude diverging national measures in the field of external relations. It was later canceled. See *Scheuing*, *Umweltschutz auf Grundlage*, EuR (1989) 152 at 173, footnote 127; *Henke*, EuGH (1992) 120; *Schröer*, *Kompetenzverteilung* (1992) 285.

⁴⁰⁹See for this implication *Schröer*, *Kompetenzverteilung* (1992) 285, referring also to *Lietzmann*, *EEA und Umweltschutz*, in *Rengeling* (ed.), *Europäisches Umweltrecht* (1988) 163 at 177; *Krämer*, *Einheitliche Europäische Akte*, in *Rengeling* (ed.), *Europäisches Umweltrecht* (1988) 137 at 153.

⁴¹⁰See *Krämer*, *European Environmental Law*, YEL (1992) 151 at 158 with reference to Regulation 594/91/EEC on the production and consumption of CFCs, OJ (1991) L 67/1.

⁴¹¹See *Krämer*, *European Environmental Law*, YEL (1992) 151 at 158.

⁴¹²See *Krämer*, *Environmental Protection*, CMLRev (1993) 111 at 135 who argues that even if Article 130 t did not apply such a prohibition would be lawful under Article 36 or the rule of reason.

⁴¹³Case 3, 4, and 6/76 *Cornelis Kramer et al. (Biological Resources of the Sea)* [1976] ECR 1279 at 1312.

6.3 Environmental Measures and External Trade: Article 113

6.3.1 Trade Related Environmental Measures (TREM)s

The system of the Treaty and particularly Article 130 r (5) do not limit the Community in its environmental protection measures to the Community environment. Respective attempts, to insert a clause into Article 130 r (1), limiting Community action to the Community environment, failed.⁴¹⁴ The Community has therefore, in its international environmental agreements and through unilateral measures, adopted a great number of measures to preserve the non-domestic environment.⁴¹⁵ Most of these measures involve important commercial issues, that is mainly import or export restrictions to third countries. In this field the Community action is closely linked to its exclusive competence for a common commercial policy, as provided for under Article 113 of the Treaty. Such trade measures for the purpose of environmental protection or trade related environmental measures (TREM)s⁴¹⁶ have an impact on both the Community's trade relations with third countries and international environmental policy.

The question of whether the Community or a Member State may take measures to protect the environment beyond the limits of its territory is very controversial.⁴¹⁷ While the Community has taken many actions, mainly trade restriction against third countries to protect the non-domestic environment, the Member States' action have to take into consideration the obligation deriving from the Treaty and the Community's international environmental and trade agreements. Where national measures use trade instruments against third countries they have to be compatible with the Community competence for a common commercial policy (Article 113). When a Member State wants to use trade instruments against other Member States its possibilities are additionally limited by the provisions on the free movement of goods (Articles 9,12 and 30 to 36 of the Treaty) and the existing Community legislation. The

⁴¹⁴Krämer, Community Environmental Law, YEL (1992) 151 at 153, *De Ruyt*, L'acte unique européen (1987) 214.

⁴¹⁵See Krämer, Community Environmental Law, YEL (1992) 151 at 153.

⁴¹⁶See Demaret, Environmental Policy (1993) 315 at 319.

⁴¹⁷See Krämer, Community Environmental Law, YEL (1992) 151 at 166, Demaret, Environmental Policy (1993) 315 at 382.

application of multilateral environmental agreements (MEAs) between the Member States belongs also in this context.⁴¹⁸

Today, measures restricting the Community's external trade for the purpose of protecting the environment concern trade in wildlife⁴¹⁹, waste and dangerous substances⁴²⁰ and products which deplete the ozone layer⁴²¹. The Community is party to several international agreements using trade measures⁴²² and has usually implemented the consequent obligations in the Community through its own legal acts. In most cases the Community and the Member States are parties to the relevant conventions but there are cases where certain Member States or even the Community itself are not (yet) parties.⁴²³

6.3.2 The Appropriateness of Article 113 or 130 r (5) for TREMs

If the Community wants to implement obligations deriving from a multilateral agreement using trade related environmental measures (TREMs) the question remains, whether the implementing regulation should be based on Article 130 s (5) or on the competence for the common commercial policy (Article 113). The survey of TREMS adopted by the Community

⁴¹⁸See also the problem of the protection of another Member State's environment under Article 36, *Everling, Durchführung, NVwZ* (1993) 209-216; *Krämer, Environmental Policy, CMLRev* (1993) 111.

