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Articles

From Rome to Nice: A Historical Profile of the Evolution of European Environmental Law*

Noah Vardi and Vincenzo Zeno-Zencovich

If today one can talk about “European Environmental Law” and refer to the European Union environmental policy, this is owed to an evolution that has taken place over the past thirty years and that has gradually lead to an autonomous and ever growing “environmental question” in the European Union context. This, of course, is partly due to the nature of the European Union and its status as an international organization. The importance of European environmental policy has grown in a pattern that followed the growth of the European Community, from its origins as a pure economic market, to its present status as a Union involved in different policies. What is particularly interesting to observe is how the European Union (at the time the European Economic Community) implemented several legislative measures concerning the environment even in the absence of explicit powers to do so.

The aim of this paper is to briefly illustrate the historical evolution that has led to the emergence of an autonomous environmental policy in the European Union. This is done, in the first part, by analysing the origins of environmental protection in the European Community. In the second part, the paper will examine the problem of finding a legal basis

for Community action in environmental issues. Finally, the paper will examine the evolution that followed the insertion of environmental policy in the European Treaties.¹

I. Tracing Environmental Policy Back to its Historical Origins

To understand how environmental law has become part of European Union policy, one has to go back in time and examine how the environment gradually became an issue within the competence of the European Community and how the question of the extension of this competence came into consideration during the “transition phases” in which the Treaties of the Community were modified. What must be kept in mind is that what today is the European Union has not always had such extended competences. Thus, one of the major problems that European Union environmental policy makers have had to face is that of finding a legal basis for their actions.

Indeed, there was no mention of the environment in the Treaty Establishing the European Economic Community,² and the EEC only had the enumerated powers stated in the Treaty. Therefore, the measures that were eventually taken in environmental policy had to find some sort of legitimacy. This was done by construing broadly some general clauses in the Treaty. The ways in which this was accomplished are analysed later in the paper.

The first signals of an environmental “awareness” can be traced back to the 1970’s. At the time the European Community was basically an economic market, where the main concerns of European policy makers were those related to freedom of trade and competition. It may seem to be a paradox that the Member States should consider the problem of environmental protection, because, historically, it is

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1. See G. BENACCHIO & V. SIMONI, *REPERTORIO DI DIRITTO COMUNITARIO CIVILE E COMMERCIALE (LEGISLAZIONE, DOTTRINA, GIURISPRUDENZA)* (2001); S. CASSESE, *DIRITTO AMBIENTALE COMUNITARIO* (1995); G. CORDINI, *DIRITTO AMBIENTALE COMPARATO* (1997); R. GIUFFRIDA, *L’EVOLUZIONE DELLA POLITICA AMBIENTALE COMUNITARIA*, IN *IL DIRITTO PRIVATO DELL’UNIONE EUROPEA*, (A. TIZZANO ed., 2000); J.H. JANS, *EUROPEAN ENVIRONMENTAL LAW*, (2nd rev.ed. 2000); A.KISS & D. SHELTON, *MANUAL OF EUROPEAN ENVIRONMENTAL LAW* (2nd ed. 1997); N.S.J. KOEMAN, *ENVIRONMENTAL LAW IN EUROPE* (199); L. KRAMER, *EC TREATY AND ENVIRONMENTAL LAW*, (3rd ed. 1998); L. KRAMER, *MANUALE DI DIRITTO COMUNITARIO PER L’AMBIENTE*, (2002); S.T. MASUCCI, *L’AMBIENTE*, IN *DIRITTO PRIVATO EUROPEO I*, (N. Lipari ed., 1997); H. SOMSEN, *THE YEARBOOK OF EUROPEAN ENVIRONMENTAL LAW* 2 (2002); M. TRIMARCHI, *LA TUTELA DELL’AMBIENTE NEL DIRITTO COMUNITARIO*, IN *IL DIRITTO PRIVATO DELL’UNIONE EUROPEA* (A. Tizzano ed., 2000).

2. Treaty establishing the European Economic Community, Mar. 25, 1957 (entered into force Jan. 1, 1958).

characterized as an issue that clearly contrasts with the doctrine of freedom of enterprise and the development of industry.

The interest in the environmental question, however, can be explained by a global trend, originating in the United States, that helped to raise awareness of the importance of antipollution measures, and was accentuated by the contemporary energy crisis that took place during the 1970's.

In the European Community context, what called for action was precisely the fear that the absence of a homogenous policy in antipollution measures, characterized by sectorial measures left to the initiative of the single Member States, would eventually lead to distortion of competition. Thus, environmental protection, at first part of the general policies aiming at the constant improvement in quality of life of the people (as stated in Article 2 of the Rome Treaty) and at a balanced economic expansion (as stated in the Preamble of the Rome Treaty), eventually became part of the economic expansion plans, moving in step with market and economic developments. It was, therefore, a favorable conjuncture of both global trends (awareness of the environmental problem, energy sources crisis) and internal concerns of the European Community market (fear of unfair competition in the absence of homogenous rules) that triggered the environmental question in the European dimension.

The birth of European environmental law is conventionally considered to have followed a series of formal communications and summits that began in 1971. Before that year, a few measures had already been taken, such as Directive 548/67,³ on the classification, packaging and labelling of hazardous substances; Directive 70/157,⁴ on acoustic pollution; and Directive 70/220,⁵ on polluting emissions from motor vehicles. However, these measures could not yet be considered as part of an organic antipollution program.

