

# Preaching Heresy: Permitting Member States To Enforce Stricter Environmental Laws Than the European Community

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"This . . . [is] a turning point for the Community. Just as the challenge of the 1980s was completion of the Internal Market, the reconciliation of environment and development is one of the principal challenges facing the Community and the world at large in the 1990s."<sup>1</sup>

## I. INTRODUCTION

Since its creation in 1957, the predominant goal of the European Community<sup>2</sup> ("EC") has been economic: the establishment of a common market in Europe where goods, persons, services, and capital move freely.<sup>3</sup> As a result of numerous legislative, judicial, and political decisions, the EC has made significant progress in achieving that goal. The process of integrating the different national markets, however, has in some ways forced and in other ways allowed the Community to broaden its focus to include other goals. The goal of environmental protection, for example, has become increasingly important in recent years, both on a Community and an international level.<sup>4</sup> Nevertheless, pursuit of this new goal sets the stage for conflicts with the more established ideal of free trade and forces the Community to weigh these competing objectives.<sup>5</sup>

1. Executive Summary, in COMMISSION OF THE EUROPEAN COMMUNITIES, TOWARDS SUSTAINABILITY: A EUROPEAN COMMUNITY PROGRAMME OF POLICY AND ACTION IN RELATION TO THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT 9 (Mar. 27, 1992) [hereinafter FIFTH ACTION PROGRAMME].

2. The term "European Community" refers to the political, economic, and legal entity created under the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [hereinafter EEC TREATY], as amended by SINGLE EUROPEAN ACT [hereinafter SEA], and TREATY ON EUROPEAN UNION [hereinafter TEU]. The Treaty of Rome appears at 298 U.N.T.S. 3. The SEA is set out in 2 C.M.L.R. 741 (1987). The Maastricht Treaty on European Union, which was signed on Feb. 7, 1992, is contained in 31 I.L.M. 247. For the researcher's convenience, a compilation of the Treaty of Rome as revised by the SEA and the TEU appears at 1 C.M.L.R. 573 (1992) [hereinafter Maastricht Treaty]. This Article cites to the last of these sources as the TEU unless there is a rationale for preferring one of the other sources. Articles of the TEU that are not included in that compilation are cited to the Maastricht Treaty.

The TEU formally introduced the term "European Union" (EU), which was meant to reflect one of the treaty's essential aims and to mark a new stage in the integration of the Member States. Although the TEU is now in effect, the term "European Community" continues to be used interchangeably with "European Union," see, e.g., TEU arts. 1-5, except when referring to the pre-TEU entity, in which case "European Community" is the correct term. There are currently 15 members of the Union: Austria, Belgium, Denmark, France, Finland, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom.

3. TEU arts. 2-3.

4. See generally Konrad von Moltke, *A European Perspective on Trade and the Environment*, in TRADE AND THE ENVIRONMENT: LAW, ECONOMICS, AND POLICY 93, 93-108 (Durwood Zaelke et al. eds., 1993) [hereinafter TRADE AND THE ENVIRONMENT] (discussing emergence and present state of European environmental policies).

5. LUDWIG KRÄMER, FOCUS ON EUROPEAN ENVIRONMENTAL LAW 15-16 (1992). This confrontation between trade and environmental concerns has also become increasingly common on the international plane, as was evident in the recent NAFTA and GATT negotiations. See Daniel C. Esty, *Integrating*

As a result of amendments to the Treaty of Rome ("Treaty") included in the Single European Act ("SEA") in 1987 and the Maastricht Treaty (the "Treaty on European Union" or "TEU") in 1993, the Community specifically identified environmental protection as one of its fundamental objectives and committed itself to basic environmental principles such as the precautionary and polluter-pays principles.<sup>6</sup> Community institutions<sup>7</sup> have expressed this commitment by passing numerous directives and regulations to ensure protection of the air, land, water, and wildlife. These institutions have also conducted a series of "environmental action programmes" and held symposia to study environmental problems.<sup>8</sup> Further, the European Court of Justice has reinforced the Community's obligation in this area by repeatedly emphasizing that environmental protection is an "essential objective" of the Community.<sup>9</sup> Decisions by the ECJ, both before and after the passage of the SEA, emphasize that environmental concerns deserve special attention and may in certain cases outweigh other fundamental Community concerns such as the free movement of goods.<sup>10</sup> Together, these actions and statements by Community institutions reflect a movement away from the traditional single-minded pursuit of free trade within the Community and toward a balancing of free trade goals with environmental goals.

The Community's recognition of the importance of environmental protection to its future raises questions about whether and how Community law should be altered to accommodate this concern. The amendments to the Treaty of Rome and the decisions by the ECJ are important steps, and Community legislation and Member State enforcement of that legislation will further promote this objective. These steps alone, however, will not solve every issue. The diversity of opinion among the Member States concerning the optimal and most feasible level of environmental protection will continue to challenge the Community, and the differences among the Member States in their ability to

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*Trade and Environment Policy Making: First Steps in the North American Free Trade Agreement*, in TRADE AND THE ENVIRONMENT, *supra* note 4, at 45, 45-55.

6. See, e.g., TEU arts. 100a(3), 130r-t; Maastricht Treaty, *supra* note 2, pmbl., art. B.

7. The principal Community institutions are the Commission, the Council, the Parliament, and the European Court of Justice ("ECJ" or "Court").

8. The Community issued Environmental Action Programmes in 1972, 1973, 1977, 1983, 1986, and 1992, and has passed over 200 environmental measures. See Resolution of the Council on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment, 1973 O.J. (C 112) 1; Council Resolution, 1977 O.J. (C 139) 1; Council Resolution, 1983 O.J. (C 46) 1; Council Resolution, 1987 O.J. (C 328) 1; Executive Summary in FIFTH ACTION PROGRAMME, *supra* note 1; see also KRÄMER, *supra* note 5, at 8 (detailing EC institutions and policies for fostering environmental protection). The Community has also organized symposia focusing on specific environmental issues, such as the Commission's 1992 Vehicle Emissions Symposium staged in Brussels in September 1992.

9. See, e.g., Case 302/86, *Commission v. Denmark*, 1988 E.C.R. 4607, 4629 [hereinafter *Danish Bottles*]; Case 240/83, *Procureur de la République v. Association de défense des brûleurs d'huiles usagées*, 1985 E.C.R. 531, 549-50 [hereinafter *ADBHU*].

10. See, e.g., Case C-2/90, *Commission v. Belgium*, 1992 E.C.R. 4471, 4479-80 [hereinafter *Wallonia Waste*]; *ADBHU*, 1985 E.C.R. at 549.

pay for environmental measures further complicate the issue. Germany, the Netherlands, and Denmark have favored more stringent levels of environmental protection than the other Member States.<sup>11</sup> The recent accessions to the Union of Sweden, Finland, and Austria, states that historically have had strict environmental measures, will presumably strengthen this group favoring stricter Community standards. Nevertheless, opinion on the stringency of Community-wide environmental standards will continue to be diverse.<sup>12</sup>

When Community institutions decide to enact new environmental measures, this diversity of opinion often sparks debate about the appropriate level of protection. If, as is often the case, the level chosen as the harmonized<sup>13</sup> Community standard represents a compromise between these conflicting views, Member States favoring a higher level of environmental protection face the question of whether they can enforce that higher level within their own borders by applying national law. Before the SEA, the well-established rule of Community law prohibiting Member States from imposing more stringent rules in harmonized areas absolutely precluded such attempts to "go it alone."<sup>14</sup> The SEA's introduction of Articles 100a(4) and 130t

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11. See KRÄMER, *supra* note 5, at 37-38, 54-55; James Cameron & Ruth Mackenzie, Environmental Law and Policy Development in the European Community After Maastricht 7 (unpublished manuscript on file with author). Grants from the Union's Structural or Cohesion Funds to less wealthy Member States may minimize some of these differences in the ability of Member States to pay for environmental measures. For a discussion of these Funds, see Diane Ryland, *The Cohesion Fund: A Question of Balance*, 3 EUR. ENVTL. L. REV. 263 (1994); David Wilkinson, *Using the European Union's Structural and Cohesion Funds for the Protection of the Environment*, 3 REV. EUR. COMMUNITY & INT'L ENVTL. L. 119 (1994).

12. The entry into force of the European Economic Area ("EEA") may lend additional voices to these debates because, although EEA signatories cannot formally participate in Community decisionmaking, they are subject to Community regulation (with the exception of Switzerland) and may thus seek to influence the drafting of Community legislation. See Karl G. Høyer, *The Role of the Nordic Environmental Policies in the European Union: Highest Common Standard or Lowest Common Denominator?*, 3 EUR. ENVTL., Dec. 1993, at 2, 2. The EEA is an agreement between the EC and its Member States, including its new members, and Iceland, Liechtenstein, Norway, and Switzerland. By contrast, accession by any of the Eastern European states that have expressed interest in joining the Community (including Poland, Hungary, and the Czech Republic) may add a different influence due to their serious environmental problems and the costs involved in their abiding by even the current Community standards. See Executive Summary, in FIFTH ACTION PROGRAMME, *supra* note 1, at 89-90; Cameron & Mackenzie, *supra* note 11, at 18.

13. "Harmonization" is an important concept in European Community law. Because one of the primary objects of the Community is to improve the free movement of goods, persons, services, and capital across national borders, much Community legislation is dedicated to establishing mandatory Community-wide standards and thus eliminating differences in rules among Member States that create obstacles to this free movement. For example, the establishment of a harmonized Community rule on the type of catalytic converters required in vehicles, see Council Directive 70/220, 1970 O.J. (L 76) 171, enabled car manufacturers to overcome the manufacturing and marketing obstacles that had resulted from differing national laws.

