

**THE EUROPEAN UNION:  
ENVIRONMENTAL POLICY AND STRATEGIES**

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## THE EUROPEAN UNION: ENVIRONMENTAL POLICY AND STRATEGIES

The European Union (EU) has been a force for the integration of Europe, while at the same time it has undergone its own internal changes. Borders have disappeared as membership has increased. The EU has been a leader in promoting an environmental agenda with some of the strongest and most innovative environmental protection measures in the world. For example, with the Kyoto Protocol in 1997, it agreed to reduce greenhouse gas emissions by 8 % of 1990 levels by 2008-2010. (It had pressed for more stringent reductions but was rebuffed by the U.S.)

The European Commission and the European Parliament have been especially concerned about the level of implementation and enforcement of environmental legislation. The following is a discussion of some of the recent and significant measures being pursued to ensure a high level of environmental protection throughout the European Union. The trend has been to develop initiatives that strengthen implementation of environmental legislation and devise new strategies that will, while recognizing the diversity and sovereignty of the Member States, allow for multiple strategies to meet EU-wide goals.

### Fifth Action Programme

The European Commission sets its agenda with action programs. The Fifth Action Programme, entitled "Towards Sustainability" was adopted in 1992 and runs through 2000.<sup>1</sup> It encourages innovative strategies to promote sustainable use of natural resources such as creating a market for recycled goods using economic incentives. A cooperative attitude toward industry, i.e. including it in negotiations during policy formulation, was advocated. Also encouraged was encouraging competition with the development of environmentally friendly product design and cost-effective technology, for example, eco-labels for environmentally benign products.

In order to strengthen the program it was recommended that legislation be codified and simplified, its enforcement improved on the national level, and more economic and fiscal instruments be introduced by states with guidelines developed on the Community level.

The Commission's own evaluation of the Fifth Action Programme,<sup>2</sup> was optimistic about accomplishments thus far but Ritt Bjerregaard, the Environment Commissioner, called for a greater

commitment by the Member States to implement existing legislation. Critics of the report questioned the lack of deadlines and goals and accused the Commission of not pushing hard enough for a stronger position. Some Member States wanted the program to be diluted even more, while others supported Parliament's strong environmental position or were content with the proposal. Many environmentalists disputed the progress cited in the report and the preferential status given to industry.

Nevertheless, Parliament approved the report, which was adopted April 17, 1997.<sup>3</sup> Article 1 called for accelerating, "the achievement of the Programme's objectives and to ensure the more efficient implementation of its approach, taking into account the Commission's progress report on the implementation of the Programme as well as the updated state of the environment report presented by the European Environment Agency, the Community will, while aiming at a high level of protection and taking into account the diversity of situations existing in the different regions of the Community, intensify its efforts on five key priorities ..." The first was the integration of the environment into other policies, such as agriculture, transportation, energy, industry and tourism. Other priorities included broadening the range of instruments, e.g. voluntary agreements, implementation and enforcement of legislation, awareness-raising and international cooperation.

Work on the Sixth Action Programme has already begun. It will most likely keep the sustainable theme emphasizing further integration of environmental policy and other sectors.

### Framework Directives

The concept of framework legislation was developed in response to the principle of subsidiarity, Article 3B of Treaty of European Union (TEU)<sup>4</sup> and to improve the implementation of existing legislation. The new guidelines for Community environmental policy allow Member States to choose the specific means to meet the articulated objectives and EU criteria for assessment in the framework legislation. Member States have more discretion to find their own strategies to meet EU goals. The framework directives are broadly drafted making it more difficult to control and later apply sanctions. Although a two-speed Community is a possibility, over the long term, all standards and established deadlines must be met.

There was concern by some non-governmental organizations (NGOs) and Members of Parliament (MEPs) that standards will be abandoned making it more difficult to achieve a "level playing field". Those states with fewer resources, e.g. Spain, Portugal and Greece, to implement legislation and lacking public pressure from

the population to do so, may have little incentive to meet their obligations in the framework legislation. Skeptics fear that the framework approach gives states an opportunity to appear as if they are taking action. For those states which choose to go slow, enforcement by the EU could be difficult. It can be argued that the Commission decided on this strategy because the environment was taking a back seat in the Commission to other issues such as completion of the internal market and unemployment. Using the framework directive model, those Member States that resisted stronger environmental goals and those with "greener policies" back home, could find a way to reach agreement on policy.

### **Integrated Pollution Prevention and Control Directive (IPPC)**

One of the first framework directives, the IPPC has been used as a model for other legislation.<sup>5</sup> Its objective was to achieve integrated prevention and control of pollution from a number of activities including chemical, mineral and energy industries, waste management and metal processing and production. It imposes common requirements for issuing permits to large industrial sources of pollution throughout the EU. All new and existing facilities must take measures to prevent or reduce pollution of the air, water, and land. Both environmental quality objectives and emission standards, a "combined approach", are used. ( The British preferred quality standards while the Germans wanted community wide emission standards.) Emission standards are based on the "best available techniques" (BAT), but state authorities have discretion and can take into "account the technical characteristics of the installation, its geographical location and the local environmental conditions."