In July 1971, the EEC Commission delivered the "First Communication on Environmental Policy", focusing on the necessary enactment of a program concerned solely with environmental protection. The Communication brought up the strongly debated issue of whether environmental problems had to be solved at Community level or by reaching intergovernmental agreements and coordinating internal policies of the Member States. The European Commission, sustained by the European Parliament, was favorable to the first option, and the Member States eventually agreed to the adoption of community

3. Council Directive 67/548/EEC, 1967 O.J. (196) 1.

4. Council Directive 70/157/EEC, 1970, O.J. (L 42) 16.

5. Council Directive 70/220/EEC, 1970, O.J. (L 76) 1.

legislative measures. This was solemnly stated in the Paris Summit in October 1972, which many authors see as the official birth date of European Environmental Law. It was at this summit that the Chiefs of the Member States affirmed that economic growth should lead to an improvement in life standards and in the general welfare. Thus, special attention had to be given to intangible values and to the protection of the environment, so as to ensure that progress would effectively be at the service of humanity.

It was following these acts that the European Community adopted the first of a series of Action Programs. These programs set certain goals and principles concerning environmental protection, but they were not legally enforceable. They served as a guideline for the enactment of specific measures at Community level, providing a general framework within which environmental action had to take place.

Community legislative action depended on the Action Programs until the EC Treaties were modified and specific mention of the environmental policy was inserted in the Treaty. Specification of environmental policy provided a legal basis for many of the antipollution measures adopted over the years. However, Action Programs continued to be enacted even after the formal mention of the environment as an autonomous policy in the Treaty, so that there are Action Programs in force to this day. These Programs usually covered a four-year span and the goals they set gradually expanded over the years, as the competences of the European Economic Community (later EU) in environmental policy were enlarged.

With the first two Action Programs, covering the period between 1973 and 1981 (1973-77 the First Action Program,⁶ 1977-81 the Second Action Program⁷) some of the key principles of European Environmental Law were set, such as the preventive action against pollution and "the polluter should pay" principles. Moreover, the Action Programs assigned a central role to the environmental question by declaring that the environment should come into consideration in every decision or program, albeit an economic one, adopted by the Community.

Under the framework of these first two programmes, a series of specific legislative antipollution measures were adopted, mainly in the form of directives. These measures were concerned with specific areas of pollution (such as water pollution, air pollution, waste pollution, hazardous substances pollution and acoustic pollution), and aimed at determining ways to prevent and control pollution sources. They made up the backbone of several sectorial measures which were to be adopted

6. First Action Programme for the Environment, 1973 O.J.(C 112) 1.

7. Second Action Programme for the Environment, 1977 O.J. (C 139) 1.

in the future.

One of the characteristics of European environmental action is that several measures (mainly directives) have been updated over the years to meet new standards and new technological developments and discoveries in antipollution devices. Consequently the directives in these domains have been amended or even enacted more than once, creating sedimented layers of normative measures.

However, the adoption of the Action Programs, and the specific measures which were to implement the general provisions they stated, posed an important preliminary question: What was the legal foundation on which the EC could base its action, given that environmental policy was not mentioned in the Treaty and that the Community, being at least from a formal point of view an organism of limited sovereignty, only has enumerated powers?

II. The Legal Basis for Environmental Action

The problem of identifying the legal foundation of Community measures, as a general issue, has several important consequences.⁸ The first one is verifying whether the article, or norm of the Treaty chosen as a basis, is broad enough to include the adoption of a determined measure so that the measure can be considered to fall within the Community's competences. The second issue concerns the competences of the single Community institutions and the definition of the extent of the Community's policies—which depend on the norm chosen as a legal basis. The last issue, closely related with the first two, concerns the decisional procedure to be adopted for the enacting of the measure and the apportionment of powers between the Community and the Member States (since competences can be of an exclusive or a concurring nature).

In the case of the environment, the solution to the problem of identifying a legal basis was found by interpretation of the Treaty. The Commission, backed by the Council, referred to the broad construction of Articles 2, 100 and 235 of the EEC Treaty (later modified and renumbered Articles 94 and 308) in the preliminary considerations of its political programs and directives. The general provision contained in Article 2 of the Treaty—to promote throughout the Community a harmonious, balanced and sustainable development of the economic activities—was referred to as a basis for the prevention of pollution and for the action taken for improvement in the environment and in quality of life.

It was especially by construing Articles 100 and 235 that the

8. These consequences are analysed by C. VIVIANI, *LE BASI GIURIDICHE DEGLI ATTI NORMATIVI COMUNITARI IN MATERIA AMBIENTALE IN FORO AMMINISTRATIVO* (1994).

Commission sought its legitimacy. These articles hold respectively that the Council shall issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market and that the Council shall take the appropriate measures to attain one of the objectives of the Community even where the Treaty has not provided the necessary powers (the so-called implicit powers clause). The Commission argued that environmental protection could be considered one of the Treaty's objectives, referring to the above-mentioned general provisions contained in Article 2, and therefore, the powers in Articles 100 and 235 could be recalled. These articles state such general and wide provisions, that the answer to the first question, that is, verifying whether the article or norm chosen as a basis is broad enough to include the measure within the powers of the Community, would probably find an affirmative answer.

Another major consideration in favour of the use of these legislative powers was the fear that the absence of a homogenous set of norms concerning environmental protection could indirectly distort competition in the common market area since the undertakings of the Member States would have to bear the different costs of antipollution measures adopted by the single Member States. The reference to freedom of competition, traditionally one of the founding objectives of the common market, gave a strong incentive to the use of the argument based on Article 100.

Article 235, when not recalled together with Article 100, was often used alone as a legal basis for the adoption of those measures concerning polluting activities which did not have a direct relation with economic, industrial or commercial activities, or which had purely environmental protection objectives. These objectives did not consider the approximation of the laws of the Member States to the extent required for the functioning of the common market. This article was also invoked for the enactment of measures which, having the environmental protection objective as prevailing, contrasted the harmonization function inherent to Article 100. The same can be said in those cases in which the reference to Article 100 would have produced inefficient and incomplete measures, conditioned by the approximation objective this article contained.