⁴¹⁹Regulation 3626/82 on the implementation in the Community of the Convention on international trade in species of wild fauna and flora, OJ (1982) L 384/1 modified by several Council regulation; specifically for certain species: Regulation 348/81 on the trade in whales, OJ (1981) L/39/1; Directive 83/129 on the trade in seals, OJ (1983) L 91/30; Regulation 3254/91 on the trade in fur-bearing mammals, OJ (1991) L 308/1; for the prohibition of imports of ivory into the Community in order to protect the African elephant, Regulation 2496/89/EEC, OJ (1989) L 240/5.

⁴²⁰E.g. the ban of exports of dangerous wastes to third countries which do not guarantee the disposal of such waste in an environmentally sound manner, Directive 86/279/EEC amending Directive 84/631/EEC on the transfrontier shipment of toxic and dangerous waste, OJ (1986) L 181/13.

⁴²¹E.g. the ban of CFCs which might harm the ozone layer, Council Regulation 3322/88/EEC of 14 October 1988 on Certain Chlorofluorocarbons and Halons which Deplete the Ozone Layer, OJ (1988) L 297/1, Regulation 594/91/EEC, OJ (1991) L 67/1 and Council Regulation 3952/92 of 30 December 1992 amending Regulation 594/91 in order to speed up the phasing-out of substances that deplete the ozone layer, OJ (1992) L 405/41.

⁴²²E.g. Article 4 of the Montreal Protocol on Substances that Deplete the Ozone Layer, reprinted e.g. in *Bundesgesetzblatt der Bundesrepublik Deutschland, II* (1988) 1015 *seq.*.

⁴²³The Community was not yet allowed to sign CITES, Convention on International Trade in Endangered Species of Wild Fauna and Flora, reprinted e.g. in *Bundesgesetzblatt der Bundesrepublik Deutschland II* (1975) 777 *seq.*; now all Member States have ratified CITES, but for a long time Greece and Ireland were not signatories.

in the past indicates that most measures were based on Article 235 of the Treaty before the Single European Act and on Article 130 s thereafter.⁴²⁴ This legal basis is very controversial⁴²⁵, especially as the Commission has most often proposed to base the measures in question on Article 113. This, however, has been accepted by the Council only twice, in 1991 for the Community's leghold trap Regulation⁴²⁶ and in 1989 for the regulation on the export of certain chemicals⁴²⁷.

The legal basis of these agreements has, however, again an important impact on national possibilities for diverging measures. Where an agreement has been based on Article 130 s of the Treaty, the Member States are in principle able to adopt more stringent measures under Article 130 t of the Treaty. This possibility for more stringent national measures is also provided for in most of the agreements in question.⁴²⁸ This is, however, not possible or needs a special Community safeguard clause where agreements are based on the exclusive competence of Article 113 of the Treaty.

The most apposite decision by the European Court of Justice concerning the appropriateness of Article 113 as a legal basis is the 1990 judgement in the *Chernobyl I* case⁴²⁹. After the nuclear accident at Chernobyl in the former Soviet Union, the Community had adopted a regulation to regulate the import of contaminated agricultural products. This regulation prescribed the maximum acceptable levels of radioactive contamination for agricultural products imported from third countries into the Community and required Member States to make appropriate verifications at its borders, and, if necessary, to prohibit the importation of the products in question. This regulation had been adopted by the Council on the basis of Article 113 by majority vote. Greece brought an action before the Court for the annulment of the regulation in question pleading that the wrong legal basis had been chosen, as the regulation dealt mainly with the protection of health. The Court, however, rejected the action holding that the regulation was mainly intended to regulate trade between the Community and third countries. The legal basis had therefore been chosen correctly.

⁴²⁴See *Demaret*, *Environmental Policy* (1993) 315 at 361; the first legislation on CITES and the protection of whales was adopted under Article 235 while the more recent modifying legislation was based on Article 130 s.

⁴²⁵*Demaret*, *Environmental Policy* (1993) 315 at 361.

⁴²⁶Regulation 3254/91/EEC prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international human trapping standards, OJ (1991) L 308/1.

⁴²⁷Regulation 428/89/EEC concerning the export of certain chemical products, OJ (1989) L 50/1.

⁴²⁸See chapter 4.2.3.

⁴²⁹Case C-62/88 *Greece v. Council (Chernobyl I)* [1990] ECR 1545.

The reasoning behind this judgement was that if the Community had not intervened with a Community action, the Member States would have taken their own measures to restrict imports of agricultural products from third countries, as they are entitled to, also under secondary legislation.⁴³⁰ This would eventually have serious implications on the Community's internal trade which, however, could be justified under Article 36 of the Treaty. To prevent such additional obstacles to trade within the Common Market TREMs should, in general, be based on Article 113 of the Treaty.⁴³¹ This also applies to commodity agreements which sometimes may have an important environmental impact, such as in the case of tropical timber⁴³².