### **Air Framework**

The inadequate implementation of environmental legislation together with the need for continued improvement in air quality provide the backdrop for the adoption of the Directive on Ambient Air Quality Assessment and Management.<sup>6</sup> This framework directive has four major objectives:

- 1) the establishment of ambient air quality objectives in order to prevent harmful effects of pollutants.
- 2) the assessment of ambient air quality with common measurements and criteria.
- 3) the maintenance and improvement of air quality by requiring states develop a plan to show how they will improve the air or maintain the level if the air is good.
- 4) in order to protect the environment and human health, it is necessary that Member States must take action when thresholds are exceeded, including alerting the public.

Member States choose a competent authority to implement the directive. Article 4 establishes a timetable for the setting of emission limits and alert thresholds but it also allows the Council to set a temporary standard if a Member State needs additional time. Additional flexibility is provided for Member States which take more stringent measures.

Daughter directives which define the objectives of the pollutants set forth in the framework directive are being adopted. Success will depend on the ability of the Commission to develop these quickly. It is envisioned that some existing directives will be superseded by new standards. Industry, NGOs and Member States have been consulted by the Commission. The first pollutants to be addressed are SO<sub>2</sub>, NO<sub>2</sub>, lead and particulates.

### Water Framework

In February 1996 the Commission issued a communication on water policy suggesting that a directive would follow which would replace six existing directives, e.g. Ecological Quality of Water, Groundwater and Surface Waters directives thereby clarifying water legislation.<sup>7</sup> It would also integrate the numerous uses and functions of water, including drinking, washing, fishing, irrigation, transportation, and recreation. A high level of environmental protection would be maintained along with transparency and public accountability. Other guiding principles to be incorporated were the precautionary principle, preventative action, the polluter pays, consideration of the cost of action as well as inaction, and in recognition of subsidiarity, support of the role of Member States in implementation.

A combined approach with both emission limits and quality objectives was the goal. The former established a tolerable level of pollution. The second, emission limit values, established a minimum level of pollution that could be expected considering current technology and cost. Environmental quality objectives allow the authorities to evaluate the effectiveness of emission standards while emission standards are needed to ensure compliance with the quality objectives. The strategy adopted in the new directive is to utilize both approaches, control pollution at the source and the establishment of environmental objectives. "Both sorts of controls will reinforce each other and, in any particular situation, it will be the more rigorous approach which applies."<sup>8</sup> The EU provides common criteria (emission limits) to be applied by the Member States in establishing national and regional standards. This provides flexibility giving recognition to special local conditions. The EU also can provide uniform quality standards or emission limits for individual pollutants if deemed necessary.

The framework itself represents an attempt to coordinate all water policy through the management of river basins and the creation of river basin management plans, to be implemented by the Member States.

Member States must designate the competent authorities to implement the plans by 2000. The plan's objectives are to prevent the deterioration and restore the quality of surface and groundwater, maintain an adequate supply of water and ensure the viability of Protected Areas. Member States have the option to apply penalties if necessary.

The debate over the directive has been revealing. The EP would like a stronger directive and is trying to exert more influence than it was able to muster during the formulation of the IPPC directive. The Member States generally agree on the merits of the directive. However, given the problems in reaching consensus on the issue of environmental liability, some Member States may be uncomfortable with accepting the polluter pays principle which is incorporated into the directive through charges.

Water policy has been controversial. Some MEPs pointed to the absence of definitions of ecologically good water. The framework directive states that it is important to set uniform standards but the directive does not specify the standards or values, but it coordinates those required under other pieces of legislation. There is also considerable discretion left to the competent authorities to modify common standards and values if local circumstances require. Article 4 allows Member States to set less stringent environment objectives if the waters are excessively polluted and control measures would be very costly, but the criteria for making such a decision is lacking.

The water framework directive is unique encompassing both water quality and quantity. But the three policymaking institutions have yet to reach consensus.

### Other Legislative Initiatives

#### Green taxes

The EU is considering a minimum tax scheme to be introduced over time on energy products including electricity, that would apply to all members. It is unique because while making a substantial contribution toward meeting the Kyoto objective of reducing greenhouse gases, it provides a mechanism for states to utilize revenues for environmental purposes and reduce the tax burden on labor. It would be a first step toward a harmonized tax structure (albeit on energy products) for the entire Community.

The Fifth Action Programme in 1992 recommended the use of economic instruments at the Community level, but so far little progress has been made. The idea received consistent support in the Commission.<sup>9</sup> Fiscal instruments were also supported by the European Councils of Madrid 1995 and Florence 1996. It is one of the most contentious issues that the EU has dealt with. While many Member States have an energy or eco-tax (Sweden, Denmark Netherlands, Belgium, Germany and the U.K.), consensus could not be reached on a uniform system of taxation that would reflect the environmental cost of producing goods and services. Nordic states have wanted to increase their eco-taxes but are reluctant because of the fear of becoming uncompetitive unless similar measures were taken across the EU.