The interpretative solution to the problem of finding a legal basis for environmental action was later confirmed by the European Court of Justice. In a judgment delivered in 1980,⁹ the Court held that "Provisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply,

9. Case 91/79, *Comm. V. Italian Republic*, 1980 E.C.R. 1099; Case 92/79, *Comm. v. Italian Republic*, 1980 E.R.C. 1115.

and if there is no harmonization of national provisions on the matter competition may be appreciably distorted.” The judgment confirmed the legitimacy of the reference to Article 100 of the Rome Treaty, where the approximation of such laws that directly affect the establishment or functioning of the common market are concerned, for the purpose of protecting the environment.

The Court also confirmed the possibility of using the so-called “implicit powers” contained in Article 235,¹⁰ when trying to achieve one of the “objectives” of the Community. The reference to Article 2 (with the construction of the general objectives of the Community so as to include environmental policy) was confirmed by the Court of Justice in a judgment delivered in 1985,¹¹ where the Court affirmed that environmental protection is one of the Community’s essential objectives.

Once the European Community found its legitimacy to adopt measures concerning the environment, its policy slowly began to expand. The most important results can be seen in the Third Action Program¹² (covering the period between 1982 and 1986), in which the European environmental action merged its existing policy aiming at the control of pollution and pollution sources with a policy based on prevention of damage to the environment. One of the Community’s objectives became that of ensuring that the sustainable economic growth it promotes, shall not degrade the ecosystem at the same time. Environmental policy makers have to confront themselves with objectives posed by other policies, such as the functioning of the common market, public health, freedom of competition or free movement of persons and goods.

Two issues would be strongly debated throughout the following years: those concerning the possible integration of environmental protection with free movement of goods on one side, and freedom of competition on the other. As for the first problem, the question was that of determining whether, in the absence of harmonized normative measures at Community level, certain barriers to the free movement of goods (caused by the disparity between single national measures) could be justified by environmental protection requirements.

Whereas the EC Treaty in Article 36 states that the provisions of Articles from 30 to 34 concerning the abolition of quantitative restrictions between the Member States:

“shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy

10. Case 38/69, *Comm. v. Italian Republic*, 1970 E.C.R. 47.

11. Case 240/83, *Procureur de la République v. Association de défense des brûleurs d’huiles usages*, 1985 E.C.R. 531.

12. Third Action Programme for the Environment, 46/1, 1983 O.J. 1.

or public security, the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property”

without however mentioning the environment, the European Commission in a Communication¹³ that followed an important judgment made by the Court of Justice¹⁴ would expressly consider the environment as well.

The Court of Justice had indeed delivered the very important principle, derived from the prohibition of any national measure capable of hindering intra-Community trade, that any product lawfully produced and marketed in one Member State must be admitted to the market of any other Member State, and that technical and commercial rules, may create barriers to trade only where those rules are necessary to satisfy mandatory requirements and to serve a purpose which is in the general interest and for which they are an essential guarantee. Among the conclusions which the Commission drew from this judgment, is the one which includes environmental protection among the “mandatory requirements” justifying barriers to trade, as long as such requirements do not become a means of arbitrary discrimination or a disguised restriction on trade between Member States. The Court of Justice would later confirm this interpretation in two famous cases.¹⁵

As for the compatibility of environmental policies with freedom of competition, the question concerned the applicability of the different provisions stated in Article 85 of the EC Treaty, which on one side, [in Article 85, 1st comma] affirmed that “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market” are “prohibited as incompatible with the common market”, but on the other hand allowed certain exceptions [in its 3rd comma¹⁶]. The Commission, in its later

13. Communication from the Commission concerning the consequences of the judgment given by the Court of Justice 3/10/1980, 1979 O.J. (C 256).

14. Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 00649.

15. Case 240/83, *Procureur de la République v. Association de défense des brûleurs d’huiles usages*, 1985 E.C.R. 531; Case 302/86, *Commission of the European Communities v Kingdom of Denmark*, 1988 E.C.R. 4607.

16. “The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices,
- which contributes to improving the production or distribution of goods or to promoting

interpretation of the issue, would affirm that national environmental agreements between undertakings and public authorities would also have to be examined as falling within the provisions of Article 85, and that the possible derogations disciplined by Article 85 [3rd comma], could only be granted by the Commission itself.¹⁷

Among the other innovations contained in the Third Action Program, the Community considered for the first time the economic and employment policies of the EC together with objectives of the environmental policy so that economic and social measures had to meet the environmental standards. An important example of this new type of policy can be found in one of the European environmental law's most important directives, the Directive on the assessment of the effects of certain projects on the environment.¹⁸

However, environmental policy was still closely tied to competition policies, the compatibility between the two, as mentioned above, being often questioned and debated.

It is only with the preparatory conferences which will lead to the Single European Act, of 1987,¹⁹ that the explicit insertion of environmental policy as part of the Treaty became an issue. In the Single European Act, environment is explicitly mentioned for the first time in a European Treaty, officially legitimating the environmental policy based on interpretative solutions and implicit powers recalled especially in the name of the proper functioning of the common market (under which concern for freedom of competition can quite easily be recognized).

III. The Environment in the European Treaties

The process which led to the insertion of the Single European Act (today Title XIX) of the Treaty, with the heading "Environment" was part of a larger process involving the creation of a "European Union". This was initiated under a proposal of the European Parliament in 1984²⁰. The process clearly implied the expansion of the domains which were to

• technical or economic progress, while allowing consumers a fair share of the resulting benefit,
and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question." Treaty Establishing the European Community, Mar. 25, 1957, Europ. T.S. No. 85 available at <http://www.hri.org/docs/Rome57/Part3Title05.html#art85>.

17. See L. KRÄMER *supra* note 1.

18. Council Directive 85/337/EEC, 1985 O.J. (L 175) 40-8.

19. The Single European Act Sept. 9, 1985 and entered into force 1 July 1987.

20. See L. KRÄMER, *MANUALE DI DIRITTO COMUNITARIO PER L'AMBIENTE* (2002).

come under the competence of the Community, including powers over environmental policy.