14. Case 148/78, *Pubblico Ministero v. Ratti*, 1979 E.C.R. 1629, 1642-44. This rule prohibiting Member State legislation in Community-harmonized areas is similar, although not identical, to the American doctrine of federal preemption of state law. According to this rule, once the Community has harmonized an area (not always an easy matter to determine, as discussed *infra* part VI.B), the Member States may not enforce national standards or rules that differ in any respect from the Community

created an exception to this formerly ironclad rule by permitting Member States to enforce more stringent rules even after harmonization, provided that certain requirements are met.<sup>15</sup> According to accepted principles of Community law, these articles represent the only avenues currently available for Member States to enforce their more stringent national standards.<sup>16</sup>

This Article departs from the accepted doctrine of Community law by arguing that the Community should liberally interpret the exceptions provided by Articles 100a(4) and 130t in the environmental sphere to allow their maximum application. It also argues that the Community should create additional exceptions to permit Member States the broadest possible discretion to enforce stricter standards. This suggestion relies on the underlying purpose of Articles 100a(4) and 130t, other Treaty amendments effected by the SEA and the TEU, and numerous legally binding and nonbinding pronouncements<sup>17</sup> of Community institutions that reflect the Community's commitment not simply to environmental protection, but to a *high* level of protection. To fulfill this commitment, Member States should be both allowed and encouraged to impose stricter environmental measures. Such stricter measures are consistent with the Community's environmental policies and would better ensure achievement of Community objectives in this sphere.

While stricter environmental measures will further the important Community aim of environmental protection, they may in some instances create the very types of barriers to the free movement of goods, persons, services, and capital that the Common Market was designed to eliminate. A hypothetical national law placing stricter limits on vehicle emissions provides

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standards or rules.

15. SEA arts. 18, 25 (introducing Articles 100a and 130t to Treaty of Rome). Article 100a of the Treaty is the legal basis for most Community harmonization measures. It requires only a qualified majority vote by the Council for the adoption of such measures rather than the unanimity required under Article 100, which was the only legal basis for harmonization before the SEA. To compensate for this more liberal voting requirement, Article 100a has several significant qualifications. Paragraph four, for example, allows Member States to continue to apply national law in harmonized areas under certain circumstances, one of which is environmental protection. For a discussion of Article 100a, see *infra* part IV.B.1. Similarly, Article 130t states that the adoption of harmonized measures based on Article 130s cannot prevent Member States from enforcing stricter environmental standards, provided that certain requirements are met. TEU art. 130t. Compare SEA art. 18 (supplementing Article 100 of Treaty of Rome with qualified majority voting provision of Article 100a) with SEA art. 25 (adding unanimous voting requirement of Article 130s to Treaty of Rome) and TEU art. 130s (repealing unanimity requirement of Article 130s). Article 130s is a provision specifically relating to the environment. However, because prior to the TEU it required unanimous voting, it was not employed as often as Article 100a, even for environmental measures. For more analysis of Article 130t, see *infra* part IV.B.2.

16. See David Wilkinson, *Maastricht and the Environment: The Implications for the EC's Environmental Policy of the Treaty on European Union*, 4 J. ENVTL. L. 221, 232-33 (1992).

17. The ECJ has ruled that interpretations of Community law may give weight to even nonlegally binding Community documents. See Case C-322/88, *Grimaldi v. Fonds des Maladies Professionnelles*, 1989 E.C.R. 4407, 4421 (1991).

one such example.<sup>18</sup> In 1972 the Community issued a harmonizing directive that required Member States to adopt legislation establishing similar standards for vehicle emissions.<sup>19</sup> If Sweden were now to pass a law establishing stricter standards than the directive and requiring all vehicles driven in Sweden to abide by the stricter standards, air quality in Sweden (and neighboring countries) would presumably improve, but the law would have a disruptive effect on the manufacture and marketing of vehicles in the Community. Cars manufactured in Italy that met the Community's harmonized standards under the directive could not be driven in Sweden. Hence, Sweden's law would create a barrier to trade among the Member States. Moreover, if the Italian car manufacturer began equipping some or all of its vehicles so that they would comply with the Swedish law, the end result would subvert the Community lawmaking hierarchy: the Swedish legislature, and not Community institutions, would in effect be establishing vehicle emissions standards for the Community.<sup>20</sup>

This Article's argument in favor of allowing stricter national standards to preserve the environment thus treads on what has until recently been a primary concern of Community law: the elimination of trade barriers. Despite this conflict, the Article asserts that Community law has already adjusted and must continue to adjust its priorities to take environmental concerns into account. As the European heads of state and government affirmed over twenty years ago,

Economic expansion is not an end in itself. . . . It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment, so that

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18. German smog regulations from the 1980s effectively set stricter emissions standards than this Community directive, leading the Commission to initiate proceedings against Germany, which were later closed when the Community standard became stricter. See KRÄMER, *supra* note 5, at 184. A problem written by Frank Emmert, lecturer of European law at the University of Basel, for the 1994 European Moot Court Competition addresses a similar situation. See European Moot Court Competition Problem, 1994 (on file with *Yale Journal of International Law*).

19. See Council Directive 70/220, *supra* note 13. A "directive" is legislation that binds the Member States with respect to the result to be achieved but allows them to choose the form and methods to achieve that end. TEU art. 189. Under the terms of each directive, Member States must pass implementing legislation by a certain date. See TREVOR C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 204-05 (2d ed. 1988) (discussing EC case law regarding time limit for implementing directives). It is generally accepted that Directive 70/220 effected a "total harmonization" of this field, thereby precluding any conflicting national legislation. See, e.g., LUDWIG KRÄMER, *EUROPEAN ENVIRONMENTAL LAW* 338 (1993).

20. Such arguments are at the heart of the debate about whether stricter environmental standards should be tolerated on a national level, or whether they threaten the entire legal structure that allows the Community to fight aggressively for the removal of trade barriers. The United States's own experience with emissions standards regulation is relevant to this debate. For some time now, California has required stricter vehicle emissions standards than the federal government, thereby forcing auto manufacturers to alter production to accommodate these different standards. Although the higher California standards have thus created obstacles to interstate commerce, the legal system has tolerated these barriers because of the strong environmental interests at stake. See *Clearing the Air*, CAL. LAW., Apr. 1995, at 47, 47.

progress may really be put at the service of mankind . . . .<sup>21</sup>

To remain true to these principles, Community institutions must balance free trade and environmental protection ideals to improve the quality of life for Europeans in both an economic and a non-economic sense.

Part II presents a general discussion of the Community's development in terms of its objectives and concerns. The Article then examines in Part III the Community's commitment to environmental protection in light of the TEU and other legal instruments, activity by the Community institutions in the environmental sphere, and decisions by the ECJ. Part IV examines the development of European Community law and policy concerning Member States' enforcement of higher environmental standards within their borders. Part V sets out the theoretical argument that permitting higher national environmental standards would better enable the Community to reach its environmental goals. Part VI suggests three modifications of Community law to permit stricter national environmental standards: liberally interpreting the exceptions offered by Articles 100a(4) and 130s, applying a presumption against a finding of harmonization in the area of the environment, and the "heresy" of creating another exception to allow stricter environmental laws even in harmonized areas. The Article concludes by discussing optimal and interim solutions for Community regulation of the environment.

## II. DEVELOPMENT OF THE COMMUNITY'S OBJECTIVES AND CONCERNS

Both the dilemma and the opportunity posed by allowing Member States to enforce stricter environmental standards are best understood in the context of the development of the Community's objectives and activities. From its inception, the Community has had large ambitions, pledging itself to both economic and non-economic goals. Indeed, the wording of the Treaty of Rome demonstrates that the Member States did not view the Community as merely another free trade agreement — a European version of the GATT — but instead saw it as the framework for a new postwar Europe that would enjoy greater economic and political stability and improved living conditions for its citizens.<sup>22</sup>

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21. Declaration of the Heads of State, in COMMISSION OF THE EUROPEAN COMMUNITIES, SIXTH GENERAL REPORT ON THE ACTIVITIES OF THE COMMUNITIES, 1972 at 7, 8 (1973) [hereinafter 1972 Declaration of Heads of State].

22. The preamble begins as follows: "DETERMINED to lay the foundations of an ever closer union among the peoples of Europe . . . AFFIRMING as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples . . . ." EEC TREATY pmbl.; see also Case 26/62, N.V. Algemene Transport — en Expeditie Onderneming van Gend & Loos v. Nederlands administratie der belastingen, 1963 E.C.R. 1, 12 [hereinafter *Van Gend en Loos*] ("[T]he Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals."); DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW 3-8 (3d ed. 1993) (describing various objectives leading to Treaty of Rome).

The Treaty's structure provided important means for making this vision a reality. Most importantly, its central provisions aimed to create a common market by 1970 in which goods, persons, services, and capital could move freely.<sup>23</sup> To this end, the Treaty empowered political institutions<sup>24</sup> to enact legislation binding on the Member States and their citizens.<sup>25</sup> The ECJ was empowered to rule on Member State compliance with Treaty obligations,<sup>26</sup> the legality of Council and Commission acts and omissions,<sup>27</sup> and the interpretation of Community law.<sup>28</sup> Exercising these powers, the ECJ created a legal framework that makes Community law supreme to national law.<sup>29</sup> The Treaty also included provisions regarding financial contributions by the Member States to the Community<sup>30</sup> and established a common agricultural policy,<sup>31</sup> a common commercial policy towards third countries,<sup>32</sup> and an antitrust policy.<sup>33</sup>

In spite of the broad scope of EC institutions and activities, realizing these objectives has been, and continues to be, quite difficult. In the early years, differences among the Member States' views on the scope of the Community's powers,<sup>34</sup> political and economic constraints, and the monumental task of

23. EEC TREATY arts. 8, 9-37, 48-73.

24. The primary political institutions created by the Treaty of Rome are the Parliament, which is referred to in the Treaty of Rome as the "Assembly" and whose members, as of 1979, are directly elected by the citizens of the Member States; the Council, comprised of the ministers of the Member States; and the Commission, whose members are chosen by the Member States. The States appoint one to two Commissioners each, depending on the State's population, and each member has responsibility for a Directorate General ("DG") that oversees one or more subjects. *See id.* arts. 4, 137-63, *amended by* TEU arts. 4, 137-63, D (adding European Council); WYATT & DASHWOOD, *supra* note 22, at 19-36.

25. The legislative procedures are generally described in Articles 100-02 and 137-63 of the Treaty of Rome but are influenced by provisions elsewhere in the Treaty depending on the subject matter at issue. *See, e.g.,* TEU art. 228 (discussing procedures for entering into agreements with third countries). *See generally* WYATT & DASHWOOD, *supra* note 22, at 37-51 (explaining legislative process).

26. EEC TREATY arts. 169-72. Because the Community lacks the sort of "federal judiciary" that the United States has, its courts are the courts of the Member States. The exceptions to this rule are the Court of Justice and the Court of First Instance, but their jurisdiction is rather limited. *See* TEU arts. 168-88.

27. *Id.* arts. 173-76.