Fiscal instruments provide an incentive for producers and consumers to behave in more environmentally sound ways. They can also increase the pace of innovation and encourage green technology. Taxes can correct price signals and market distortions. The revenues can be used for environmental purposes or can be revenue neutral, i.e. used to decrease other taxes which may be having a negative effect on the economy.

Why has the EU been unable to take action? The barriers are both political and perceptual. Some Member States have argued that they would lose a measure of sovereignty if Brussels were to establish a tax structure. The U.K. has been the strongest advocate of this position using the principle of subsidiarity.<sup>10</sup> The current buzzword "competitiveness" is used by some industries and states to arouse concern that industry will be hurt in world markets if their cost of production increases due to more taxes. Nevertheless, industry is also wary of diverse systems of eco-taxes in the states because of market distortions and trade barriers. Others contend that green taxes are merely a scheme to generate more revenue disguised as environmental measures. Most importantly, because all tax legislation must be approved unanimously in the Council, reaching consensus has been thus far impossible.

Supporters of EU green taxes, e.g. the Netherlands, Denmark and Germany, explain that Community-wide instruments are warranted because of transboundary spillover effects. (The Netherlands uses eco-taxes to reduce its CO<sub>2</sub> emissions.) National tax policies affect neighboring states. Harmonization of tax policy and central administration would eliminate differences, indirect protectionism, and barriers to the free movement of goods. For example, in 1997, there were controversies over the German packaging law, and a proposed Luxembourg eco-tax on non-reusable drink containers and minimum quotas for reusable packaging, because of possible barriers to free trade.

The Commission has been creative trying to win support for eco-taxes among the Member States. If Member States could not agree on giving the EU a tax mandate, the EU could provide a framework for those states wishing continue their own system of environmental taxes and charges, or develop new ones. "The aim is to ensure a balanced and efficient use of the instruments at Member State, regional or local level, and a transparent assessment by the Commission."<sup>11</sup> Member States must ensure that any taxation system apply equally to products of other states with allowances for industry exemptions. Revenues can be used for environmental activities, for the collection and disposal of dangerous products or substances or redistributed to those taxed.

One of the more interesting but controversial strategies of the Commission was the CO<sub>2</sub>/energy tax.<sup>12</sup> In 1992 it introduced a proposal as part of the plan to reduce CO<sub>2</sub> emissions. The tax would begin at \$3 barrel for oil and rise \$1 per year up to \$10 a barrel in 2000. Other forms of energy were included in the tax so that nuclear power would not be advantaged. (It would be taxed according to an equivalent energy rate to carbon based fuels.) Fiscal neutrality would minimize any regressive impacts on consumers of energy, e.g. lowering social security contributions thereby maintaining current overall tax burdens.

The proposal received strong reactions from adherents and opponents. Industry feared that their competitiveness in global markets would be hurt because of higher energy prices. Some argued that if the EU took this step, without the agreement of other industrialized states not only would the EU be at a competitive disadvantage but the CO<sub>2</sub> stabilization target (reaching 1990 emission levels by the year 2000) could not be met. A few Member States, the U.K. most notably, would not consider giving any tax competence to the Community. States such as Greece and Portugal complained they were being unfairly burdened because their contribution of CO<sub>2</sub> was much smaller than the more industrialized states. Others such as Belgium, the Netherlands, Luxembourg, Italy and Germany supported the tax. Some Member States already had or were considering their own carbon or energy taxes, e.g Germany, Denmark, Sweden, Finland. The Netherlands, for example, collects the largest amount of revenues from environmental taxes with 24% coming from fuel which represents 1% of total indirect tax revenue.<sup>13</sup>

Subsequent debate in the Council and disagreement between Community institutions produced deadlock. When it was learned by MEP Ken Collins, Chair of the Committee on the Environment, Public Health and Consumer Protection, that the Commission was considering allowing energy taxes to be adopted by states unilaterally with a goal of eventual harmonization, he expressed his astonishment that the EU would leave it up to the states to decide if they would go ahead alone.<sup>14</sup> Parliament took the



Commission and the Council to task for abandoning its commitment to CO<sub>2</sub> stabilization and lack of consultation with Parliament. This second Commission approach, modifying the original scheme to win adherents dropped the conditionality clause requiring other industrialized states to adopt similar energy taxes. It also allowed for a flexible transition period giving Member States an option to set the tax rate of zero. There was no firm date for final harmonization of rates after 2000, leaving it up to a unanimous decision of the Council, which would be problematic. The Commission said it would negotiate with Member States on their individual tax structures. Mario Monti, Commissioner for Taxation explained, the "... implementation of this tax by several Member States will certainly have the effect of pulling the others along, thus leading at medium term to the adoption of a uniform tax within the Union." <sup>15</sup> proposal received no more support than its predecessor although in a bow to subsidiarity Member States could exercise more discretion. Germany said it would not support it unless the tax was mandatory.<sup>16</sup> The U.K. continued its opposition to expanding the tax competence and there was no likelihood of a change in that position with. Interestingly, the U.K. is the most advanced in market based instruments except for the Netherlands.