6.3.3 Specific Safeguard Clauses for Stricter National Measures

Where a Community measure has been adopted under Article 113, it has been taken with the objective of eliminating intra-community obstacles to trade, and therefore the Member States no longer have the option of taking diverging national measures.⁴³³ Most legal writers hold that the safeguard clause of Article 115 is not applicable in the field of environmental measures.⁴³⁴ The case law of the Court is very restrictive when the interference of Member States' action with the common commercial policy under Article 113 is concerned.⁴³⁵

6.3.4 National TREMs

Whenever the Community has not adopted any measures under Article 113 of the Treaty the Member States are authorized under the delegation doctrine⁴³⁶ to adopt trade measures against

⁴³⁰See Regulation 288/82 on common rules for imports, OJ (1982) L 35/1 and Regulation 1765/82 on common rules for imports from state-trading countries, OJ (1982) L 195/1.

⁴³¹This argument is upheld by *Demaret*, Environmental Policy (1993) 315 at 363 who indicates the analogy to Article 100 a in its relation to Article 130 s and the relevant case law; see also *Schröer*, Kompetenzverteilung (1992) 290. See also section 4.

⁴³²Council Decision of 26 March 1985 on the application of the International Agreement on Tropical Timber 1983 (OJ 1985, L 236/8). The text can be found in: UNEP, Selected Multilateral Treaties in the Field of the Environment, Cambridge, Grotius Publisher (1991) volume II, 271.

⁴³³See above Case C-62/88 Greece versus Council (*Chernobyl I*) [1990] ECR 1545.

⁴³⁴*Schröer*, Kompetenzverteilung (1992) 295 with reference to *Piepkorn* in *Beutler/Bieber/Piepkorn/Streil*, Die EG (1987) 527 with many references.

⁴³⁵See e.g. Case C-62/88 Greece versus Council (*Chernobyl I*) [1990] ECR 1527 at 1545.

⁴³⁶See e.g. Case C-62/88 Greece versus Council (*Chernobyl I*) [1990] ECR 1527 at 1545.

third countries. This is explicitly provided for by Regulation 288/82 which authorizes Member States to adopt or maintain TREMs against third countries as long as the Community does not act, provided the measures are notified to the Commission.⁴³⁷ They allow the restriction of imports and exports to third countries under similar grounds as provided for by Article 36 of the Treaty.⁴³⁸

The main problem in such a case, however, might be the implications for trade within the Community as a Member State must also ban trade with the other Member States to prevent any circumvention of these regulations. This, however, implies that the Member State must justify the trade restrictions towards other Member States as lawful under Article 36 or possibly the rule of reason. Keeping in mind the broad interpretation of Article 30 in the *Dassonville* formula and the questionable justification of Article 36 for the protection of the non-domestic environment, this can lead to serious problems.

In this case the products originating in a third country but legally brought into commerce in another Member State underlie the provisions of Article 30 of the Treaty.⁴³⁹ Any national measure has to be compatible with the relevant Treaty obligations even if the products' country of origin is a third country. The provision of Article 9 (2) prevent the application of more stringent measures outside Article 36 or the rule of reason which might hinder trade within the European Community.

As an example we could imagine Germany's restriction on the import of beer not produced according to the German standard of the "Reinheitsgebot".⁴⁴⁰ In its 1987 judgement⁴⁴¹ the Court of Justice decided that Germany could no longer restrict the import of beer from other Member States on the ground that it did not conform its own norms. Germany had not been able to demonstrate the justification needed under Article 36 of the Treaty. It is, however, free to restrict the import of such beer from third countries as the external trade restrictions are not

⁴³⁷See for the system concerning the notification of environmental measures also the relevant provisions and secondary legislation under Article 100, 100 a (4), 100 a (5), 130 r.

⁴³⁸See also *Schröer*, Kompetenzverteilung (1992) 295 with reference to *Gilsdorf*, Grenzen der gemeinsamen Handelspolitik (1988) 24.

⁴³⁹There may, however, exist specific Community regulations in order to coordinate such import restrictions against goods originating in third countries.

⁴⁴⁰This example is given by *Demaret*, Environmental Policy (1993) 315 at 378.

⁴⁴¹Case 178/84 Commission versus Germany (*German Purity Law*) [1987] ECR 1227.

normally subject to the broad prohibition of the Dassonville formula. The problem arising for Germany, however, in this situation would be that it is not allowed to ban the import of such beer from another Member State even if it originates from a third country but has been legally imported to another Member State.