28. *Id.* art. 177. Pursuant to this article, national courts may pose questions of Community law to the ECJ in an interlocutory proceeding. The Court's resolution of these questions is binding on the referring court, *Case 29/68, Milch-, Fett- und Eierkontor GmbH v. Hauptzollamt Saarbrücken*, 1969 E.C.R. 165, 179-80, and arguably on all other courts in the Community, HARTLEY, *supra* note 19, at 280-81.

29. The Court of Justice held in a landmark decision that Community law could have "direct effect" — that is, it could create rights on which an individual could rely even if national law were to the contrary. *See Van Gend en Loos*, 1963 E.C.R. at 13; *see also Ratti*, 1979 E.C.R. at 1641-42 (1980) (holding that Community law is supreme over national law).

30. EEC TREATY arts. 199-209.

31. *Id.* arts. 38-47.

32. *Id.* arts. 110-16.

33. *Id.* arts. 85-94.

34. A tension inheres in the Community system between the promotion of national interests (those of the individual Member States) and the promotion of supranational interests (those that transcend national interests and aim instead for goals that benefit the Community as a whole). One aspect of this



ensuring the free movement of goods limited the Community's ability to devote substantial attention to the pursuit of non-economic goals.<sup>35</sup> The focus during this period was therefore on eliminating trade barriers between the Member States and establishing a common market.<sup>36</sup> To accomplish these goals, the Community passed legislation aimed at harmonizing standards and rules in a variety of areas.<sup>37</sup>

Harmonization was crucial to the establishment of a common market because it meant that private industry had to comply with only one set of rules rather than with multiple sets, thereby promoting efficiency and increased circulation of goods within the Community. Harmonization also promoted the Community's sphere of influence at the expense of the Member States because the Member States were no longer entitled to issue their own regulations in an area after the issuance of harmonization legislation.<sup>38</sup>

One of the Community's principal weapons in eliminating trade barriers has been Article 30 of the Treaty. This article is important because it constitutes the primary restraint on Member State enforcement of stricter environmental standards when no harmonization has occurred.<sup>39</sup> Article 30 forbids the Member States from maintaining quantitative restrictions on trade between Member States or "measures having equivalent effect" to such restrictions.<sup>40</sup> Based on decisions by the Court of Justice, the phrase "measures having equivalent effect" has a wide reach and includes "[a]ll trading rules enacted by member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."<sup>41</sup> Given this broad definition, it is not surprising that the Court has found many types of national laws to violate this provision, including national environmental protection measures.<sup>42</sup>

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tension is the differing views Member States have historically held regarding the scope of the Community's powers relative to national powers. See generally HARTLEY, *supra* note 19, at 8-47 (explaining division of powers among EC political institutions); Joseph Weiler, *The Community System: The Dual Character of Supranationalism*, 1981 Y.B. EUR. L. 268 (analyzing particular nature of Community supranationalism).

35. See Renaud Dehousse, *1992 and Beyond: The Institutional Dimension of the Internal Market Programme*, 1 LEGAL ISSUES EUR. INTEGRATION 109, 109-12 (1989).

36. See Phillip M. Hildebrand, *The European Community's Environmental Policy, 1957 to '1992: From Incidental Measures to an International Regime?*, 1 ENVTL. POL. 13, 15, 17-20 (1992).

37. See Dehousse, *supra* note 35, at 11-12.

38. Ratti, 1979 E.C.R. at 1642-43, 1644. For further development of this point, see *infra* part IV.

39. See, e.g., Case C-131/93, *Commission v. Germany*, 1994 E.C.R. 3302 [hereinafter *German Crayfish*].

40. TEU art. 30.

41. Case 8/74, *Procureur du Roi v. Dassonville*, 1974 E.C.R. 837, 851-52.

42. See, e.g., *id.* (law requiring certificate of origin from exporting State to accompany imported goods bearing certain names); *German Crayfish*, 1994 E.C.R. at 3316-23 (law prohibiting import of crayfish except for research and educational purposes); *Cassis de Dijon*, 1979 E.C.R. at 661-64 (law requiring certain alcoholic content in beverages with certain names). See generally WYATT & DASHWOOD, *supra* note 22, at 211-24 (discussing Article 30 cases). Some commentators have argued that the Court has begun to restrict the reach of Article 30. See, e.g., L. Hancher & H. Sevenster, *Case*

Two routes exist for derogating from Article 30: Article 36 and the rule enunciated in *Cassis de Dijon*.<sup>43</sup> Article 36 states that restrictions that are justified on grounds such as "the protection of health and life of humans, animals or plants" are exempted from Article 30 if they do not "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."<sup>44</sup> In addition, the ECJ has required an examination of whether the law "constitutes a measure which is disproportionate in relation to the objective pursued, on the ground that the same result may be achieved by means of less restrictive measures, or whether . . . such a system is necessary and hence justified under Article 36."<sup>45</sup>

By contrast, the *Cassis de Dijon* "rule of reason" provides a broader derogation but is only relevant when the national law in question is not protectionist — the law must apply equally to domestic and imported goods. The *Cassis de Dijon* rule provides that "obstacles to free movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applicable to domestic and imported products without distinction, may be recognized as being necessary in order to satisfy mandatory requirements recognized by Community law" and are "proportionate to the aim in view."<sup>46</sup>

The *Cassis de Dijon* ruling established the principle of "mutual recognition" of national rules meeting its requirements and hence departed from the previous approach favoring uniformity in national laws. This acceptance of differences in national laws coincided with a renewed interest

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C-2/90, *Commission v. Belgium*, 30 COMMON MKT. L. REV. 351, 361 (1993) (suggesting that Article 30 may no longer cover indistinctly applicable measures — those that burden domestic and imported goods equally). *But see* Peter von Wilmowsky, *Waste Disposal in the Internal Market: The State of Play After the ECJ's Ruling on the Wallon Import Ban*, 30 COMMON MKT. L. REV. 541, 541 n.1 (1993) (explicitly rejecting Hancher and Sevenster theory). The Court's decision in Cases C-267/91 and C-268/91, *Criminal Proceedings Against Keck and Mithouard*, 1993 E.C.R. 6097, may lend further support to this argument. The ECJ held there that national legislation prohibiting certain selling practices did not fall within Article 30 even though it might hinder inter-State trade. The Court noted that the legislation did not intend to have this effect on inter-State trade; criticized traders' increasing tendency to rely on Article 30 even when the laws at issue lack a protectionist intent; and concluded that, where national laws prohibiting certain selling practices are indistinctly applicable, such laws fall outside Article 30. *Id.* at 6130-32. Another reading of the *Keck* decision is that it creates a *de minimis* exception to Article 30: where the effect on inter-State trade is minimal, the measure does not fall within Article 30. Future decisions of the ECJ will no doubt clarify whether a change in its Article 30 jurisprudence has occurred. A change that accepted "indistinctly applicable measures" could strongly impact the ability of Member States to enforce national environmental measures, which in general are indistinctly applicable.

43. Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649 [hereinafter *Cassis de Dijon*].

44. TEU art. 36.

45. Case 124/81, *Commission v. United Kingdom*, 1983 E.C.R. 203, 236.

46. *Danish Bottles*, 1988 E.C.R. at 4629 (restating, with immaterial modifications, *Cassis de Dijon's* "rule of reason"). The Court has identified environmental protection as a "mandatory requirement which may limit the application of Article 30," *id.* at 4630, and thus the *Cassis de Dijon* derogation may apply to national laws aimed at environmental protection if its other requirements are met.

in expanding the Community's powers.<sup>47</sup> At a summit conference in 1972, the heads of state and government of the Member States acknowledged that many economic, social, and political problems were beyond their individual capabilities. They therefore aimed to achieve a European Union covering all relations of the Member States.<sup>48</sup> A subsequent summit conference further emphasized this objective,<sup>49</sup> and several reports were drawn up outlining the framework of the proposed Union.

Even while some in the Community pressed for expansion into new areas of activity, frustration mounted concerning the Community's failure to fully achieve objectives already envisioned in the Treaty, particularly the establishment of a common market. In furtherance of this objective, the Commission issued a report describing an impressive legislative program that emphasized the removal of the remaining trade barriers.<sup>50</sup> This paper served as the basis for negotiating the SEA, a 1987 amendment of the Treaty of Rome. The SEA, primarily concerned with integrating the national markets, set the end of 1992 as the deadline for completion of the internal market.<sup>51</sup> The SEA also expressly increased the Community's powers, thereby reflecting the parallel trend within the Community to expand the breadth of its activities. Environmental protection was one of the areas added in this first expansion of the Community's competencies through amendment of the Treaty.<sup>52</sup>

The second expansion of the Community's competencies occurred when the Maastricht Treaty entered into force in 1993. The Maastricht Treaty amended the Treaty of Rome in a number of significant respects.<sup>53</sup> In keeping

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47. This pattern of allowing somewhat more differentiation among the Member States in return for an agreement to expanded Community powers has been repeated at other junctures in the Community's development, notably in the Treaty amendments effected by the SEA and the TEU. For example, while the SEA established qualified majority voting, it also enacted Article 100a(4), which allows for derogations from harmonizing measures. Similarly, although the TEU expanded the Community's competencies, it also required the incorporation of the principle of subsidiarity into all Community actions.

48. See E. P. Wellenstein, *Unity, Community, Union — What's in a Name?*, 29 COMMON MKT. L. REV. 205, 207-08 (1992).

49. *Id.*

50. Dehousse, *supra* note 35, at 112-14 (citing Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final).

51. SEA art. 13. The SEA's introduction of Article 100a, which allowed qualified majority voting for harmonization measures instead of the previous requirement of unanimity, was crucial to the attainment of this goal.

52. *Id.* tit. VII; see also Hildebrand, *supra* note 36, at 23 (explaining different stages of Community environmental policy and describing it as "gray zone" of Community competence prior to SEA); David Judge, "Predestined to Save the Earth": *The Environment Committee of the European Parliament*, 1 ENVTL. POL., Special Issue, Winter 1992, at 186, 188-89 (noting that this inclusion was in large part due to efforts of European Parliament and arguing that these efforts were part of Parliament's general "strategy," in wake of first direct elections, to promote public awareness of need to have greater democratic control over EC's transborder policies).