In the original proposal made by the European Parliament, the Community was supposed to have concurring powers with the Member States as to environmental policy. The proposal was then analysed by a specific Commission whose conclusions only made a general reference to the environment as one of the domains calling for major cooperation in the future. In 1985, the European Council summoned an Intergovernmental Conference to discuss further changes to be made to the Treaty.

The European Commission presented the project for a new title concerned with the environment. It was made up of an article on objectives and principles of environmental action, an article concerning procedural aspects, and an article containing a safeguard clause with the possibility for the Member States to adopt even stricter measures, and was to become the final text respectively of the new Articles 130R, 130S and 130T of the EEC Treaty.

These articles lay down the basic principles of European environmental law, several of which had been previously developed in the Action Programs. More specifically, Article 130R sets the objectives of Community action relating to the environment, that is, "[t]o preserve, protect and improve the quality of the environment, to contribute towards protecting human health, to ensure a prudent and rational utilization of natural resources."²¹ The wording of this principle is extremely broad, and includes, according to the mostly followed interpretation, protection measures in areas outside the Community boundaries as well. There seems to be an extremely vast conferring of powers to the Community in environmental action. In the light of such a broad formulation, Article 235 also loses part of its importance as a legal basis for environmental action, since it may only be invoked where no other norm serving as a basis can be recalled.²²

The article also states that "[a]ction by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay."²³ The nature of these principles has long been discussed, especially with reference as to whether they should be considered as legally binding principles, or more generally as political guidelines for Community action.²⁴

21. Treaty Establishing the European Economic Community. Mar. 25, 1957, art. 130R, 294 U.N.T.S. 17.

22. See L. KRÄMER, *supra* note 20, at 57.

23. EEC Treaty, *supra* note 21, at 2nd comma.

24. See the arguments brought by L. KRÄMER, *supra* note 20, at 80 and

As for the meaning of these principles, the preventive action principle is based on the idea that preventive measures should be taken to avoid environmental damage before it occurs, as it is far more difficult and more expensive, from an economic point of view, to try to repair damages to the environment than it is to prevent the damage from taking place. Several measures have been adopted throughout the years under this principle, such as the assessment of the effects of certain projects on the environment,²⁵ the imposition on undertakings of preventive measures against the major-accident hazards of certain industrial activities,²⁶ the obligation to notify the Commission of certain products brought into the European market or of exportation to an extra-European country,²⁷ restrictions and prohibitions to the transfer of waste within the Community or between the Community and third countries.²⁸

Closely related to the preventive principle, is the principle that environmental damage should, as a priority, be rectified at its source. This entails that environmental damage should be mitigated as early as possible in order to avoid the expansion of its effects. One of the unsolved questions, that has arisen with the application of this principle is whether the legislator should enact quality norms (norms prescribing the maximum amount of pollution which can be tolerated by a certain environment over a given period of time) or emission norms (norms which specify the amount or maximum level of polluting agents which can be exhaled by a source in a given environment), to achieve the objective of rectifying environmental damage at its source.²⁹

As for the polluter should pay principle, it is one of the oldest principles of European environmental law, mentioned as early as the First Action Program. The meaning of the principle has evolved throughout the years from an initial economic value³⁰ that stated that

accompanying text.

25. Council Directive 85/337/EEC, 1991 O.J. (L 216).

26. Council Directive 82/501/EEC, 1982 O.J. (L 230).

27. *See generally* Council Directive 92/32/EEC, 1992 O.J. (L 154) (amending for the seventh time Council Directive 67/548/EEC, 1992 O.J. (L 154) on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances); Council Directive 90/220/EEC, 1990 O.J. (L 117) (on the deliberate release into the environment of genetically modified organisms); Council Regulation (EEC) 2455/92, 1992 O.J. (L 251) (concerning the export and import of certain dangerous chemicals).

28. *See* Council Regulation (EEC) 259/93, 1993 O.J. (L 030), *amended by* Council Regulation (EC) 120/97, 1997 O.J. (L 022), (on the supervision and control of shipments of waste within, into and out the European Community).

29. *See* L. KRÄMER, *supra* note 20 at 85.

30. *See also* the Communication from the Commission to the Council Regarding Cost Allocation and Action by Public Authorities on Environmental Matters: Principles and Detailed Rules Governing Their Application, annex to the 75/436/EEC, 1975 O.J. (L 194) (regarding cost allocation and action by public authorities on environmental

costs due to the deterioration of the environment, environmental damage and reclamation, should be borne by those who caused the damage, not by tax-payers, nor by employing public funds and by assuring the enforceability of the national and communitarian norms. The principle has more recently acquired a legal value related to civil liability.

Whilst the economic meaning of the principle implied the creation of a system of charges and taxes that should have weighed on the polluters, so that the emission of polluting agents into the environment would entail the payment of a price, the practical application of the principle has not quite followed this scheme. The Community legislation and policy is based on the principle that all the emissions into the environment which are not expressly prohibited are to be considered authorized, thereby leaving it to the single Member States to resolve the problem of identifying who should bear the costs.³¹

The interpretation of the polluter should pay principle as entailing civil liability was proposed for the first time with the enactment of the Directive 84/631/EEC³², on the supervision and control within the European Community of the transfrontalier shipment of hazardous waste, which affirms (in Article 11 of the Directive) that “[w]ithout prejudice to national provisions concerning civil liability, irrespective of the place in which the waste is disposed of, the producer of the waste shall take all necessary steps to dispose of or arrange for the disposal of the waste so as to protect the quality of the environment.” The doctrine also invites the Council to determine “the conditions for implementing the civil liability of the producer in the case of damage or that of any other person who may be accountable for the said damage.”

Further still, with a slight anticipation of the historical process which will lead to these acts, and which will be examined further on, the polluter should pay principle (together with the preventive action principle) has been used as the basis for the introduction of civil liability for damage caused by waste in a proposal of a Directive.³³ The proposal, taking into consideration the risk of distortion of competition, hampering of free movement of goods, and disparity in the protection levels of health, goods, and environment, laid down a system based on strict liability of the producer for the damages caused by waste generated while carrying out a professional activity. In 1993, the European Commission presented a Green Paper on remedying environmental

matters).