6.3.5 The Application of TREMs between Member States

All the TREMs mentioned can have an important impact on the internal market. One of the main reasons for the explicit implementation of MEAs in the Community legal order by a secondary legislation is actually to prevent the heterogeneous application of MEAs by the Member States which would hinder intra-Community trade.⁴⁴² Only by implementing the MEAs directly can the Community guarantee the functioning of the internal market. Normally these agreements would provide for severe border controls and trade restrictions towards non-parties.⁴⁴³ Any national ban on imports from third countries which is not applied homogeneously in all the Member States results in new trade barriers erected between Member States.⁴⁴⁴ The implementation of the agreements in question on Community level avoids this danger. Once an agreement is implemented at Community level, a Member State can therefore no longer apply trade restrictions against other Member States without infringing with its duties under Article 30 *seq.* of the Treaty.

There remains, however, the problem arising from conventions which have been ratified by certain Member States but not (or not yet) ratified or implemented by the Community. Apart from the question of competence this poses the question of the application of the convention's obligations among Member States and their compatibility with the other Treaty obligations. Many conventions require trade restriction with countries which are not parties to the convention. In the framework of the Community such discriminatory treatment would clearly contradict the obligations arising from the Treaty.⁴⁴⁵ The general principle, as

⁴⁴²See preamble of Council Regulation 3626/82 of 3 December 1982 on the implementation in the Community of the Convention on international trade in endangered species of wild fauna and flora, OJ (1982) L 384/1.

⁴⁴³E.g. Article 4 (5) of the Basle Convention on Transboundary Movements of Hazardous Waste, or Article II, III, IV, and XIV of the CITES Convention.

⁴⁴⁴*Demaret*, Environmental Policy (1993) 315 at 375.

⁴⁴⁵The general non-discrimination principle as incorporated in Articles 6, 9, 12, 30, 34, 36, 95 and others of the Treaty.

developed by the Court of Justice, that a Member State may not use its obligations from a subsequent international treaty as a reason for the non-fulfillment of its Treaty obligations⁴⁴⁶ is applicable. The adherence to an MEA which entails trade restrictions against other Member States or third countries which are not lawful under the general provisions of the Treaty is non-compatible with the obligations arising from the framework of the Treaty and in particular from Article 5.⁴⁴⁷

The Basle Convention, for example, was signed by the Community and the Member States. In the framework of the Community it was intended to become a mixed agreement.⁴⁴⁸ For the moment, however, only France has ratified this convention while the other Member States and the Community itself have not yet ratified the convention. One of the most significant aspects of the Convention, however, is that it prohibits any movement of hazardous waste between parties and non-parties.⁴⁴⁹ In this case France is, in principle, obliged to apply the convention's provisions also in relation to its Community partners. As shown above, however, such a discrimination against other Member States is not lawful under the Treaty.⁴⁵⁰ If the Community and the Member States were all parties to this agreement the question would be dealt with in the relevant Community regulations concerning the application of the convention between the Community Members. In the absence of such Community legislation on the application of the Basle Convention the general Treaty obligations and the Community secondary legislation have to be observed. Directive 84/631, which deals with external and internal movement of hazardous waste, preempts the unilateral application of the Basle convention by France. The jurisdiction of the Court of Justice concerning import and export restrictions on waste remains applicable and France will be obliged to fulfill its Community obligations.⁴⁵¹

⁴⁴⁶The same is true for treaties which oblige the signatories to take certain measures which are not compatible with other basic principles of the EEC Treaty, such as e.g. the French prohibition of night work for women deriving from an ILO Convention, which was considered not to be compatible with the Community legislation in force, see Case C-345/89 *Stoeckel (Nightwork for Women)* [1991] ECR 4047 *seq.*

⁴⁴⁷*Demaret*, Environmental Policy (1993) 315 at 377.

⁴⁴⁸*Demaret*, Environmental Policy (1993) 315 at 380.

⁴⁴⁹Article 4 (5) of the Basle Convention.

⁴⁵⁰See also Case C-2/90 *Commission versus Belgium (Walloon Waste Case)* [1992] ECR 4431.

⁴⁵¹See only *Krämer*, Community Environmental Law, YEL (1992) 151 at 158.