The discussions in the EU institutions were replaced by other issues such as the recession and unemployment while the environment declined in importance.

However, the Commission refused to give up and developed a third strategy. This proposal called for an expansion of the excise taxes on energy products. Until, then, taxes were allowed only for mineral oils including heating oil and gasoline. It extended the mineral oils tax to include coal, natural gas, lignite and electricity. It was a two-step approach. First create the system for all energy products and then gradually increase the taxes to the appropriate level, according to the carbon content. In this way there would be no distortions of prices among energy products.

The content of the debate switched from global climate change to taxation! There was discussion about using the tax to reduce labor costs and the erosion of the direct tax base. This was due in part to the dependence of taxes on income and profits for revenues forcing states to look for opportunities to increase indirect taxes. Excise taxes already existed for alcohol, tobacco and mineral oil. The tax income potential of the latter was the greatest. Tax officials proposed to create a tax structure and administration as the first step.

This proposal focused not only on energy policy but included employment and transportation.<sup>17</sup> It was not a new tax but a framework of taxation of energy products enabling the

restructuring of national tax systems. The existing lack of harmonization among states had caused distortions of the internal market since some states already had energy taxes on a variety of products with different rules. The harmonization of national tax rates would reduce tax competition and discourage industry from relocating capital and labor to low tax states. Minimum levels were set by the Commission to be increased until 2002. Exemptions were possible for environmental activities, e.g. promotion of renewable energy. States had the flexibility to differentiate rates based on environmental criteria as long as the minimum rates were respected. A strong argument was made that because the proposal was tax neutral, offsets could be made by reducing labor charges thereby reducing unemployment. By shifting the tax burden to energy products, it was estimated that 145,000 jobs could be created by 2002. "...without introducing a new tax, this proposal fits in with the objectives of deepening the internal market, greater respect for the environment and the fight against unemployment, by setting up a Community framework for taxing energy products, thus facilitating the restructuring of national tax systems."<sup>18</sup> What was unique about this proposal was that revenues were the main focus with environment the secondary beneficiary. While it seemed like success was at hand, by early 1999, no agreement had been reached as details of the proposal were still being debated in the Council. The European Parliament was caught in a debate over how to increase support of renewable energy without reducing the competitiveness of industry. However, the Commission has not given up making an energy tax the key strategy toward meeting the EU commitment to reduce greenhouse gasses made at the climate change conference in Kyoto in December 1997.<sup>19</sup> The mass resignation of the Commission in March 1999, will in all likelihood put these issues on hold until new leadership takes over.

### Voluntary Agreements

Environmental voluntary agreements between industry and the EU or individual Member States, are another tool encouraged by the Commission with the direction of the Council.<sup>20</sup> The Commission hoped it would reduce the need for legislation if agreement was reached beforehand on effective preventative steps. Agreements could also be used to implement existing Community environmental legislation. Since legislation can take up to ten years from agenda-setting to legitimation (Council approval), voluntary agreements could be quicker.

Agreements are either binding (the practice of some Member States) or voluntary and non-binding (through letters of intent, notes or declarations) recognized by both sides. A Commission objective was to change the context for making decisions about environmental strategies from adversarial to cooperative.

The Commission established guidelines to facilitate the development of such agreements.<sup>21</sup> Governments, public authorities or the EU set a target and industry decides how it will be met. (This similar in philosophy to framework legislation). The agreements must be designed so that environmental goals are met in a cost-effective way. The key to making it work is adequate monitoring and reporting. A recent example is the proposed agreement between the car industry and the Commission adopted on October 6, 1998, to increase fuel efficiency and reduce CO<sub>2</sub> emissions.

The industry response was positive. The Union of Industry and Employers Confederation of Europe (UNIECE) asked that environmental objectives be clearly articulated, e.g. timetables.<sup>22</sup> However, the European Environmental Bureau (a coalition of environmental groups) was concerned that voluntary agreements were weak, providing no incentive for enforcement. Greenpeace was more pessimistic warning that industry would not change unless it was forced to. The European Parliament expressed reservations about industry negotiating directly with the Commission leaving it and national parliaments cut off from the decision making process.