53. For a general synopsis of the changes wrought by the Maastricht Treaty, see WYATT & DASHWOOD, *supra* note 22, at 653-73; Trevor C. Hartley, *Constitutional and Institutional Aspects of the Maastricht Agreement*, 42 INT'L & COMP. L.Q. 213 (1993). The Treaty will again be the subject of

with its resolution to "mark a new stage in the process of European integration,"<sup>54</sup> the Treaty added a number of new Community competencies, including those in the fields of European citizenship,<sup>55</sup> education,<sup>56</sup> consumer protection,<sup>57</sup> and industry,<sup>58</sup> as well as two new pillars covering foreign and security policy<sup>59</sup> and addressing cooperation in the fields of justice and home affairs.<sup>60</sup> These developments, which put to rest the idea that the Community is solely concerned with trade liberalization, are the natural result of trends within the Community since its inception.

### III. THE COMMUNITY'S COMMITMENT TO ENVIRONMENTAL PROTECTION

Development of the Community's activity in the environmental sector mirrors in many respects its development as a whole. The desire to eliminate differences in national rules that acted as trade barriers inspired the initial efforts in the environmental sector, which date from the late 1960s.<sup>61</sup> The Community first evinced an interest in environmental protection for its own sake in 1972 when the heads of state and government issued their aggressively pro-environmental declaration<sup>62</sup> and the Community passed its first "environmental action programme."<sup>63</sup> Subsequent years saw increased environmental legislation, the ECJ's declaration that environmental protection was an "essential objective" of the Community,<sup>64</sup> and Community involvement in international environmental protection efforts.<sup>65</sup> The environmental breakthrough, however, was the SEA's amendment of the Treaty of Rome to include environmental provisions. Amendments by the TEU further solidified the impact of those provisions on Community law. As a result of this episodic history of environmental reform, the Community's commitment to environmental protection appears in a number of sources: the TEU, international environmental conventions, the five Action Programs on the Environment, environmental legislation, and various statements and decisions

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discussion and possible amendment at an intergovernmental conference to be held in 1996. *See* Maastricht Treaty, *supra* note 2, art. N.

54. Maastricht Treaty, *supra* note 2, pmb1.

55. TEU arts. 8-8e.

56. *Id.* art. 126.

57. *Id.* art. 129a.

58. *Id.* art. 130.

59. Maastricht Treaty, *supra* note 2, art. J.

60. *Id.* art. K. Other important changes include legislative procedures, *see* TEU arts. 189-91, the incorporation of subsidiarity as a general principle, *see* TEU Art. 3b, and provisions regarding common economic and monetary policies, *see* TEU arts. 3a(2), 102a-109m.

61. *See, e.g.,* LUDWIG KRÄMER, EEC TREATY AND ENVIRONMENTAL PROTECTION §§ 1.01-02 (1990) (canvassing origins of EC environmental policy).

62. *See* 1972 Declaration of Heads of State, *supra* note 21.

63. *See* KRÄMER, *supra* note 5, at 63.

64. *Danish Bottles*, 1989 E.C.R. at 4630 (quoting *ADBHU*, 1985 E.C.R. 531 at 549).

65. *See infra* part III.B.

by Community institutions concerning the environment.<sup>66</sup>

A. *The Commitment to a High Level of Environmental Protection in the Treaty on European Union*

The TEU's many provisions regarding environmental protection are the most important demonstration of the Community's commitment. For example, the Preamble proclaims that the Member States are determined "to promote economic and social progress for their peoples, within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection."<sup>67</sup> Article 2 includes among the Community's tasks the promotion of "balanced development" and "sustainable and non-inflationary growth respecting the environment."<sup>68</sup> Article 3(k) requires that the Community develop as part of its activities "a policy in the sphere of the environment."<sup>69</sup> Importantly, Article 100a(3) provides that 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*."<sup>70</sup>

Of the TEU's environmental provisions, Article 130r provides the most comprehensive guidance regarding the scope of the Community's commitment. Its language merits quoting in full:

Community policy on the environment shall aim at a *high level of protection* taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and 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. Environmental protection requirements must be integrated into the definition and implementation of other Community policies.<sup>71</sup>

Articles 130r and 100a(3) represent significant undertakings. First, both

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66. While only the TEU, international treaties, Community legislation, and decisions by Community courts are legally binding, less formal statements from Community institutions may still have legal effect. See generally FRANCIS SNYDER, *SOFT LAW AND INSTITUTIONAL PRACTICE IN THE EUROPEAN COMMUNITY*, European University Institute (October 1993) (describing influence and implications of non-legally binding Commission statements). At the very least, these sources are tools that the Community courts may use in interpreting Community legislation, particularly when the legislation cites such documents, as environmental legislation often does. See, e.g., Directive 89/458 amending Directive 70/220, 1989 O.J. (L 266) 1, with regard to European emission standards for cars below 1.4 liters (citing First and Third Action Programmes).

67. Maastricht Treaty, *supra* note 2, pmbl., para. 7. As the ECJ made clear in the *Van Gend en Loos* decision, when it relied on a phrase in the preamble in its ruling, the words in the Treaty's preamble do have legal significance. See *Van Gend en Loos*, 1963 E.C.R. at 12.

68. TEU art. 2.

69. *Id.* art. 3(k).

70. *Id.* art. 100a(3) (emphasis added).

71. *Id.* art. 130r, § 2 (emphasis added).

use the phrase "high level of protection."<sup>72</sup> Second, the express requirement that the Community integrate environmental concerns into all Community policies has no parallel.<sup>73</sup> Third, the invocation of the precautionary principle also manifests the Community's commitment to environmental protection. While the SEA contains no definition of that principle, the definition provided in the Bergen Ministerial Declaration on Sustainable Development and adopted in a number of subsequent agreements provides some guidance: "Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."<sup>74</sup> Application of the precautionary principle promotes the adoption of those measures most likely to prevent pollution (i.e., the most stringent) at the earliest possible stage<sup>75</sup> and thus supports a significant level of environmental protection.

Fourth, national and international law protect "fundamental" individual rights such as health, safety, and consumer protection.<sup>76</sup> Placing environmental protection in Article 100a(3) on par with these individual rights confirms the Community's commitment to protect the environment at an enhanced level. Finally, consideration of the underlying purpose of Articles 100a(4) and 130t provides further evidence of the Community's commitment. The Community intended these articles to ensure that Member States would

72. How "high" a "high level" of protection is will be a never-ending point of contention. It cannot mean environmental protection at any cost because that cost may in some cases be impossible to pay in practice. See, e.g., *Environmentalism Runs Riot*, THE ECONOMIST, Aug. 8, 1992, at 11 (citing Office of Management and Budget Report calculating cost per life saved of EPA rule on wood preservatives at \$5.7 trillion, roughly equal to U.S. GNP). Nevertheless, the fact that a cost is difficult to quantify does not mean that the relevant environmental protection measure is impracticable. Application of this standard, in tandem with such concepts now enshrined in the Treaty as the precautionary principle, will help in evaluating the legality of proposed Community actions and the methods and means they adopt.

73. KRÄMER, *supra* note 5, at 9-10. The absence of this requirement for other Treaty objectives does not mean that Community policies can ignore these other objectives. Implicit in the Treaty of Rome is the idea that Community policies must take into account all Treaty objectives. Environmental policy is unique, however, because it is the only objective for which there is an expressly stated integration requirement. *Id.* To further its environmental obligation, the Commission adopted an Internal Communication on June 2, 1993, specifying how to ensure the integration of environmental protection requirements into other Community policies. Cameron & Mackenzie, *supra* note 11, at 16-17.

74. Bergen Conference, Ministerial Declaration on Sustainable Development, May 16, 1990, para. 7, reprinted in 20 ENVTL. POL'Y & LAW 100, 100 (1990); see also *Rio Declaration on Environment and Development*, UN Conference on Environment and Development, U.N. GAOR, 47th Sess., Agenda Item 9, at 3, U.N. Doc. A/CONF. 151/5/Rev. 1 (1992) (Principle 15). See generally James Cameron & Juli Abouchar, *The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment*, 14 B.C. INT'L & COMP. L. REV. 1 (1991) (analyzing precautionary principle).

75. The polluter pays principle may promote a higher level of protection because it will force polluters to internalize the cost of the pollution into their production costs. Companies that pollute less will then be rewarded because their cost of doing business will be less than the costs of the heavier-polluting companies.

76. KRÄMER, *supra* note 5, at 10 ("[T]he Single Act intends to bestow a special protection on the environment.").

not be forced to lower their environmental standards when the Community passed harmonization measures.<sup>77</sup>

#### B. *The Community's Commitment As Expressed in Other Instruments*

Other instruments also reflect the Community's commitment to a high level of environmental protection. On the international level, the Community is a contracting party to approximately thirty conventions and international agreements for environmental protection and has been active in the conventions leading up to those agreements, including the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro.<sup>78</sup> Within the framework of these agreements, the Community has also taken a leadership role in lobbying for more stringent standards.<sup>79</sup> These international agreements are binding on the Community institutions and Member States.<sup>80</sup>

On the Community level, the Community has adopted five "Action Programmes on the Environment" that provide a blueprint for future environmental protection actions.<sup>81</sup> The latest Programme, entitled "Towards Sustainability: A European Community programme of policy and action in relation to the environment and sustainable development," not only incorporates the principles of sustainable development, preventive and precautionary action, and shared responsibility,<sup>82</sup> but also contains language

77. Commission Communication Concerning *PCP* Case, 1992 O.J. (C 334) at 8 [hereinafter *PCP* Communication] (summarizing Commission Decision of December 2, 1992) (on file with *Yale Journal of International Law*); KRÄMER, *supra* note 5, at 10. Articles 100a(4) and 130t can be read as guaranteeing "that a level of environmental protection established by national law in a particular Member State can only be lowered with the consent of the State concerned." *Id.*

78. Resolution embodying the opinion of the European Parliament on the proposal from the Commission to the Council for a resolution on a Community program of policy and action in relation to the environmental and sustainable development [hereinafter Resolution] in FIFTH ACTION PROGRAMME, *supra* note 1, at 8 (referring to Community's participation in UN Conference on Environment and Development (UNCED) and to its implementation of Berne and CITES Conventions); Opinion on the proposal for a resolution of the Council of the European Communities on a European programme of policy and action in relation to the environment and sustainable development, in FIFTH ACTION PROGRAMME, *supra* note 1, at 148 (referring to Community's position at the UNCED).