6.3.6 *International Trade and Commodity Agreements: Article 113*

Articles 113 and 114 of the Treaty provide the Community with an explicit and exclusive⁴⁵² competence to regulate commercial policy relations. This power includes, apart from the regulation by unilateral measures concerning imports and exports (autonomous commercial policy), the conclusion of agreements with third countries (conventional commercial policy).⁴⁵³

Many of the commercial agreements concluded by the Community on the basis of Article 113 include certain environmental provisions which limit or authorize the Community and its Member States to take trade measures for the protection of the environment⁴⁵⁴. They are usually much more difficult to interpret as the main objective of the concluded treaties is the promotion of trade and not the protection of the environment. Nevertheless there is a growing awareness of the importance of such environmental escape clauses or minimum standards. They seek a symbiosis between environment and trade and should not be interpreted as eliminating national environmental measures to a maximal extent. Nevertheless the impact of these provisions can be particularly far-reaching and has not yet been sufficiently analyzed. The same is true for commodity agreements which may sometimes have an important environmental impact (e.g. tropical timber). They are often based on Article 113 in spite of their importance for the international environmental policy of the Community.⁴⁵⁵

6.4 Association Agreements under Article 238

Association Conventions under Article 238 may also include environmental provisions which lead to harmonization at Community level and restrict the Member States in their national environmental policy against the associated countries. The legal literature holds that the use

⁴⁵²See Case 41/76 *Suzanne Donckerwolcke Epouse Criel versus Procureur de la République et al.* [1976] ECR 1921 at 1937.

⁴⁵³*Kapteyn/VerLoren van Themaat*, *Law of the European Communities* (1988) 788.

⁴⁵⁴E.g. Article XX GATT.

⁴⁵⁵See chapter 6.3.

of Article 238 is lawful in these cases as association agreements may cover all areas mentioned in the Treaty.⁴⁵⁶ Considering the effect of Article 130 r (2) the protection of the environment shall also be taken into consideration in the association policy of the Community. In the Lomé Conventions, in particular, the Community has integrated over time more and more environmental aspects with direct effect on the Member States.

While the Lomé II Convention only contained a declaration on environmental desirability of certain objectives⁴⁵⁷, the Lomé III Convention contained an entire chapter on drought and desertification control⁴⁵⁸. The Lomé IV Convention contains a specific chapter on the environment including prohibition on exporting dangerous waste from the Community to Lomé countries.⁴⁵⁹ The most important provision here is Article 39. It provides that the Community shall prohibit all direct or indirect export of such waste to the ACP countries.⁴⁶⁰

⁴⁵⁶Schröder, *Kompetenzverteilung* (1992) 296 with reference to *Piepkorn*, in *Beutler/Bieber/Piepkorn/Streil*, *Die EG* (1987) 538; *Vedder*, Article 234, in *Grabitz*, *Kommentar EWGV*. See also Case 12/86 *Meryem Demirel versus Stadt Schwäbisch Gmünd* [1987] ECR 3719 at 3751.

⁴⁵⁷OJ (1980) L 347/2, Article 83, 84 g, 93 c.

⁴⁵⁸OJ (1986) L 86/3 and L 292/52, chapter 2, Article 38 to 43, also in *Council of Ministers*, *The Third ACP-EEC-Convention*, Brussels (1985).

⁴⁵⁹See *Krämer*, *Community Environmental Law*, YEL (1992) 151 at 156, referring to the Fourth Convention ACP-EEC, signed at Lomé on 15 December 1989, Part 2, Title 1, Articles 33 to 44, also *Council of Ministers*, *Fourth ACP-EEC Convention*, Brussels (1992).

⁴⁶⁰See *Demaret*, *Environmental Policy* (1993) 315 at 345; *Kuschel*, *Lomé-Abkommen*, EA (1990) 333 at 335; *Cova*, *Lomé IV*, RMC (1990) 1.

7 Systematic Conclusion

7.1 The Common Market and Protection of the Environment

The establishment of a Common Market and the elimination of national borders for the exchange of goods has been one of the pillars of the European Community since the very beginning. On the other hand the protection of the environment was given little attention during the first period of European integration.⁴⁶¹ But since the early 1970s and particularly since the coming into force of the Single European Act the Community has been entrusted with the effective protection of the environment.⁴⁶² Today both the establishment of one market and the efficient protection of the environment are equally important objectives of the Community. Nevertheless the pursuit of these two objectives simultaneously can cause problems. They are not *per se* in contradiction but they need a certain coordination.

National environmental measures, such as product standards, production requirements, prohibition of certain substances, specific environmental taxes and state aids, can hinder trade or have an important impact on the competitive situation in the common market.⁴⁶³ The Treaty of Rome therefore includes a set of rules aimed at avoiding unjustified national measures hindering the free movement of goods. While Articles 9, 12, 92, and 95 aim mainly at national measures applied in a discriminatory way, Articles 30 to 36 are intended to eliminate national measures which have similar effects as quantitative trade restrictions. Article 36 in connection with the case law of the European Court of Justice on the *rule of reason* allows, however, certain exceptions to the general prohibition of Article 30. The protection of the environment is such an exception which allows national measures if they are justified, applied in a non-discriminatory way, and proportionate.⁴⁶⁴

⁴⁶¹See chapters 2.2.1 and 2.2.3.