31. See L. KRÄMER, *supra* note 20 at 89.

32. Council Directive 84/631, 1983 O.J. (L 326) (*repealed* by Council Regulation EEC 259/93, 1993 O.J. (L 030).

33. Council Directive 91/219/EEC, 1991 O.J. (C 192).

damage,³⁴ which provided a general system of fault-based liability, and a special system, which refers to activities bearing an increased risk, based on strict liability.

In the year 2000, there followed a White Paper on environmental liability,³⁵ which explored various ways to shape an EC-wide environmental liability regime. It affirmed that “[e]nvironmental liability makes the causes of environmental damage (the polluter) pay for remedying the damage that he has caused. Liability is only effective where polluters can be identified, damage is quantifiable and a causal connection can be shown. It is therefore not suitable for diffuse pollution from numerous sources. [. . .] Liability should enhance incentives for more responsible behaviour by firms and thus exert a preventive effect.”

The White Paper outlined the possible main features of a Community regime including:

“no retroactivity (application to future damage only); coverage of both environmental damage (site contamination and damage to biodiversity) and traditional damage (harm to health and property); a closed scope of application linked with EC environmental legislation [. . .]; strict liability for damage caused by inherently dangerous activities, fault-based liability for damage to biodiversity caused by a non-dangerous activity; commonly accepted defences, some alleviation of the plaintiffs’ burden of proof and some equitable relief for defendants; liability focused on the operator in control of the activity which caused the damage; criteria for assessing and dealing with the different types of damage; an obligation to spend compensation paid by the polluter on environmental restoration; an approach to enhanced access to justice in environmental damage cases; co-ordination with international conventions; financial security for potential liabilities, working with the markets.”

The Single European Act also introduces the integration principle (which states that “[e]nvironmental protection requirements shall be a component of the Community’s other policies”³⁶) and the subsidiary principle (which affirms that “The Community shall take action relating to the environment to the extent to which the objectives [. . .] can be attained better at Community level than at the level of the individual Member States.”³⁷).

After further discussion, a relevant modification to the original project was made concerning the title for addressing the environment in

34. COM/93/47 FINAL.

35. COM/2000/0066 FINAL.

36. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 130R, 294 U.N.T.S 17 (entered into force Jan. 1, 1958).

37. EEC Treaty, *supra* note 36, at 4th comma.

the Treaty. Whereas the original proposal provided that the decisions concerning the environment were to be taken with a majority vote in the Council, the final version provided that unanimity was necessary (with the exception of those matters on which the Council would decide that a majority vote would be sufficient).

As a consequence of this unanimity decisional procedure, the Community in the future would often invoke competition policies when discussing the environment, thus adopting the majority vote decisional procedure allowed in competition issues³⁸.

This problem was part of the more general one concerning the legal basis for environmental action, which was only partly solved by the modifications brought to the Treaty by the Single European Act.

On one hand, the Treaty now mentioned environmental policy explicitly, but it still contained articles with general objectives, which were, on the other hand, modified. Article 100, which had served as a basis before the Single European Act, was substituted by Article 100A, which only required a qualified majority for the adoption of measures for the approximation of such laws that directly affect the establishment or functioning of the common market. Article 235 no longer applied because the Treaty now expressly mentioned the environment in Title VII. Other articles could serve as a basis for environmental measures (such as Article 118A on the improvement of the working environment for the protection of the health and safety of the workers, Articles from 130A to 130E on economic and social cohesion, and Articles from 130F to 130P on research and technology development³⁹).

As a consequence, one of the problems which remained to be solved was that of determining when a measure had to be adopted on the basis of the specific articles on the environment contained in Title VII, and when they could be based on general provisions such as Article 100A.

As already mentioned, the importance of the choice also depended on the different decisional procedures these articles set. Both articles were, as a matter of fact the result of a compromise. On the one hand, Article 100A only required a qualified majority for the adoption of measures, with the consequence that measures of a less strict nature were more likely to be adopted. This would have forced Member States with strict pre-existing environmental legislation to give it up for less stringent measures in the name of approximation of laws. To avoid this, a special safeguard clause was inserted in paragraph 4 of Article 100A which allowed Member States to keep in force national rules which were

38. The voting procedures are stated in the articles concerning competition rules (Chapter I, Title I, Part Three of the Treaty establishing the European Community).

39. See VIVIANI, *supra* note 8 at 1045.

stricter than those adopted by the qualified majority at Community level.

Article 100A also contained another very important disposition, which qualified it as a good basis for the adoption of environmental protection measures; this was the provision that in environmental policies, the Commission had to base its action on a “high level of protection”.⁴⁰

On the other hand, Article 130S also called for a compromise on decisional procedures which had resulted in the unanimity procedure. The need to avoid the lowering of protection levels previously adopted by single Member States was assured by the safeguard clause contained in Article 130T.

The practical solution that was given to the problem of choosing on which norm to base environmental action can be observed in the legislative measures that were adopted after the Single European Act. To briefly summarize an issue that involved many discussions⁴¹ and on which the European Court of Justice expressed itself more than once⁴² the European Institutions (Council and Commission) usually referred to the criterion of the main objective of the measure to be adopted, taking into consideration whether the measure could be said to pursue prevalently the realization of the internal market (Article 100A) or whether it pursued specific environmental protection objectives (Articles in Title VII). Another criterion required examining the content of the measures—that is, the objects on which the proposed measures would impose legal effects.

As these problems indicate, the independence of environmental policy from other policies was not yet completed. It would take the Maastricht Treaty signed in 1992 to achieve the result.