79. See Executive Summary, in FIFTH ACTION PROGRAMME, *supra* note 1, at 84.

80. TEU art. 228(7). The ECJ relied in part on such an agreement in *Wallonia Waste* in concluding that a Belgian waste disposal law was compatible with Community law even though it constituted a trade barrier. *Wallonia Waste*, 1992 E.C.R. 4470 at 4480.

81. See *supra* note 8. Adoption of these programs is mandatory pursuant to Article 130s(3), which states that "general action programmes setting out priority objectives to be attained shall be adopted by the Council" and that "[t]he Council . . . shall adopt the measures necessary for the implementation of these programmes." TEU art. 130s(3). The now more than 200 pieces of Community environmental legislation often refer to these Action Programmes and their recommendations. See, e.g., Council Directive 91/441 of 26 June 1991 Amending Directive 70/220 on the Approximation of the Laws of the Member States Relating to Measures to be Taken Against Air Pollution by Emissions from Motor Vehicles, 1991 O.J. (L 242) 1 (referring to First Action Programme's call "for account to be taken of the latest scientific advances in combating atmospheric pollution").

82. See Resolution, in FIFTH ACTION PROGRAMME, *supra* note 1, at 96-97.

that reflects a new and more aggressive Community environmental policy. For example, in a resolution accompanying the Programme, the EC Parliament observed that "a correct environmental policy should aim resolutely to achieve an economy which takes account of our planet's ecological capacity" and that "the careful exploitation of natural resources is as important as the factors of capital and employment."<sup>83</sup> The Parliament also noted that "there must therefore be a profound change in the future Union's economic approach that takes account of the depletion and impairment of natural resources [and] places a positive value on the environmental assets of flora, fauna and the ecosystems, not covered by the market approach."<sup>84</sup> While the Action Programmes are not legally binding documents, courts may use them as interpretative tools in determining the scope of Community legislation, evaluating the consistency of national law with Community law, and interpreting national law.<sup>85</sup>

In addition to these written expressions of the Community's commitment, the Community's ever-increasing expenditure of resources in the area of environmental protection further evidences the depth of its concern. The European Parliament has calculated that ECU 2.3 billion of the Union's 1994 budget is allocated to environmental protection, an amount forty times greater than the 1988 allocation.<sup>86</sup> A Community-funded research and development program for harmonization of measurements and testing,<sup>87</sup> a European Environment Agency, and a European Environment Monitoring and Information Network provide other indicia of environmental protection's important status within the Community hierarchy.<sup>88</sup>

### C. *The Tradeoff Between Environmental Protection and Free Trade*

Statements in the "Toward Sustainability" report support the conclusion that environmental protection should not always be sacrificed when it conflicts with other important Treaty objectives like the free movement of goods. Such statements are perhaps the most persuasive evidence of the Community's increasing commitment to environmental protection and are a notable departure from the Community's traditional focus on economic integration. They reflect the Community's movement toward evaluating environmental concerns on the same level as free trade concerns.<sup>89</sup> Whereas these statements by Community

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83. *Id.* at 9.

84. *Id.* at 10.

85. *Cf. Grimaldi*, 1989 E.C.R. at 4422 (ruling that national courts must take Community recommendations into consideration in deciding disputes). *See generally* SNYDER, *supra* note 66 (describing influence of Commission statements).

86. David Wilkinson, *supra* note 11, at 119.

87. Council Decision 92/247, 1992 O.J. (L 126) 12.

88. Council Regulation 1210/90, art.1(2), 1990 O.J. (L 120) 1, 1-2.

89. The Community's willingness to undertake such balancing notwithstanding its strong need to eliminate trade barriers is all the more impressive when compared with GATT's treatment of environmental issues. Although GATT has been less stringent in eliminating trade barriers, it has also,



institutions reflect a balancing of economic and environmental concerns,<sup>90</sup> only the decisions of the ECJ have transformed this approach into legally binding norms.

The ECJ has directly addressed the tension between the Community's trade and environmental objectives in three cases.<sup>91</sup> The cases concern the compatibility of national environmental protection laws with Community law, particularly Article 30, in nonharmonized areas.<sup>92</sup>

The first of those cases, decided in 1985, preceded the express inclusion of environmental protection as a Community objective in the EEC Treaty. *ADBHU* involved a French law transposing a Community directive that required Member States to pass legislation guaranteeing the safe collection and disposal of waste oil. The French law went further than the Community directive in that it prohibited the burning of waste oil except in certain approved industrial installations,<sup>93</sup> whereas the directive simply required that companies obtain a permit before undertaking any type of waste oil disposal.<sup>94</sup> The French government invoked this law to apply for the dissolution of an industrial association that burned waste oils on the grounds that the association's aims and objects were unlawful. In defending against this action, the association's defense relied on two arguments: (1) the directive was incompatible with fundamental Community principles such as the free movement of goods, and (2) the French law was incompatible with the directive.<sup>95</sup>

The French court referred these issues to the ECJ,<sup>96</sup> which concluded that

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paradoxically, been less willing than the Community to recognize environmental concerns as having equal weight. *See, e.g., Mexico v. United States* ("Yellow-Fin Tuna Decision"), GATT Doc. DS21/R, (Sept. 3, 1991) (holding U.S. Marine Mammal Protection Act violative of GATT).

90. *See, e.g., 1972 Declaration of Heads of State, supra* note 21; Council Resolution, 1993 O.J. (L 138) 1; Resolution, in *FIFTH ACTION PROGRAMME, supra* note 1, at 9-10.

91. The trade/environment issue has arisen in other cases, but the ECJ has not addressed it. Although the ECJ's recent decision in the *PCP* case is somewhat inconsistent with this prior case law, *PCP* does not overrule it because the Court in *PCP* exclusively addressed the issue of the scope of Article 100(a)(4) and did not reach the environmental implications of the case. *See Case C-41/93, France v. Commission*, 1994 E.C.R. 1829, 1846 [hereinafter *PCP*]. For an analysis of the *PCP* holding, *see infra* part IV.B.1.(b). *German Crayfish* is more on point but still does not represent a change in the ECJ's overall treatment of the trade/environment issue. 1994 E.C.R. at 3303. The German law at issue in that case effectively prohibited the importation of live crayfish except for research or teaching, in which case a license was required. *Id.* at 3316. Although the law aimed at preventing the spread of a crayfish disease that threatened European crayfish with extinction, the ECJ held that the law violated Article 30 and failed to meet Article 36's requirement that less restrictive measures be less effective in achieving their goal. Germany did not make the required showing under Article 36. *Id.* at 3322-23.

92. *See supra* notes 39-45 and accompanying text.

93. *ADBHU*, 1985 E.C.R. at 547.

94. *Id.*

95. *Id.*

96. The French court referred the questions pursuant to the procedure set forth in Article 177 of the Treaty, which permits courts of Member States to request ECJ rulings interpreting Community law. *See TEU art. 177.*

the directive was valid and that the French law was compatible with it.<sup>97</sup> The Court declared that the directive must be interpreted from "the perspective of environmental protection, which is one of the Community's essential objectives."<sup>98</sup> Then, mirroring its language in *Cassis de Dijon*, the ECJ concluded that any restriction on trade imposed by the directive was justifiable insofar as the measure taken is "neither . . . discriminatory nor . . . beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection, which is in the general interest."<sup>99</sup> The ECJ found that the French law was consistent with Community law because it furthered the aim of the waste directive, the "disposal of waste oil in a manner which is safe for the environment."<sup>100</sup>

Four years later, after the passage of the SEA, the *Danish Bottles* case addressed the question of whether a Danish law requiring all beer and soft drink containers to be re-usable was consistent with Article 30.<sup>101</sup> The law obliged all manufacturers and importers to establish a deposit-and-return system and to use only containers that had been approved by a certain government agency.<sup>102</sup> The ECJ's analysis began by citing the *ADBHU* holding that "the protection of the environment is 'one of the Community's essential objectives' which may as such justify certain limitations on the principle of the free movement of goods."<sup>103</sup> The ECJ then noted that this view is "confirmed by the Single European Act."<sup>104</sup> Concluding that environmental protection "is a mandatory requirement which may limit the application of Article 30 of the Treaty,"<sup>105</sup> the Court then turned to whether the Danish law met the *Cassis de Dijon* requirement of proportionality. The ECJ held that the restrictions imposed by the approval system were disproportionate to the objective pursued because "the Danish authorities [may] refuse approval to a foreign producer even if he is prepared to ensure that returned containers are used again."<sup>106</sup>

The *Wallonia Waste* decision both followed the reasoning in *Danish*

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97. *ADBHU*, 1985 E.C.R. at 548-52.

98. *Id.* at 549.

99. *Id.*

100. *Id.* at 551. The directive expressly called for the establishment of a permit system. Thus, Member States still had the power to deny permits where disposal would harm the environment. The ECJ saw the French law as invoking this option because it only allowed the burning of waste oil at certain facilities that conformed to environmental protection standards. *Id.* at 551-52. The Court thereby implicitly ruled that the directive had not fully harmonized the area.

101. 1989 E.C.R. at 4628. The Danish government brought this case pursuant to Article 169 of the Treaty. *Id.*

102. *Id.* at 4628-29. The law was later amended to allow non-approved containers if they were not metal and were not "used for quantities exceeding 3000 hectoliters a year per producer," or if they were used for drinks "sold by foreign producers in order to test the market." *Id.* at 4629.

103. *Id.* at 4630.

104. *Id.*

105. *Id.*

106. *Id.* at 4631.

*Bottles* and went a step further. At issue in *Wallonia Waste* was the compatibility with Community law of a regional Belgian law prohibiting the discharge in Wallonia of waste from outside the region.<sup>107</sup> Although the ECJ did find that the Belgian law ran afoul of a Community directive with respect to the disposal of hazardous waste,<sup>108</sup> it concluded that, with respect to waste not covered by the directive, the law fell within the *Cassis de Dijon* derogation from Article 30. This conclusion was surprising because the law clearly discriminated against imported waste<sup>109</sup> and therefore failed to meet the essential requirement in *Cassis de Dijon* that such laws apply to domestic and imported products without distinction.