⁴⁶²See chapters 2.2.3 and 2.2.4.

⁴⁶³See chapter 2.2, chapter 3.2.1, and chapter 3.3.1.

⁴⁶⁴See Case 240/83 *ABDHU* [1985] ECR 532 at 548; Case 302/86 *Danish Bottles Case* [1988] ECR 4606; see chapter 2.2.3.

7.2 Further Integration through Harmonization

The general principle of non-discrimination and specific safeguard clauses for public interest reasons is integrated in most trade agreements.⁴⁶⁵ The European Community, however, has further-reaching objectives. As long as the members of a trade area are allowed to maintain very different rules for environmental reasons, the elimination of trade obstacles is limited. The harmonization of national laws and rules which hinder trade is one of the most specific elements of the Community in relation to ordinary international bodies. The harmonization of product-related national measures allows the elimination of different standards hindering trade and, at the same time, guarantees the maintenance of certain standards in the public interest. Also in the field of environmental product measures the Community can harmonize national standards and thereby eliminate obstacles to trade which otherwise would be covered by the exception clause of Article 36⁴⁶⁶ or lawful as applied in a non-discriminatory way. In the field of environmental production measures, state aids and taxes the harmonization of laws is rather in the interest of the elimination of differences in the competitive situation in the Member States.⁴⁶⁷

The general harmonization of differing national rules hindering the establishment of the Common Market is based on Article 100 and 100 a. They are also appropriate for the harmonization of certain environmental measures.⁴⁶⁸ Other provisions exist in the Treaty for the harmonization of rules in specific fields. Particularly important for the harmonization of environmental measures are: Article 43 (Agriculture)⁴⁶⁹, Articles 75 and 84 (2) (Transport)⁴⁷⁰, Article 130 s (Environment)⁴⁷¹. Specific environmental taxes used as economic instruments for the protection of the environment can also fall under Article 99 (Indirect Taxation)⁴⁷².

⁴⁶⁵E.g. GATT Articles I, III and XX.

⁴⁶⁶See e.g. Case 272/80 Criminal Procedure against FNMBP (*Plant Protection Products*) [1981] ECR 3277 at 3290.

⁴⁶⁷See Cases 91/79 and 92/79 Commission versus Italy [1980] ECR 1099 and 1115; see chapter 3.2.

⁴⁶⁸See chapter 3.

⁴⁶⁹See chapter 4.3.

⁴⁷⁰See chapter 4.4

⁴⁷¹See chapter 4.2.

⁴⁷²See chapter 5.2.

Article 130 r (4) also empowers the Community to adopt measures which concern the environmental cooperation with third countries.⁴⁷³

Related to the external relations the Community has exclusive power under Article 113 to adopt measures concerning the common commercial policy. Since more and more trade measures are used for the protection of the environment Article 113 is applied for the relations to third countries in a similar way to Article 100 a within the internal market to harmonize trade related environmental measures (TREM)s⁴⁷⁴. To avoid new trade hindering obstacles deriving from different national environmental measures against third countries the Community has the power to adopt a common position for the whole territory of the common market.⁴⁷⁵

Under the aspect of environmental protection the harmonization of national laws is acceptable as long as the level attained in the Community guarantees an efficient protection. Several provisions in the Treaty imply that the level of protection is intended to be high.⁴⁷⁶ Nevertheless, the harmonization of environmental rules is not intended to eliminate justified environmental concerns in the Member States in the interest of the free movement of goods. As under Article 36 here again both objectives, the establishment of the common market and the protection of the environment, have to be observed equally.

7.3 Subsidiarity and Competition of Regulatory Systems

The regulatory power of the Community is, however, limited. While the establishment of the Common market legitimizes certain harmonizing measures, the general harmonization of specific policy areas is limited by the principle of attributed powers and subsidiarity. There is no intention in the Treaty to eliminate all differing national standards and rules. Under the

⁴⁷³See chapter 6.2.

⁴⁷⁴See chapter 6.3

⁴⁷⁵See Case C-62/88 Greece versus Council (*Chernobyl I*) [1990] ECR 1545; see chapter 6.3.

⁴⁷⁶See chapter 2.4 and chapter 2.5.

Single European Act Article 130 r (4) stressed the subsidiarity of Community environmental policy. Now with the coming into force of the Treaty on European Union this principle has become a guideline for all Community action (Article 3 b).⁴⁷⁷ The Community shall act only if and in so far as the protection of the environment cannot be sufficiently achieved by the Member States.