### Implementation

The actual implementation of Community legislation in the Member States continues to be problematic for a variety of reasons. There are approximately 200 pieces of legislation, many amending other directives. Because of the imprecise and sometimes intentionally vague language, the transposition may differ from state to state. Terms such as BAT are open to varying interpretations. There are not sufficient Commission staff to monitor transposition, initiate infringement proceedings and oversee actual application. In states that have federal structures, the EU can not intervene if legislation is not implemented in a region. This inhibits uniform application within a Member State. The Commission relies on information from complaints, petitions and communications from the EP, NGOs, media, citizens and states to provide information about the status of implementation of legislation. Some states do not have adequate resources or skilled personnel to carry out monitoring and inspections and oftentimes governments are either unable or unwilling to respond to requests for information or provide required periodic reports. For example, states were late in submitting strategies to meet the EU stabilization target for CO<sub>2</sub>. Some states had no numerical target or an objective for 2000.<sup>24</sup>

The European Parliament continues to advocate strengthening of implementation mechanisms. According to Ken Collins, "The credibility of the EU itself rests in part, on its ability to

implement and enforce legislation.<sup>25</sup>

The Commission proposed to increase the implementation of the Fifth Action Program through: 1) shared responsibility, 2) review existing legislation, and 3) broadening the mix of instruments, e.g. voluntary agreements and fiscal and economic instruments. There is a stated commitment that environmental goals be met in all states to avoid different levels of protection and market distortion. Policies are ineffective if states fail to enforce environmental legislation. The Commission also proposed to codify environmental legislation and improve its transparency and coherence. It said it would give priority to increasing DGXI staff and resources.

It also supported the establishment of an environmental inspectorate, (that had long been advocated by the Parliament), monitored by the Commission. The inspectorate would have the authority to provide guidelines to the states for transposing legislation. Called IMPEL, its role is to develop competencies for carrying out inspections. It was created in 1993 and is composed of representatives of national authorities and the Commission with a general mandate to improve enforcement. In the future it could take on greater responsibilities such as oversight of the national inspection bodies and the establishment of rules for inspectors.

### Enforcement Strategies

A significant problem that has impeded implementation is the inability of the EU institutions to enforce legislation and administer sanctions and penalties. Those states complying with Community law are concerned that they are at a competitive disadvantage because of the financial burdens on industry.

In 1997 the worst offender Spain. Finland, Luxembourg, and Sweden had the fewest offences. The Dutch had the best record. Most infringements concerned environmental law and free market legislation. Environmental violations increased, reversing a four year trend.<sup>26</sup> The Commission has taken a more active role in punishing Member States for failure to implement EU law and ruled that individuals must be compensated for losses for government inaction. The U.K. had to pay damages to Spanish fishermen who were banned from British waters since 1989. Germany had to compensate a French brewery which was banned from selling its product in Germany because it did not comply with German purity laws. Generally, the law violated must be sufficiently serious and the damage must have been directly caused by the government's breach.<sup>27</sup> National courts make the determination of seriousness and damages.

In June 1997 the Commission announced legal action against more than half of the Member States for non-implementation, with 16 cases (Belgium, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal and Spain). Greece and Netherlands failed to draw up a pollution reduction program for a 1976 directive on Dangerous Substances in the Aquatic Environment. Greece failed to adopt national legislation implementing a 1991 directive on hazardous waste and Portugal failed to adopt legislation to implement a 1991 directive on urban waste water treatment.

Article 169 which allows citizens, business, local authorities or NGOs to initiate complaints to the Commission are lengthy. There are too many cases and it is impractical to have all legal actions channeled through the Commission, a national court of law and the European Court of Justice (ECJ). Moreover the Commission can not take action against a local government if that is where the problem is, only against a Member State.

The Commission's approach is to assist states in transposition in all states to achieve the desired results. Those complaints that are procedural, i.e. lack of information, could be handled by the Member State. There should be non-judicial complaint investigators on the local level which could make the process easier for citizens as well as faster and less costly.

Responding to criticism that the Commission was no longer adequately guarding the Treaty, and with the objective of strengthening deterrence, Commissioner Ritt Bjerregaard decided to exercise the Commission's authority to apply financial penalties to Member States under Article 171 of the TEU. The Commission must ask the ECJ to fix the size of the fine, large enough to exert pressure. The sum is calculated on basis of seriousness of the violation, vagueness of the transposed rule, irreparable damage to human health, the environment, or economic harm to individuals or traders, the amount of money involved in the infringement, any financial benefit the state derived from non-compliance and the states's ability to pay (including GDP and number of votes in the Council, indicating the amount of influence of the state.) There is a basic lump sum of 500 ecu/day beyond the deadline for compliance.

Germany was fined 264,000 ecu daily for not implementing a 1991 directive on the quality of groundwater, 26,400 ecu daily for failing to apply legislation on the protection of wild birds, and 158,400 ecu for lack of standards on surface water. Italy was fined 123,900 ecu daily for waste management and 159,300 ecu daily for lack of implementation of measures to protect against ionising radiation. Six months later, in July 1997, most of the cases were resolved and there was hope that states would be embarrassed enough in the future to abide by legislation so that legal action would be unnecessary.

In another example, a majority of states have failed to comply with the 1992 habitats directive by providing lists of protected areas. The Commission in June 1997, sent out legal warnings, the first step on the road to the European Court of Justice.