Acknowledging this departure from its previous jurisprudence, the ECJ explained that the issue of whether the law was discriminatory depended on the nature of the subject matter in question.<sup>110</sup> The Court focused on the "special characteristic" of waste, the accumulation of which "constitutes a threat to the environment because of the limited capacity of each region or locality for receiving it."<sup>111</sup> It also relied on Article 130r(2)'s principle that "environmental damage should as a priority be rectified at source"<sup>112</sup> and cited principles from an international hazardous waste convention to which the Community is a party in order to justify its conclusion that, given the nature of waste, the law was not discriminatory.<sup>113</sup>

These three cases demonstrate that, at least with respect to nonharmonized areas, the Court is often willing to uphold Member States' environmental protection measures even where such measures restrict intra-Community trade. The SEA's environmental amendments partially justify this approach. Yet the ECJ arrived at this result even before enactment of the SEA. Furthermore, the TEU's amendments to the Treaty of Rome could lead to further developments in the Community's environmental law jurisprudence. Will the ECJ now be willing to apply its approach in the *ADBHU*, *Danish Bottles*, and *Wallonia Waste* cases to harmonized areas, thereby permitting Member States to enforce stricter environmental standards than the Community?

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107. *Wallonia Waste*, 1992 E.C.R. at 4472. As in the *Danish Bottles* case, the Commission challenged the national law pursuant to Article 169. *Id.* For a more detailed discussion of this case, see Hancher & Sevenster, *supra* note 42, at 351-67 (providing history and analysis of case). See generally von Wilmsowsky, *supra* note 42, at 541-70 (describing case and its implications for Community policy).

108. *Wallonia Waste*, 1992 E.C.R. at 4477. The ECJ found that, although the law was consistent with a Community directive that did not forbid Member States from adopting such prohibitions, it was incompatible with the other directive, which did not contain specific provisions regarding the circumstances in which Member States could refuse waste shipments and therefore forbade Member States from adopting blanket prohibitions like the Belgian law. *Id.* at 4475-77.

109. See *id.* at 4479-80.

110. *Id.* at 4480.

111. *Id.* at 4479 (translation by author).

112. *Id.* at 4480.

113. *Id.*

IV. COMMUNITY DOCTRINE REGARDING STRICTER NATIONAL STANDARDS  
FOR THE ENVIRONMENTA. *The Accepted Wisdom: Once the Community Has Acted, Member States Cannot Impose More Stringent Regulations*

When the Community has not harmonized an area, Member States' adoption of regulations that burden intra-Community trade is constrained only by Article 30. If the subject matter falls within Article 36 or meets the requirements of *Cassis de Dijon*, the national regulation will be valid under Community law.<sup>114</sup> When the Community has passed harmonizing legislation, however, the situation is different. Prior to the adoption of the SEA, Member States were absolutely precluded from imposing more stringent requirements in a harmonized area: unless the Community measure expressly allowed derogations, Member States could only apply the Community standards. This prohibition applied even to national rules motivated by health or safety concerns.<sup>115</sup>

The classic statement of this rule appears in the ECJ's decision in the *Ratti* case. In *Ratti*, the Court held that when the Community has issued a directive under Article 100<sup>116</sup> harmonizing a classification (in this case, the packaging and labeling of chemical solvents), "a Member State may not introduce into its national legislation conditions which are more restrictive than those laid down in the directive in question, or which are even more detailed or in any event different."<sup>117</sup> Italy's attempt to impose stricter labeling requirements, despite Community harmonization of this area, was therefore incompatible with Community law.<sup>118</sup>

The ECJ confirmed this holding in subsequent cases by consistently rejecting the Member States' attempts to impose their own requirements in areas already subject to Community regulation through harmonization measures.<sup>119</sup> The rationale of this approach rests on two concerns. First, the Court feared that any concession to Member States permitting them to set up regulatory structures parallel to those of the Community would hinder the free

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114. For an explanation of these derogations, see *supra* notes 43-45 and accompanying text.

115. See *Ratti*, 1979 E.C.R. at 1644.

116. Prior to adoption of the SEA in 1987, Article 100 provided the legal basis for harmonization measures.

117. *Ratti*, 1979 E.C.R. at 1643.

118. *Id.* at 1646-47.

119. See, e.g., Case 190/87, *Oberkreisdirektor des Kreises Borken v. Handelsniedermerins Moormann BV*, 1988 E.C.R. 4689, 4719-21 (holding German law requiring inspections of poultry meat incompatible with Community directive that harmonized procedures for such inspections); Case 28/84, *Commission v. Germany*, 1985 E.C.R. 3097 [hereinafter *Compound Feedingstuffs*] (holding German law establishing limits for certain substances in compound feedingstuffs incompatible with Community regulation in same arena); Case 35/76, *Simmenthal SpA v. Italian Minister of Finance*, 1976 E.C.R. 1871.

movement of goods within the Community. Second, the ECJ opined that permitting stricter standards would contribute to legal uncertainty and undermine the Treaty's division of powers by subverting the authority of Community institutions (i.e., manufacturers of solvents might choose to comply with national law rather than Community rules).<sup>120</sup> These twin concerns prompted the ECJ to prohibit, without exception, stricter national rules; the rationale for adopting the stricter standards was deemed irrelevant.

#### B. *Reformation of the Accepted Wisdom: Articles 100a(4) and 130t*

The SEA created two exceptions to the prohibition against stricter national rules in harmonized areas. Articles 100a(4) and 130t of the SEA allow Member States to impose stricter rules when they meet certain requirements. The introduction of these two "escape routes" represents a significant change in Community law and demonstrates a willingness to tolerate greater diversity.<sup>121</sup>

The addition of Articles 100a(4) and 130t is analogous to the change in Article 30 jurisprudence that the ECJ articulated eight years earlier in the *Cassis de Dijon*<sup>122</sup> decision. As set forth above, that case and its progeny established that Member States may deviate from Article 30 if they can demonstrate that their measure is (1) "applicable to domestic and imported products without distinction," (2) "necessary in order to satisfy mandatory requirements recognized by Community law," and (3) "proportionate to the aim in view" because it represents "the means which least restricts the free movement of goods."<sup>123</sup> Although the language of Article 100a(4) echoes these three requirements, the following analysis illustrates that its operational effects may be different.

##### 1. *Article 100a(4)*

The Community introduced Article 100a to facilitate completion of the internal market by 1992. The article promotes this goal by allowing a qualified majority rather than unanimity for votes on harmonization measures by the

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120. The ECJ ruled that Germany could not rely on Article 36 to justify a national measure in an area subject to complete harmonization. Such a reliance threatened the division of powers under Community law as well as the free movement of goods. *Compound Feedingstuffs*, 1985 E.C.R. at 3123.

121. Some commentators have dubbed these exceptions an acceptance of a "variable speed Europe." E.g., Wilkinson, *supra* note 16, at 231. One reading of this change is that the Community has reached a point in its development where allowing more structural flexibility will not undermine Community authority. Alternatively, the new exceptions may be a response either to growing resentment among Member States regarding Community authority or to divisions among Member States on issues such as environmental protection. Both viewpoints are probably at work, forming a backdrop to these "escape route" articles.

122. 1979 E.C.R. at 9.

123. *Danish Bottles*, 1988 E.C.R. at 4629.

Council of Ministers.<sup>124</sup> In exchange for this relaxed voting requirement, Article 100a contains three significant qualifications. First, it does not apply to measures relating to fiscal provisions, the free movement of persons, or the rights and interests of employed persons.<sup>125</sup> Second, it requires that harmonization measures regarding health, safety, and environmental or consumer protection "take as a base a high level of protection."<sup>126</sup> Third, and most significantly for purposes of this Article, it allows Member States to impose stricter rules in certain circumstances:

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

The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between member States.<sup>127</sup>

Article 100a(4) thus departs from the rule established in *Ratti* that Member States may not derogate from Community law in harmonized areas. Significantly, Article 100a(4) singles out environmental protection as one of the areas where derogation is allowed. This express inclusion was urged by Germany and Denmark, which feared they would be forced to lower their environmental standards as a result of Community harmonization measures.<sup>128</sup>

#### *a. Debates Surrounding the Scope of Article 100a(4)*

Several disputes have arisen concerning Article 100a(4). The following discussion examines these debates according to the order in which the relevant language appears in the provision.

The first debate concerns whether a Member State must have unsuccessfully opposed the measure from which it seeks to deviate in the Council in order to rely later on Article 100a(4)'s derogation procedure. Although at least one commentator supports this view, arguing that the provision is a tradeoff for allowing measures based on a qualified majority

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124. The Maastricht Treaty subsequently amended Article 100a, replacing qualified majority voting with Article 189b's "co-decision procedure." See *infra* note 175.

125. TEU art. 100a, para. 2.

126. *Id.* art. 100a, para. 3.

127. *Id.* art. 100a, para. 4 (emphasis added).

128. JEAN-VICTOR DE RUYT, *L'ACTE UNIQUE EUROPEEN* 172 (2nd ed. 1989). De Ruyt also points out that Article 100a(4) fills the role formerly played by the Luxembourg Compromise because it gives Member States an avenue for protecting their "vital interests." Unlike the Luxembourg Compromise, however, it does not permit a Member State to block a vote by invoking such interests. *Id.* at 175. The Compromise was an agreement among the Member States to try, "within a reasonable time," to obtain unanimous support for any proposed Community action, otherwise subject to qualified majority voting, that affected a State's "vital interest." WYATT & DASHWOOD, *supra* note 22, at 46.

vote,<sup>129</sup> the more accepted opinion is that such opposition is not required. This latter view relies on the absence of an opposition requirement in the text of the article. Furthermore, it recognizes that the former interpretation would hinder passage of harmonization measures because Member States would be required to oppose any legislation where they anticipated reliance on Article 100a(4).<sup>130</sup>

The second debate centers on whether a subjective or objective perspective should govern the necessity requirement. The wording of the article appears to support a subjective test — a Member State's determination that a measure is necessary is sufficient. However, the ECJ implicitly rejected this view in its *PCP* decision and instead required the Commission to conduct a thorough review of the legal and factual circumstances before confirming the measure.<sup>131</sup> The Advocate General goes even further, suggesting that the burden of proof for demonstrating necessity should lie with the Member State.<sup>132</sup>

The third debate concerns whether the word "apply" in Article 100a(4) allows a Member State to introduce a new national law or merely permits enforcement of an already existing measure. Again, the article's language does not limit Member States to already existing measures.<sup>133</sup> A comparison with the language used in Article 130t, which specifically employs the phrase "maintaining or introducing," nonetheless suggests another view.<sup>134</sup> Relying on this difference, some commentators<sup>135</sup> have argued that Article 100a(4) only covers existing measures.<sup>136</sup> In light of the Community's expressed

129. DE RUYT, *supra* note 128, at 171, 174.

130. WYATT & DASHWOOD, *supra* note 22, at 365; *see also* Han Somsen, *Applying More Protective National Environmental Laws after Harmonization*, 3 EUR. ENVTL. L. REV. 238, 241 (1994) (noting that it would "defy common sense" to require Member States to oppose Community environmental measures in circumstances where doing so would harm both environment and common market).