In the period between the adoption of the Single European Act and the new changes brought by the Maastricht Treaty, the Community continued to expand its activity in environmental policy, now legitimated by the new Title VII with Articles 130R, 130S, 130T.

Shortly after the Single European Act was approved, the Fourth Action Program⁴³ was adopted, covering a six-year period (1987-1992). For the first time, the integration between environmental policy and other policies became a central issue. The Action Program aimed at protection

40. EEC Treaty, *supra* note 36, at art. 100A, ¶3 (“The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection.”).

41. See C. VIVIANI, *supra* note 8.

42. See Case 62/88, *Hellenic Republic v. Council of European Communities*, 1990 E.C.R. 1527; Case 300/89, *Commission of the European Communities v. Council of the European Communities*, 1991 E.C.R. 2867; Case 155/91, *Commission of the European Communities v. Council of the European Communities*, 1993 E.C.R. 1-939.

43. Fourth Action Programme for the Environment, 1987 O.J. (C 238) 0001.

and improvement of environmental quality (especially in the areas of air and water pollution, chemical products, noise, and biotechnology), at protection of human health, at a rational management of natural resources (to be implemented by preserving environmental resources, land protection and management of waste), at development of research and activities at international level, at integration of environmental policies with other Community policies, and at the coordination and harmonisation between the single national environmental policies (to be implemented by the correct application of the Treaty norms, the carrying out of the planned actions, the application of appropriate procedures for the information on the environment's conditions).

However, notwithstanding the progress made by European environmental law, it was only with the Maastricht Treaty⁴⁴ that the process of creating an independent policy was completed. And indeed, one of the first issues discussed by the European Commission and by the European Council, and later at the Intergovernmental Conference for the creation of European Political Union held in 1991, was the call for a new decisional procedure. Among the proposed modifications of the Treaty, there was the one concerning Article 130S, which was supposed to provide for a qualified majority instead of the existing unanimity. Other modifications, such as a new definition of the integration principle, the declaration of a right to a healthy environment (later withdrawn), and the insertion in the Treaty of a general subsidiarity clause (which would become the new Article 3B), were also discussed.

The draft which introduced an explicit mention of the "environment" in Articles 2 and 3 of the Treaty was quite significant. After several discussions and modifications, the precautional principle was added to the text of article 130R. The main difference with the preventive action principle and with the precautional principle is that the latter justifies the adoption of environmental protection measures even before scientific proof demonstrating the cause of deterioration of the environment.

One of the most contentious points continued to be the voting procedure. Some Member States favored the maintenance of unanimity; others favored a majority vote. A compromise was finally reached with the adoption of the majority vote for all issues, with exceptions made for provisions primarily of a fiscal nature, measures concerning town and country planning, land use (with the exception of waste management and measures of general nature, and management of water resources), and measures significantly affecting a Member State's choice between

44. The Maastricht Treaty was signed on Feb. 7, 1992, and entered into force on Nov. 1, 1993.

different energy sources and the general structure of its energy supply, where unanimity was still required.

As for the new Article 100A, the voting procedure was to consist of the co decision mechanism between the European Council and Parliament, as dictated by Article 189B of the Treaty.

Once approved, the final text of the Maastricht Treaty brought the necessary innovations which consolidated the role of the environment as a “policy,” not merely as one of the objectives of the Community’s action.

This emerged quite clearly with the new Articles 2 and 3, which provide that “The Community shall have as its task . . . to promote throughout the Community a . . . sustainable and non inflationary growth” (Article 2), and that, “[f]or the purposes set out in Article 2, the activities of the Community shall include a policy in the sphere of the environment” (Article 3). Environmental protection became one of the pillars of sustainable growth, to be attained especially by preventive action with the aim of avoiding permanent damages to the environment.

The Title VII of the Treaty, under the new name of Title XVI, went through several changes. As a result, besides the voting procedure, the innovations added a new principle to the three already stated by article 130R, that is, the recognition of the importance of Community action in environmental questions on international level.

Also, the principle of a high level of protection, at first mentioned in Article 100A, where it referred especially to the measures involving the approximation of national legislations, was now inserted in Article 130R as well, with the addition of the provision stating that the diversity of situations in the various regions of the Community must be taken into account. This further provision cannot be invoked to reduce the principle of a high level of protection, on which all measures regarding the environment must be based, to the lower levels existing in the different regions. Instead, it should serve for the adoption of measures aiming at removing the obstacles to the attainment and maintenance of a high level of protection.⁴⁵ The exact meaning of the principle of a high level of protection, is defined nowhere in the Treaty, so that its extent as well as its enforceability remain open to discussion.⁴⁶

When recalling the proposals for the modifications of the Treaty, another very important principle, first introduced by the Single European Act in Article 130R—the principle of subsidiarity—now became an autonomous principle contained in the text of the new Article 3B. As

45. See A.L. DE CESARIS, IN S. CASSESE, DIRITTO AMBIENTALE COMUNITARIO, (1995).

46. See L. KRÄMER, *supra* note 20 at 75.

compared to Article 130R, Article 3B states the principle in terms which seem to be stricter with Community competences.

Under the strong influence of the new European Union Treaty, the Fifth Action Program⁴⁷ was enacted in 1992, covering the period between 1993 and 2000. Indeed, this Action Program focused on sustainable development, on the international dimension of environmental policy, and on the ever closer interaction that should exist between environmental matters on one side and economic and social development on the other, especially in developing countries. The Program singled out certain areas requiring priority in common action, such as durable management of natural resources, integration between measures adopted against pollution and measures for the managing of waste, reduction of non-renewable energy consumption, more efficient management of mobility, improvement of urban environment quality, and more incisive measures in health and security issues.