To deal with the immense backlog in infringement cases, some of which had not been dealt with in years, the Commission has turned enforcement over to national courts. It takes months before initial warnings are sent and states can force delays. The Commission argues that national courts would be enforcing law at the most appropriate level and are better suited to consider the particular legal, administrative and environmental context. NGOs could have standing in the states to bring judicial review of action. Moreover, it would reduce the cost to the Commission which has insufficient resources to handle the backlog of cases. There was some concern raised by small business and individuals that they would have to pay to take a case to the national court, while the Commission now investigates a complaint with no charge. Lawyers argue that Community law will be difficult for national courts to utilize. Others think the move in the name of efficiency is really a derogation of EU responsibility.

### Subsidiarity

The principle of subsidiarity, is described in Article 3b of the TEU has had an impact on environmental legislation. It states that actions should be taken by the Member States unless the objectives can be better achieved through EU actions. All legislative proposals must now state how they are consistent with subsidiarity. This has resulted in the reduced number and scope of legislative proposals produced by the Commission. According to Tony Long, World Wide Fund for Nature, "The environment has been the big victim of subsidiarity. We are not criticizing the move to subsidiarity, but it seems to have caused a loss of confidence and direction in DG XI. It may be no coincidence that framework legislation giving more flexibility to states, is the consequence of the nod to subsidiarity, and an opportunity for states to justify actions in their own self interest.<sup>31</sup> An example is the position of the U.K. which has stated the decision-making should be at the local level and that national parliaments should be a greater role.<sup>31</sup> However, London and probably not the local councils are what is meant as "local".

For most environmental issues, decisions on the EU level are not difficult to justify. Water and air pollution certainly cross national boundaries and individual states are unable to mitigate transboundary pollution unilaterally. The proposal for the promotion of renewable energy sources recognized that if CO<sub>2</sub> objectives were to be achieved, a coordinated policy of national

measures was necessary.<sup>33</sup>

While the debate over which environmental problems should best be handled by Member States or the EU is far from being settled, and a new subtly has been introduced. States can now reserve flexibility in the strategy they choose to meet communitywide targets. The proposal for a Council Directive on the landfill of waste states that it is compatible with the principle of subsidiarity. The legislation argues for communitywide standards. Because different national standards lead to a divergence in environmental standards and thereby stimulate increased shipments of waste within Europe, uniform standards are deemed necessary. States may, however, apply the most appropriate option to meet their particular national conditions." States have the flexibility in choosing which way the reduction targets for landfilling of biodegradable waste are to be achieved."<sup>35</sup>

The draft Treaty of Amsterdam, Chapter 9, is consistent with the principles of the legislation described above, saying subsidiarity is a dynamic concept and should be "expanded where uncertainties so require, and if conversely, to be restricted or discontinued where it is no longer justified."<sup>36</sup> Nevertheless, the Community is directed to leave as much scope for national decision-making as possible. Guidelines are provided for complying with subsidiarity as well as the principle of proportionality which according to the same section defines it as, "any action by the Community shall not go beyond what is necessary to achieve the Objectives of the Treaty." They include 1) whether an issue is transnational, 2) if actions by a Member State or inaction by the Community "would conflict with the requirements of the Treaty, and 3) whether Community action would produce greater benefit than on the Member State level.

The Directive 97/11/EC of March 3, 1997 amending an earlier directive on the assessment of the effects of certain public and private projects on the environment, is another example of giving states latitude in applying EU criteria to their specific situations, e.g. determining criteria to be utilized to decide which projects should be subject to assessment. In this directive there is a list of projects which must be assessed and another for which there is discretion by the Member State.

Flexibility to choose strategies can lead to an a la carte Europe impeding the creation of a "level playing field" for all states. Such flexibility could allow states to move either faster or slower in meeting Communitywide objectives depending upon how subsidiarity is interpreted. The result has been less legislation adopted and consolidated.

## Enlargement of the European Union

"The Union's environment is changing fast, both internally and externally...Enlargement represents a historic turning point for Europe, an opportunity which it must seize for the sake of security, its economy, its culture and its status in the world."<sup>37</sup> The addition of new members to the European Union is potentially the most significant and weighty issue on the European agenda. Aside from the institutional changes that will be necessary to accommodate more chairs around the table, the environment may prove to be one of the most troublesome policy areas.

In 1993, the heads of government decided to open the doors at such time when the prospective members could meet EU criteria for membership.<sup>38</sup> From then on Central and Eastern European (CEE) leaders met with their counterparts in Brussels to prepare strategies for accession. By July 1997, nearly the same time the North Atlantic Treaty Organization (NATO) announced that Poland, the Czech Republic, Hungary and Estonia would be considered for membership, the EU announced that Estonia, the Czech Republic, Hungary, Poland, Slovenia, and Cyprus would be the first five states to prepare for accession by 2006. In the wings were Bulgaria, Romania, Latvia, Lithuania and Slovakia which were encouraged to continue to strengthen their political and economic institutions. In March 1999, The Czech Republic, Hungary and Poland joined NATO. As of spring 1999, it seemed likely that Slovakia and Latvia might be added to the first round of accession states to the EU.