131. *PCP*, 1994 E.C.R. at 1850.

132. *Id.* at 1834 (Opinion of Advocate General Tesaro). This opinion is discussed in more detail in Part IV.B.1. The Advocate General's role is to provide a nonpartisan analysis of the issues to assist the Court. TEU art. 166.

133. *See* DE RUYT, *supra* note 128, at 171; WYATT & DASHWOOD, *supra* note 22, at 365.

134. *See infra* part IV.B.2.

135. *See, e.g.*, KRÄMER, *supra* note 5, at 27. Mr. Krämer is Head of Legal Matters and Community Law at the Commission's Directorate General responsible for environmental affairs.

136. *See PCP*, 1994 E.C.R. at 1832 (Opinion of Advocate General Tesaro); KRÄMER, *supra* note 19, at 338-39; Ludwig Krämer, *Environmental Protection and Article 30 EEC Treaty*, 30 COMMON MKT. L. REV. 111, 113 & n.11 (1993); *see also* Somsen, *supra* note 130, at 241-42 (characterizing ECJ holding in *PCP* as stating that Article 100a(4) applies only to existing measures); Wilkinson, *supra* note 16, at 223 (characterizing this argument as more "widely-accepted view"). From a policy standpoint, allowing Member States to enact more stringent laws *after* Community law is passed might constitute a greater threat to the supremacy of Community law than permitting Member States to pass more stringent laws *before* Community law is enacted. National legislators could then effectively overrule Community law. In contrast, by pressuring Member States to pass the stricter measures before the passage of the Community legislation, this approach might ultimately help influence the passage of stricter measures on a Community level.

commitment to a high level of environmental protection, resolving ambiguity with respect to environmental matters should allow Member States to pass stricter legislation even after Community measures are in place.

The fourth debate relates to the level of review the Commission should impose on national measures before confirming them. According to a declaration it annexed to the SEA, Denmark views the notification requirement as a mere formality.<sup>137</sup> Under this interpretation, if a measure passes Article 100a's nondiscriminatory/non-arbitrary threshold, the Commission must confirm it.<sup>138</sup> Yet most commentators believe such a result would be contrary to the supremacy of Community law because it would resolve the conflict between Community law and national law in favor of the latter without the intervention of any Community institution.<sup>139</sup> The ECJ's *PCP* decision reflects this same belief in that the Court required the Commission to thoroughly explain its reasons for determining that the requirements of Article 100a had been met.<sup>140</sup>

A final debate concerns whether a Member State may enforce its law after notification to the Commission but before the Commission has issued its confirmation.<sup>141</sup> This issue holds particular importance when a delay occurs in the Commission's review of the measure, as in the *PCP* case. In that situation, sixteen months passed between Germany's notification of its intent to rely on Article 100a(4) and the Commission's decision to confirm the reliance. Moreover, the confirmation came five months after the deadline for transposition of the measure.<sup>142</sup> If such delays could prevent Member State enforcement of the national law in question, they would significantly restrict or possibly eliminate the derogation provided by Article 100a(4). A more rational solution would be to allow the provisional application of such laws until the Commission has come to a decision, but the ECJ did not opt for this

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137. The Danish Government notes that in cases where a Member State is of the opinion that measures adopted under Article 100A do not safeguard higher requirements concerning the working environment, the protection of the environment, or the needs referred to in Article 36, the provisions of Article 100 A(4) *guarantee* that the Member State in question can apply national provisions. Such national provisions fulfill the aforementioned aim and may not entail hidden protectionism. Declaration by the Government of the Kingdom of Denmark on Article 100A (emphasis added); *see also* DE RUYT, *supra* note 128, at 173 (noting the Danish declaration).

138. The nonbinding nature of such declarations, however, means that Denmark would not necessarily be exempted from the notification requirement.

139. *PCP*, 1994 E.C.R. at 1835 (Opinion of Advocate General Tesouro); *see also* WYATT & DASHWOOD, *supra* note 22, at 366 (discussing quantitative restrictions and measures having equivalent effect).

140. *PCP*, 1994 E.C.R. at 1841.

141. A related issue concerns the timing of notification. *See* Somsen, *supra* note 130, at 242.

142. The Commission not only delayed in its decision, but also allowed almost four months to expire before informing Germany that it had received the notification. *See PCP* Communication, *supra* note 77, at 2-4; *see also PCP*, 1994 E.C.R. at 1835 n.8 (Opinion of Advocate General Tesouro) (commenting on passage of time and suggesting that this should not work to disadvantage of Member State). The Advocate General's position here seems ambiguous and somewhat contradictory in light of his disapproval of the notion that confirmation is more than a formality.



solution in its *PCP* decision. Instead, the Court mandated Commission approval before Member States could enforce their stricter measures.<sup>143</sup>

b. *The First Decision Regarding the Scope of Article 100a(4): The PCP Case*

Member States have rarely relied on Article 100a(4). They have made notifications under it only twice since its introduction in 1987: once in 1987 with respect to restrictions on vehicle emissions, and again in 1991 with respect to the marketing and use of the chemical pentachlorophenol ("PCP").<sup>144</sup> Only the latter case reached the stage of formal confirmation by the Commission. France appealed the Commission's decision to the ECJ, thereby affording the Court its first, and to date only, opportunity to interpret the scope of Article 100a(4).<sup>145</sup>

The *PCP* case involved a Community directive that severely restricted the use of PCP and a more stringent German law that effectively banned the chemical, which is dangerous to humans and the environment.<sup>146</sup> In 1989, Germany outlawed concentrations of PCP in manufactured goods exceeding 0.01% of the total composition of the product. Two years later, the Council voted by qualified majority (with Germany opposing) to modify the existing Community directive regulating PCP usage to permit a maximum concentration of 0.1%. The new Community measure established a July 1992 deadline for transposing the directive. In August 1991, Germany notified the Commission that it intended to rely on Article 100a(4) and maintain its banning regulation.<sup>147</sup>

When the Commission sent the notification request to the Member States for their opinions, Greece and Belgium maintained that the level imposed by the Community was appropriate and that the German measure would hinder intra-Community trade. Italy agreed, arguing further that Germany's ban would adversely affect imports of Italian leather with no offsetting environmental benefit. France claimed that Germany had not adequately justified the measure, which would lead to serious trade losses both within the Community and with other nations. Only Denmark supported the measure.<sup>148</sup> In spite of the opposition, the Commission confirmed the request, and France brought an

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143. *PCP*, 1994 E.C.R. at 1849; see also Somsen, *supra* note 130, at 242 (suggesting that imposition of this "standstill obligation" . . . may mean that this part of Article 100a(4) is directly effective").

144. The policies of Germany were at issue in both of these cases.

145. *PCP*, 1994 E.C.R. at 1831 (Opinion of Advocate General Tesauro). France based its action on Article 173 of the Treaty of Rome, which grants the ECJ jurisdiction to hear a Member State's challenge to a Commission decision.

146. PCP is used principally as a wood preservative. Krämer, *supra* note 136, at 125.

147. *PCP*, 1994 E.C.R. at 1831-32 (Opinion of Advocate General Tesauro).

148. *PCP* Communication, *supra* note 77, at 5.

action challenging the Commission's decision.<sup>149</sup>

Because Germany did oppose the Community's modification of the PCP regulation in the Council, and because the German legislation was already in place when the Community legislation came into force, the *PCP* case does not directly address the first and third debates about Article 100a(4).<sup>150</sup> Yet, it squarely raises the other debates and has given both the Commission and the ECJ an opportunity to comment on the scope of Article 100a(4).

In its first of two decisions in this case, the Commission noted that the Community enacted Article 100a(4) to ensure that, when a harmonizing measure is passed, Member States will not be obliged to lower their standards of protection in areas such as the environment.<sup>151</sup> In light of this observation, the Commission concluded that (1) like other exceptions to the uniform application of Community law, this derogation must be interpreted strictly; (2) the German PCP ban was more stringent than the Community directive; (3) PCP was known to be a dangerous chemical; (4) the "major needs" requirement of Article 36 justified the German law; (5) by the terms of the directive, the Community must reconsider the restrictions on PCP in three years; and (6) while the German ban constituted a trade barrier, the measure was not disproportionate to the interest the derogation sought to protect and did not constitute arbitrary discrimination or a disguised restriction on intra-Community trade.<sup>152</sup>

These findings demonstrate that the Commission does not view confirmation or denial of a Member State's request as purely formal. Yet although the Commission insisted that the article be strictly interpreted, the tests in this initial decision were not onerous. In particular, the Commission did not seem to have considered, in finding that the German law was not disproportionate to the ends it envisaged, whether other means might have afforded the same level of protection while impinging less on trade. The Commission also apparently did not consider whether the German standard of 0.01% would afford environmental benefits that the Community limit of 0.1% did not. Its evaluation implicitly took the view that if a Member State makes a *prima facie* case that its law aims at environmental protection, the Commission will confirm its request to derogate from a lower Community standard. While the Commission did not discuss its philosophy concerning Article 100a(4), its analysis suggests that its chief concern was giving effect

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149. *PCP*, 1994 E.C.R. at 1831-32 (Opinion of Advocate General Tesouro). Significant economic and political factors may have been at work as well. The Dutch Association for Nature and the Environment, arguing in support of a community-wide ban on PCP, implied that domestic and economic concerns motivated France's challenge to the Commission's decision. The French company Rhône-Poulenc is the principal European importer of PCP. See Alain Franco, *Une association néerlandaise lance une campagne contre le pentachlorophénol*, LE MONDE, July 6, 1994, at 9.

150. For an explanation of the debates, see *supra* part IV.B.1.a.

151. See *PCP* Communication, *supra* note 77, at 8.

152. *Id.* at 5-7.

to the environmental policies underlying the article.