Notwithstanding the recent modifications to the Treaty, the evolution process of the European Union was not yet over. The discussions which took place before and during the new Intergovernmental Conference for the revision of the Maastricht Treaty, which was to be held in 1996, involved the environment and to some extent was prodded by several environmental organizations. The final results, reached after the consultation of reports presented by a study group and of drafts made by the European Commission and by the European Council, were inserted in the Amsterdam Treaty signed in 1997.⁴⁸

The general principle of a "balanced and sustainable development" was inserted by the Amsterdam Treaty in Article 2 (ex Article B) of the Treaty on the European Union⁴⁹ without any explicit reference to the environment. The widely accepted interpretation of this principle, which remains quite vague from a legal point of view, is that natural resources should be used in a careful way in order to take into account the economic and environmental interests both of the present and the future generations. The principle of "a high level of protection and improvement of the quality of the environment" was inserted in Article 2 of the Treaty establishing the European Community, thus becoming part

47. Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of Feb. 1, 1993 on a Community Programme of Policy and Action in Relation to the Environment and Sustainable Development – A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development, July 23, 2002, 1993 O.J. (C 183) 1.

48. The Amsterdam Treaty was signed on Oct. 2, 1997 and entered into force May 1, 1999, *see* Treaty of Amsterdam, 1997 O.J. (C340) 2.

49. The Amsterdam Treaty, Consolidated Version of the Treaty on European Union, tit. 1, art. 2 (ex art. B), 1997 O.J. (C 340) 2.

of the objectives of the Community⁵⁰. This seems to definitively preclude the adoption of measures aiming at the minimum common denominator of environmental protection, often justified by invoking the safeguard clause allowing Member States to adopt stricter measures, since the insertion in Article 2 of the Treaty implies that the high level of protection must be attained at Community, not at the national level.

The principle of integration of environmental policy with other policies, so far affirmed in article 130R, now became the text of a new Article 6 of the EC Treaty. Articles 130R, 130S and 130T, were renumbered Articles 174, 175 and 176, and Title XVI became Title XIX.

Article 100A became Article 95, with the addition of the principle that when taking as a base the high level of protection necessary in matters of health, safety, environmental protection and consumer protection, the Commission has to consider in particular any new development based on scientific facts.

The environmental question had by now evolved into an autonomous and integrated Community policy; however, the Community continued to use certain instruments, such as Action programmes, which had served as guidelines when the policy was still at its early stages.

The Fifth Action Program ended in 2000, and the Sixth Action Program⁵¹ was enacted on July 22, 2002, covering a ten-year period starting from this date. The scope of the Program, while insisting on objectives already set in the past, such as promoting the integration of environmental concerns in all Community policies and contributing to the achievement of sustainable development throughout the current and future enlarged Community, also focuses on particular issues. These are defined key environmental priorities and concern climate change, biodiversity, environment and health, quality of life, natural resources, and wastes.

Finally, a mention must be made about the Treaty of Nice, which was signed on February 26, 2001⁵² and has amended the existing Treaties. It entered into force on February 1, 2003. Of interest from the environmental point of view, is the new second paragraph of Article 175, which replaced the existing paragraph 2 of Article 175, by slightly changing the specific areas requiring unanimous decisional procedures.

50. "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Article 3 and 4, to promote throughout the Community . . . a high level of protection and improvement of the quality of the environment." The Amsterdam Treaty, Consolidated Version of the Treaty on European Union, tit. 1, art. 2 (ex art. B), 1997 O.J. (C 340) 2.

51. Sixth Community Environment Action Programme, 1997 O.J. (C 340) 2.

52. Treaty of Nice Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, 2002 O.J. (C 80) 1.

IV. Conclusions

This is the stage into which European environmental policy has so far evolved⁵³. As compared to the origins, much has been achieved over the years in terms of environmental protection and the growing public concern over environmental policy.

The European Community has enacted measures covering large areas, which range from protection of natural habitats, to creation of information networks, to liability for damage, to economic and fiscal incentives. Traces of this activity are visible in the large number of directives which have been enacted over the years.

In the attempt to very roughly classify these directives, they can be divided into a group concerning the conservation of existing natural resources and the control of pollution sources, which includes directives on protection and management of water,⁵⁴ on control of air pollution,⁵⁵

53. As this paper is being published, a Draft Treaty establishing a Constitution for Europe was submitted by the European Convention to the European Council in July 2003. The environmental question is mentioned throughout different parts of this complex document (whose future is yet to be defined). It is especially worth signalling that the principles of a high level of environmental protection and of sustainable development are affirmed among the Union's objectives (Article 3 of the Draft Treaty establishing a Constitution for Europe), and are recognized as constituting the Union's fundamental rights. Article 7 of the Draft Treaty recalls indeed the Charter of Fundamental Rights of the European Union (adopted in December 2000), which contains in Article 37 a provision on environmental protection. The Draft Treaty also recognizes the integration principle in Article III-4, and it reaffirms in Articles III-129, III-130 and III-131 the examined principles of European environmental law, as stated in Articles 174, 175 and 176 of the EC Treaty.

54. See Council Directive 2000/60/EC, 2000 O.J. (L 327) (establishing a framework for Community action in the field of water policy); Council Directive 76/464/EEC, 1976 O.J. (L 129) (on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community); Council Directive 75/440/EEC, 1975 O.J. (L 194) (concerning the quality required of surface water intended for the abstraction of drinking water in the Member States); Council Directive 76/160/EEC, 1975 O.J. (L 31) (concerning the quality of bathing water); Council Directive 80/68/EEC, 1979 O.J. (020) (on the protection of groundwater against pollution caused by certain dangerous substances); Council Directive 80/778/EEC, 1980 O.J. (L 229) (relating to the quality of water intended for human consumption); Council Directive 93/75/EEC, 1993 O.J. (L 247) (concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods); Council Directive 98/83/EC, 1998 O.J. (L 330) (on the quality of water intended for human consumption).