Enlargement could mean that the population of the EU could increase by 1<sup>1/3</sup> billion in this first wave and to over 500 million with over 25 members. The EU would stretch from Lisbon to Bucharest and the Arctic Sea to the Mediterranean Sea. Many inside the Commission argue that enlargement is inevitable given the political realities of these states which would like to shed their second-class status in Europe. However, there are some potentially serious problems which could threaten the accession timetable or even the future direction of the EU. The disparity of economies of these primarily former Soviet bloc states is enormous compared to the EU. The GNP of the 11 potential accession states equals the Netherlands. It is estimated that it will take Poland 20 years with a 6% annual growth rate to catch up to Greece, the poorest of European states.<sup>39</sup> CEE states have yet to develop real market economies and their environmental standards are years behind their western neighbors. The poorer EU countries, Greece, Portugal, Ireland and Spain are concerned that their aid will be reduced in all areas including the environment. They could conceivably withhold support for accession or at minimum, slow the process. The EU can not afford



to support the CEE at the same level it did Portugal, for example. The total EU budget can not be increased. The cost of expansion is estimated to be 120 billion ecu (1 ecu= \$1.07 as of spring 1999). The Commission estimates that it would require 3-5% of the applicants countries' GDP over 20 years to comply with EU environmental legislation. Commissioner Bjerregaard has warned that the cost of meeting the EU's requirements should not be taken lightly.

The environmental acquis must be adopted by the accession states. EU environmental policy is based on the principle of sustainability and is made operational through the integration of environmental policy into all EU sectoral policies, the polluter pays principle and mitigating pollution at the source. In order to qualify as members, applicants must accept EU rules and standards embodied in EU legislation. For the CEE, the problem is how to accomplish that given the already difficult budgetary demands and undeveloped political and administrative institutions. Some states have existing laws guaranteeing health and environmental protection and since 1993 have passed legislation modeled after the EU. But there has been little implementation. The EU has been working closely with prospective applicants helping them to adapt and implement community law in the environment but none of the prospective states will be able to comply fully with the acquis any time soon. The lack of prior planning necessitates an inventory of problems and proposals for action as a first step.

Each state has a different mix of problems, administrative structures and legal systems. Problem areas identified by the Commission include lack of trained staff, financial resources, monitoring equipment and environmental law specialists as well as poor implementation and enforcement. Complicating the process of institution building is the lack of experience with democratic and representative structures which require transparency and confidence. The environmental problems are serious and varied. The Danube River has toxic waste, the Czech forests have been decimated and the Baltics and Poland suffer from maritime pollution.

Each state has to prepare a strategic plan for meeting EU environmental law and the EU is assisting in the transposing of legislation. During the screening process the amount of time necessary to solve problems will be determined. It is the Council that will determine the Commission position toward the candidates. Priority areas are drinking water, waste water treatment, solid waste, energy and enforcement procedures. The Commission is particularly interested in the reduction of air pollution from fossil fuel plants through desulfurization technology. Initiatives in waste management including recycling and recovery systems are also encouraged. The EU can pressure CEE

into making environmentally sound investments through the use of fiscal instruments. Resources will come primarily from domestic and foreign sources in the private sector because the EU will be unable to shoulder the financial burden.

The Czech Republic, for example, needs to transpose the IPPC directive and develop resources to implement air, water and waste sector legislation. Although the basic framework for adoption of the acquis is in place, many areas do not conform and special attention needs to be given to strengthening implementation, enforcement and the efficiency of economic instruments.

Acceptance into the EU is advantageous for the CEE in order to improve their economies as part of the single currency and larger free market. It may be cost-effective if industry develops environmentally sound technology now rather than retrofit in the future. For the EU there is an advantage to assist in reducing pollution in the East because it is cheaper for western European states which have reduced pollution to the point where additional increments are considerably more expensive.

A number of CEE states have pledged to meet the EU target for 2005 cutting greenhouse gas emissions by 7.5%. Because of slower economies following 1989, increased targets for 2010 will be more difficult to meet. This is an opportunity for the CEE to shape its energy policies so they are consistent with EU policy. However, it remains to be seen whether this is real or only an example of good intentions.