On the other side, the divergence of national environmental standards can also have positive economic effects. An elimination of unjustified product standards is usually considered positive as they constitute obstacles to trade and hinder the optimal allocation of resources in the international exchange of goods. But differing national rules in the public interest, such as the protection of life, health, morality or the protection of the environment, may be justified. As different regions have different needs and considerations on the desirable level of protection of the environment they should be allowed to regulate it according to their preferences. The diversity of the various regions⁴⁷⁸ also justifies differences in the applied regulatory system of the Community. Another economic argument is the constant research for optimal solutions. In fields where the optimal mechanism for the protection of the public good is not yet known, the resulting outcomes from different regulatory systems may lead to an improvement in the knowledge about the area.⁴⁷⁹ All these arguments can be integrated into the idea of competition between regulatory systems.

7.4 Shared Responsibility and Shared Competence

The Community has no exclusive competence for the protection of the environment. Its own environmental policy is limited by the principle of subsidiarity.⁴⁸⁰ Furthermore the Community and the Member States share the responsibility for the protection of the environment within the territory of the Community. From the common responsibility derives

⁴⁷⁷See chapter 2.5 and chapter 4.2.

⁴⁷⁸Article 130 r (2) of the Treaty.

⁴⁷⁹See *Nicolaidis*, Competition among rules, *Journal of World Trade* (1992) 113-121.

⁴⁸⁰See e.g. *Toth*, The principle of subsidiarity in the Maastricht Treaty, *CMLRev* (1992) 1179-1106.

the common competence for the adoption of measures to safeguard the environment.⁴⁸¹ The Community and the Member States have to balance the interests of trade and environment policy. The system developed by the Community and its Member States includes various mechanisms for the coordination of national environmental measures, Community environmental measures and the harmonization of rules for the establishment of the Common Market.

A particularly instructive example is the external environmental agreements of the Community. These are usually concluded as mixed agreements allowing both the Community and the Member States to negotiate and ratify⁴⁸². After the conclusion of such agreements the Community often adopts specific measures to ensure the homogenous implementation of such agreements within the common market. This implementing legislation is important to avoid any new trade obstacles deriving from the heterogenous application of such agreements. This is particularly important if such agreements involve trade measures.⁴⁸³

Under the Treaty on European Union a system of rules has been further institutionalized which allows for different degrees of harmonization and a complex set of Community measures and national measures for the protection of the environment.⁴⁸⁴ In view of the principles of subsidiarity, shared competence for the environment and a high level of environmental protection this system allows the Member States in most cases to adopt more stringent environmental measures if they are justified in the interest of the environment.

7.5 Options for the Implementation

The Community has in principle five different legal instruments for the implementation of its

⁴⁸¹See chapter 2 and chapter 4.2.

⁴⁸²See chapter 6.2.

⁴⁸³See chapter 6.3.

⁴⁸⁴See chapter 2.5.

policies: regulations, directives, decisions, recommendations or opinions.⁴⁸⁵ Most provisions for the harmonization of national rules allow the use of all possible instruments (Article 43, 75, 100 a, 113, 130 s). This was, however, not the case for the general harmonization of laws under Article 100 which allows only the adoption of directives.⁴⁸⁶ According to a declaration by the governments also under Article 100 a there shall be a preference for directives in spite of the open wording.⁴⁸⁷

In the field of Community environmental measures there is a general preference for directives. This leaves the Member States "a certain freedom of manoeuvre in transposing [the] relevant requirements into national law"⁴⁸⁸. The choice of appropriate ways and means for the achievement of the prescribed results remains with the Member States. They must, however, fulfill certain minimum requirements and ensure compliance. The Court has repeatedly checked such national implementing legislation and has often found it non-effective.⁴⁸⁹ Only in areas where a homogenous application of standards is important is there a preference for regulations. This is the case for most legislation implementing international obligations.⁴⁹⁰

7.6 Minimum Standards and Safeguard Clauses

Only in very few cases does a harmonization of laws exclude the Member States from adopting more stringent environmentally justified measures. This can, however, happen if harmonization has taken place to foster the establishment and functioning of the common market in general (Article 100) or in certain specific sectors, such as agriculture (Article 43) transport (Articles 75 and 84 (2)) or trade with third countries (Article 113). Harmonization of economic instruments, such as indirect taxes (Article 99), could also lead to fuel

⁴⁸⁵As enumerated in Article 189 of the Treaty.

⁴⁸⁶See chapter 3.2.

⁴⁸⁷See chapter 3.2.2.

⁴⁸⁸*Krämer*, Community Environmental Law, YEL (1992) 151 at 159.