55. See Council Directive 96/62/EC, 1996 O.J. (L 296) (on ambient air quality assessment and management); Council Directive 70/220/EEC, 1970 O.J. (L 076) (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); Council Directive 80/1268/EEC, 1980 O.J. (L 375) (on the approximation of the laws of the Member States relating to the fuel consumption of motor vehicles); Council Directive

on management of waste and adoption of clean technologies,⁵⁶ on chemical substances, industrial risks and biotechnology,⁵⁷ on conservation of the flora and fauna,⁵⁸ and on acoustic pollution.⁵⁹

84/360/EEC, 1984 O.J. (L 188) (on the combating of air pollution from industrial plants); Council Directive 88/609/EEC, 1988 O.J. (L 336) (on the limitation of emissions of certain pollutants into the air from large combustion plants); Council Directive 89/369/EEC, 1989 O.J. (L 163) (on the prevention of air pollution from new municipal waste incineration plants); Council Directive 89/429/EEC, 1989 O.J. (L 203) (on the reduction of air pollution from existing municipal waste-incineration plants); Council Directive 92/72/EEC, 1992 O.J. (L 297) (on air pollution by ozone); Council Directive 94/67/EC, 1994 O.J. (L 365) (on the incineration of hazardous waste); Council Regulation CE 2037/2000, 2000 O.J. (L 244) (on substances that deplete the ozone layer).

56. Council Directive 75/442/EEC, 1975 O.J. (L 195) (on waste); Council Directive 75/439/EEC, 1975 O.J. (L 194) (on the disposal of waste oils); Council Directive 78/176/EEC, 1978 O.J. (L 054) (on waste from the titanium dioxide industry); Council Directive 91/689/EEC, 1991 O.J. (L 377) (on hazardous waste); Council Regulation (EEC) 259/93, 1993 O.J. (L 030) (on the supervision and control of shipments of waste within, into and out of the European Community); Council Directive 94/62/EC, 1994 O.J. (L 365) (on packaging and packaging waste); Council Directive 2000/76/EC, 2000 O.J. (L322) (on the incineration of waste); Council Decision 98/352/EC, 1998 O.J. (L 159) (concerning a multiannual programme for the promotion of renewable energy sources in the Community (Altener II)).

57. Council Directive 96/61/EC, 1996 O.J. (L 257) (concerning integrated pollution prevention and control); Council Directive 93/76/EEC 1993 O.J. (L 237) (to limit carbon dioxide emissions by improving energy efficiency (SAVE)); Council Regulation (EEC) 1993 O.J. (L 084) (on the evaluation and control of the risks of existing substances); Council Directive 67/548/EEC, 1967 O.J. (P 196) (on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances); Council Directive 76/769/EEC, 1976 O.J. (L 262) (on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations); Council Directive 90/219/EEC, 1990 O.J. (L 117) (on the contained use of genetically modified micro-organisms); Council Directive 90/220/EEC, 1990 O.J. (L 117) (on the deliberate release into the environment of genetically modified organisms); Council Directive 93/67/EEC, 1993 O.J. (L 227) (laying down the principles for assessment of risks to man and the environment of substances notified in accordance with Council Directive 67/548/; Council Directive 96/82/EC, 1996 O.J. (L 101) (on the control of major-accident hazards involving dangerous substances); Council Directive 1999/45/EC, 1999 O.J. (L 200) (concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations).

58. Council Directive 92/43/EEC, 1992 O.J. (L 206) (on the conservation of natural habitats and of wild fauna and flora); Council Directive 79/409/EEC, 1979 O.J. (L 103) (on the conservation of wild birds); Council Regulation (EEC) 3528/86, 1986 O.J. (L 326) (on the protection of the Community's forests against atmospheric pollution); Commission Regulation (EC) 1771/94, 1994 O.J. (L 184) (laying down provisions on the introduction into the Community of pelts and manufactured goods of certain wild animal species); Council Regulation (EC) 338/97, 1996 O.J. (L 061) (on the protection of species of wild fauna and flora by regulating trade therein).

59. Council Directive 70/157/EEC, 1970 O.J. (L 042) (on the approximation of the laws of the Member States relating to the permissible sound level and the exhaust system of motor vehicles); Council Directive 80/51/EEC, 1979 O.J. (L 018) (on the limitation of

Another group of directives concerns the creation of an information network of special agencies and the allocation of specific funds for the environment.⁶⁰ A third group of directives concerns the creation of economic, financial and fiscal measures.⁶¹

The process is far from being completed and new issues continuously arise; the environmental question has become a central issue at a global level, and the European Union cannot afford to stay behind. The aim of this paper is to go through the historical phases which determined the existing status of a "policy" of the Community regarding the environment. The principles of environmental action have been only briefly mentioned, whereas the legislative measures adopted, and the important case-law supporting or rejecting Community decisions have not been analysed, as they exceed the previously determined field of investigation.

noise emissions from subsonic aircraft); Council Directive 86/594/EEC, 1986 O.J. (L 344) (on airborne noise emitted by household appliances); Council Directive 2000/14/EC, 2000 O.J. (L 162) (on the approximation of the laws of the Member States relating to the noise emission in the environment by equipment for use outdoor).

60. Council Directive 90/313/EEC, 1990 O.J. (L 158) (on the freedom of access to information on the environment); Council Regulation (EEC) 1210/90, 1990 O.J. (L 120) (on the establishment of the European Environment Agency and the European Environment Information and Observation Network); Council Directive 91/692/EEC, 1991 O.J. (L 377) (standardizing and rationalizing reports on the implementation of certain Directives relating to the environment); Council Directive 85/337/EEC, 1985 O.J. (L 175) (on the assessment of the effects of certain public and private projects on the environment).

61. Council Regulation (EC) 1655/2000, 2000 O.J. (L 192) (concerning the Financial Instrument for the Environment (LIFE)); Council Regulation (EC) 1980/2000, 2000 O.J. (L 237) (on a revised Community eco-label award scheme); Council Regulation (EEC) 1836/93, 1993 O.J. (L 168) (allowing voluntary participation by companies in the industrial sector in a Community eco-management and audit scheme).