There is some concern by the "greener" states that environmental issues will be sacrificed to get the new states on board and secure the eastern border with Russia for security reasons. If the CEE is unable to come up to EU standards, the result could be a flood of western products in the east with no packaging or recycling programs and a glut of automobiles compounding existing severe air pollution. While accession first appeared as an opportunity for the CEE to be pulled along at a quickened pace, improving the environment, it is doubtful that the timetable can be kept and standards met. Denmark has expressed concern that if new states do not meet EU norms, western European competitiveness could be threatened by those states with lower standards. Denmark disagrees with the Commission position that compliance does not necessarily have to occur until after accession and has argued that they must comply upon accession.<sup>41</sup>

Flexibility is the key to the EU strategy. To bring the CEE up to EU standards will take longer and cost more than expected. The strategy may be to maintain a core of higher standard states and use economic pressure and financial aid to bring the others around. This may result not in a two-speed but a three-speed Europe. Such a strategy does not help NGOs in CEE in pressuring

their governments to do more. The European Environmental Bureau (EEB) is concerned that if the Commission allows states to join prior to compliance, EU targets for sustainability will be compromised. CEE could slow environmental progress in the EU by forming alliances with the laggard EU environmental states.<sup>42</sup> If the EU does not require full compliance with EU environmental legislation at the end of the transition process, the driving force for strengthening the environment will end and an opportunity will be lost.

Although Commissioner Bjerregaard has said that EU standards will not be compromised, the question remains as to whether the ten year timetable will be enough or will have to be extended. If it is the latter, the environment may prove to be a real impediment in the accession process. The Commission would like the CEE states to leap frog over the EU and develop superior environmental technology avoiding more retrofitting of its inefficient industrial sector.

#### The Treaty of Amsterdam

Changes in the Treaty of the European Union agreed to in October 1997 could affect the future of European environmental policy. However, it is still unclear if environmental policymaking will be strengthened as a result.

The opportunity for states to introduce new stringent national measures has finally been recognized. Article 100a, which now becomes Article 95, has been modified. If a Member States wishes to take more stringent measures than provided for in a harmonizing measure, it now has to do more than notify the Commission. While the opportunity for more stringent measures is now specifically stated (which is positive), there are now conditions to be met which could be problematic. The environmental problem a Member State is addressing must be specific and occur after the harmonizing measure was taken. Environmental problems that have been persistent or occurred in the past could be excluded. The effect could be a reduction in the number of problems covered by this "environmental guarantee". The new article also requires that the measure not be an obstacle "to the functioning of the internal market," which is an additional requirement to the present treaty, which required that the measure shall not be arbitrary discrimination or a disguised restriction on trade.

Article 130t of the Maastricht Treaty allowed states to keep higher standards implemented prior to EU membership. Now these stricter rules could be examined for a breach of free trade rules.

The significance of the requirement that the state's environmental problem be based on scientific evidence is also unclear. It could mean that environmental high standards would be encouraged and thereby push states toward improving the environment. On the other hand, it could be interpreted to mean that action could not be taken until it is scientifically proven, that is necessary to do so and or the measure will have the intended impact.

While these new provisions may have been inserted to resolve some of the tension between the harmonization of legislation and national standards, new opportunities for conflict may have been created which will then have to be resolved through legal procedures.

Article 130r of the Maastricht Treaty which requires that the environment be integrated into other internal market policies with the objective of promoting sustainable development, has been moved to the front of the treaty and is now Article 6. In order for environmental policies to be effective other community decisions must be consistent and compatible with environmental objectives. For example, the nitrate directive was not as effective as intended because agricultural policy encouraged increased use of chemical fertilizers. While its new location at the beginning of the treaty may increase the moral force of environmental protection it remains to be seen how effective the Commission be in implementing its commitment. In the Cardiff summit in June 1998, the Council reaffirmed the policy of environmental integration especially in the area of enlargement and climate change.<sup>44</sup>

Declaration 12 states that the Commission will make an environmental impact assessment for proposals "which may have significant environmental implications." While such a provision existed in the former treaty, the roles of the European Parliament and the Council have been eliminated.

Sustainable development remains at the core of EUs objectives. It remains part of the preamble and Article B, as an objective of the EU. It is also referred to in Part I, Principles, Article 2, but there is a slight change in the reference to sustainable development. The 1992 Maastricht Treaty states that the task was to promote, "sustainable and non-inflationary growth respecting environment..." The new treaty refers to, "balanced and sustainable development of economic activities..." It does add the phrase, "a high level of protection and improvement in the environment..." The significance of these changes is still unclear. That sustainable development appears in three places and in a leading position in the Treaty is strategically important because interpretation of Community law is based on the preamble

and principles.

Changes in the Amsterdam Treaty have streamlined the co-decision procedure. The extension of the co-decision procedure giving the Parliament and the Council a joint role in legitimizing legislation may yield more decisions favoring the environment given Parliament's more environmentally supportive stand.

#### Future Prospects

One of the greatest challenges facing the European Union is enlargement. Aside from the institutional changes that will be necessary to accommodate more chairs around the table, the environment may prove to be the most troublesome areas. Environmental problems in Central and Eastern Europe are severe and these states lack administrative structures, financial resources and enforcement mechanisms that will enable them to meet EU standards and implement EU legislation. The European Union, itself, must improve its record of implementation of legislation and has few resources to assist potential members.

New types of legislation, financial penalties for failure to implement EU legislation, and leadership for sustainable development principles characterize the accomplishments of the EU. However, challenges remain and the next few years will reveal how far the member states are willing to support the Commission's efforts to keep environmental issues high on the European agenda.

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