⁴⁸⁹See chapter 3.2.

⁴⁹⁰See chapter 6.2.

harmonization. Nevertheless, in all these cases there is a constant practice to establish minimum standards or specific safeguard clauses if these are deemed appropriate and justified in the context of the harmonization objective.⁴⁹¹ Such specific provisions allow the application of more stringent national measures if they are environmentally justified. They must be compatible with the other provisions of the Treaty, i.e. they must be acceptable under the general Treaty system for the coordination of trade and environmental protection.⁴⁹²

The practice already established under the Treaty of Rome has been institutionalized in the Single European Act by a new generation of provisions for the harmonization of national rules. Article 100 a (5)⁴⁹³ and Article 130 r (2)⁴⁹⁴ mention the desirability of such safeguard clauses in appropriate cases. They refer directly to the mechanism of Article 36 and the recognized reasons for diverging national measures. In spite of their slightly differing wording they both include, in our view, the protection of the environment. Thus all Treaty provisions being relevant for the application of national environmental measures allow for the inclusion of safeguard clauses or the establishment of minimum standards. They allow more stringent national measures justified for the protection of the environment and compatible with the general obligations of the Treaty.

7.7 Systematic Diverging National Measures

The Community measures adopted under Articles 43, 75, 84 (2), 99, and 113 sometimes include specific safeguard clauses which allow for more stringent national measures. Only Articles 100 a (4) and 130 t of the Single European Act have introduced a systematic mechanism for the application of more stringent national measures. They both allow in a general way the application of more stringent protective measures for the environment in spite of existing harmonization in the field. While in the case of Article 100 a (4) it is

⁴⁹¹See chapter 3.2.5, chapter 4.3.4, chapter 4.4.3, chapter 5.2.3, chapter 6 2.5, chapter 6.3.3.

⁴⁹²See chapter 7.1.

⁴⁹³See chapter 3.3.3.

⁴⁹⁴See chapter 4.2.3.

disputed whether this also includes the introduction of new more stringent measures after the harmonization at Community level,⁴⁹⁵ this is explicitly provided for by Article 130 t.⁴⁹⁶

Under these provisions the harmonization effect of a Community measure is intended to leave intact national measures in the interest of a high level of environmental protection. While under the old generation of Treaty provisions complete harmonization eliminated the possibility of invoking Article 36 for national measures this is explicitly allowed under the new provisions.

7.8 Notification Procedures and Mutual Information

An important condition for the functioning of the Community's system for the coordination of national environmental measures and its own objectives of a high level of environmental protection and the establishment of the common market is the mutual information between Commission and Member States. A key element is the established information and notification procedures under the Treaty. They usually provide for a stand-still period and an examination of the measures in question by the Commission

While for a long time the Member States had no duty to inform the Commission about planned environmental measures which might concern the common market there is now an elaborate set of procedures. The gentlemen's agreement of 1973 on the notification of national draft environmental legislation has been largely replaced by more stringent provisions. Directive 83/189/EEC requires the notification of all national draft legislation providing product specification.⁴⁹⁷ The broad interpretation by the Commission makes it cover most national environmental legislation. In relation to national trade related environmental measures against third countries Directive 288/82/EEC provides for a similar

⁴⁹⁵See chapter 3.3.4 and chapter 3.3.5.

⁴⁹⁶See chapter 4.2.4.

⁴⁹⁷See chapter 3.2.6 and *Krämer*, Community Environmental Law, YEL (1992) 151 at 173.

procedure.⁴⁹⁸

The specific safeguard clauses of the relevant harmonizing Community measures usually require the execution of a specific notification and examination procedure to be applicable.⁴⁹⁹ This system has been institutionalized under Article 100 a (5)⁵⁰⁰ and Article 130 r (2)⁵⁰¹. Article 100 a (5) mentions explicitly the application of a "*control procedure*", while Article 130 r (2) refers to an "*inspection procedure*". The systematic application of diverging measures under Article 100 a (4)⁵⁰² and Article 130 r⁵⁰³ require notification to the Commission.

The Commission as the guardian of the Treaty shall control the application of all diverging national measures and examine their compatibility with the provisions invoked and the system of the Treaty in general. If it doubts the lawfulness of national measures it may take an action against the Member State concerned to the European Court of Justice.

⁴⁹⁸See chapter 6.3.3.

⁴⁹⁹See chapter 3.2.6, chapter 4.3.4, chapter 4.4.4, chapter 5.2.3.

⁵⁰⁰See chapter 3.3.3.

⁵⁰¹See chapter 4.2.3.

⁵⁰²See chapter 3.3.6.

⁵⁰³See chapter 4.2.5.

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