Advocate General Tesauro read Article 100a(4) in a way much less favorable to the Member State invoking it. Like the Commission, he insisted that the article be strictly interpreted;<sup>153</sup> unlike the Commission in its first decision, however, he applied this principle. He stressed that the Commission's role in reviewing a Member State's application pursuant to this article is fundamental, and not purely formal, because only through obtaining the Commission's confirmation can the Member State be authorized to derogate from the harmonized regulation.<sup>154</sup> Accordingly, Advocate General Tesauro argued that when it reviews a national law for compliance with Article 100a(4), the Commission should apply the same test mandated under Article 36: the measure must be both necessary and proportional.<sup>155</sup> According to Tesauro, this standard is hard to meet. The Member State must not only bear the burden of proof on these points, but must also show that no alternative measure exists that would achieve the end at a lesser cost to the free circulation of goods.<sup>156</sup> He thus concurred with France that Germany demonstrated neither the necessity nor the proportionality of its law, and he found that the Commission had provided inadequate reasons for its decision.<sup>157</sup> In the Advocate General's view, the Commission must do more than acknowledge that a national law imposes stricter standards; it must further state why the stricter standards are both necessary and proportional.<sup>158</sup>

The ECJ did not reach the issue of whether the German law met the requirements of Article 100a(4) because it, like the Advocate General, concluded that the Commission had not given adequate reasons. While it did not address the case on the merits, the Court did provide an interpretation of Article 100a(4) to the extent needed to resolve this procedural question. The Court began by examining the structure of the Treaty of Rome itself. This structure, the ECJ emphasized, aims to create a common market through the elimination of obstacles to intra-Community trade.<sup>159</sup> Accordingly, Article 100a(4) permits derogation from this fundamental goal only when the Commission finds that the conditions set forth in the article are met.<sup>160</sup> The Court seemed to assume that only existing laws may benefit from this derogation<sup>161</sup> and stated specifically that the Member State may not enforce

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153. *PCP*, 1994 E.C.R. at 1833 (Opinion of Advocate General Tesauro).

154. *Id.* The Advocate General thus seems to be implying, contrary to the interpretation of the Commission's decision offered above, that the Commission's review of the German law was purely formal.

155. *Id.* at 1834.

156. *Id.*

157. *Id.* at 1836.

158. *Id.* at 1838.

159. *Id.* at 1841, 1847.

160. *Id.* at 1848.

161. *Id.* (noting that existing laws may benefit "where . . . a Member State intends, as in this case, to *continue* to apply national provisions derogating from the measure") (emphasis added).

its law without the Commission's approval.<sup>162</sup> The Commission should not give such approval, moreover, before it thoroughly analyzes the national law and the rationale for derogation. Thus, the ECJ held that the Commission erred in determining that the German regulation complied with the requirements of Article 100a(4) without explaining why, in law and fact, it had met these requirements.<sup>163</sup> The ECJ consequently annulled the Commission's decision.

The Commission responded to the ECJ's decision by issuing another of its own that analyzed in detail the uses of PCP and the types of health hazards associated with it.<sup>164</sup> The Commission explained that PCP presented a "special health problem for Germany because of its past as a major producer and user of this substance," thereby posing hazards to both humans and the aquatic environment.<sup>165</sup> The Commission observed further that the German measure applied equally to domestic and nondomestic products containing PCP and hence did not represent a disguised restriction on trade between the Member States. Germany had no "special interest in the development, production of [sic] exportation of substitutes for PCP," and there was little trade in PCP-containing products between Germany and the other Member States.<sup>166</sup> Based on these factors, the Commission concluded that the measure met the requirements of Article 100a(4). Because neither France nor any other Member State challenged this decision within the requisite time period,<sup>167</sup> the German measure may now be enforced.

The Court's approach in the *PCP* case is noteworthy precisely because it is not novel. Although *PCP* was the first case involving Article 100a(4) and presented the highly topical issue of how to balance free trade with concern for the environment, the ECJ chose to avoid addressing this issue and opted instead for a strictly procedural approach. Such an approach is not entirely surprising given that this was the first Article 100a(4) case and that the Commission decision was quite brief. An ECJ decision based on the Commission's second, more detailed opinion would give a better sense of how the Court views this derogating provision and how likely it would be to uphold Member State reliance on the article. Nevertheless, even given the limited scope of its opinion, the ECJ has provided some insight into its general approach to Article 100a(4). The Court's decision not to mention the express inclusion of the phrase "environmental protection" in Article 100a(4) or other Treaty language that underscores the Community's commitment to

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162. *Id.* at 1849. The Court's summary of the facts of the case noted that Germany had voted against the directive in the Council. Arguably, this observation is evidence that the ECJ requires such action before a Member State may rely on Article 100a. *Id.* at 1845.

163. *Id.* at 1850.

164. Commission Decision of 14 September 1994 Concerning the Prohibition of PCP Notified by the Federal Republic of Germany, 1994 O.J. (L 316) 43, 44-45.

165. *Id.* at 45.

166. *Id.* at 47-48.

167. France (or any other Member State) had two months after publication of the decision to bring another action before the Court. *See* TEU art. 173.

environmental protection (or its own jurisprudence to that effect) and instead to focus on free trade concerns is significant. Rather than recognizing that the type of legislation in the *PCP* case represents a vastly different situation from conflicts over trade, the ECJ apparently treated the case like yet another garden-variety conflict over the free movement of goods.<sup>168</sup> From this perspective, the Court had no trouble deciding that Article 100a(4), like other derogating provisions, requires strict interpretation.

At the very least, the Court's *PCP* decision represents a missed opportunity: a chance for the ECJ to instruct the Commission and the national courts on how to balance the competing objectives of free trade and environmental protection. While the Commission's second decision does provide such instruction, the ECJ may not adopt the same approach. Furthermore, to the extent that the *PCP* decision may represent how the Court would weigh the competing ideals of free trade and environmental protection in harmonized areas, the decision is troubling.

The *PCP* opinion appears to be a step backward from the ECJ's decisions in *ADBHU*, *Danish Bottles*, and *Wallonia Waste*. In those cases, the Court resolved conflicts between protecting the environment and preserving free trade in favor of the environment. The *PCP* decision moves in the other direction, subordinating the Community's environmental objectives to the preservation of free trade. Indeed, the primary concern of both the ECJ and the Advocate General was to ensure free trade within the Community.<sup>169</sup>

The balance implicitly struck between trade and environment would curtail a Member State's ability to pursue on its own initiative the goals that the Community has committed itself to accomplish both internally and internationally. Furthermore, the very exercise of balancing these two competing objectives is unnecessary, and perhaps even unwarranted, because the Community has already established this balance by creating Article 100a(4). The tradeoff for allowing Community measures adopted by qualified majority voting to impose lower environmental standards was that Member States would have the possibility to "opt out" of the harmonization program. Consequently, if a Member State meets the requirements of Article 100a(4), no further balancing of environmental and trade objectives is necessary.

While the *PCP* case is one of the few instances in which a Member State has relied on Article 100a(4), it is not likely to be the last. New Member States whose existing environmental legislation is stricter than the Community's standards have acceded to the Community.<sup>170</sup> The EEA has come into being and includes states that value high levels of environmental protection; Community law will apply to these states as well.<sup>171</sup> The stage

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168. Instead, the German law may impose a competitive disadvantage on German manufacturers by requiring them to find replacements for PCP in their products.

169. See *PCP*, 1994 E.C.R. at 1847-48; *id.* at 1834 (Opinion of Advocate General Tesaro).

170. See Hoyer, *supra* note 12, at 3.

171. *Id.* at 2-3.

is thus set for the regular invocation of Article 100a(4). If attempts to rely on Article 100a(4) are questioned, the ECJ may have occasion to revisit its decision in the *PCP* case, this time addressing the underlying issue of whether the German measure meets the requirements of Article 100a(4). At the very least, the Commission and national courts now face the tasks of applying the *PCP* decision in other cases and resolving the questions that it leaves unanswered.

## 2. Article 130t

Article 130t provides the other route for enforcement of more stringent national laws. It appears in Title XVI, which the SEA added to the Treaty of Rome specifically to address environmental issues. Article 130t provides the Community with its first explicit legal basis for actions to protect the environment. As modified by the Maastricht Treaty, Article 130t states that "[t]he protective measures adopted in common pursuant to Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty. *Such measures must be compatible with this Treaty. They shall be notified to the Commission.*"<sup>172</sup> Although the TEU's imposition of the notice requirement made Article 130t more consistent with Article 100a(4), Article 130t provides Member States with greater room to enforce their national laws than Article 100a(4). Under Article 130t, Member States may not only maintain existing national laws, but they may also introduce new laws — a right they might not enjoy under Article 100a(4). In addition, unlike Article 100a(4), Article 130t does not require that the Commission approve the measure; it only requires that the Member State notify the Commission.<sup>173</sup> Finally, because Article 130t does not mention Article 36, Advocate General Tesauro's argument in the *PCP* case, that the Article 36 requirement of necessity would apply, lacks force.

The ECJ has not yet addressed these issues. Article 130 cases have concerned only the question of proper legal basis, whether Article 130s should serve as the legal basis for a particular directive rather than some other article such as Article 100a.<sup>174</sup> The legal basis affects Member States' ability to enforce stricter standards because, although Article 130t imposes an easier standard than Article 100a(4), a Member State can invoke Article 130t only if

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172. TEU art. 130t (emphasis in original). Article 130s describes the legislative procedures that the institutions must follow when pursuing the environmental protection objectives outlined in Article 130r. TEU art. 130s.

173. The ECJ may very well decide, however, that Commission review is implicit in such a notification requirement. At any rate, the Commission could always challenge such a measure under Article 169.

174. See, e.g., Case C-155/91, *Commission v. Council*, 1993 E.C.R. 963, 964-69 [hereinafter *Waste Directive*]; Case C-300/89, *Commission (Parliament Intervening) v. Council*, 1991 E.C.R. 2867 [hereinafter *Titanium Dioxide*].

the relevant Community measure is based on Article 130s.

Article 130s cases involving proper legal basis arose because, under the SEA, the legislative procedures differed significantly for Article 130s and Article 100a measures.<sup>175</sup> The difference in these procedures prompted disputes between the Council, which favored the use of Article 130s, and the Commission and European Parliament, which favored the use of Article 100a because voting under Article 100a was by qualified majority and Parliament had a greater role in the legislative process.<sup>176</sup> Although these decisions do not specify which national laws benefit from the derogation permitted by Article 130t, they do indicate what type of Community legislation should rest on Article 130s rather than on Article 100a.

The ECJ recently addressed the issue of legal basis in the *Waste Directive* case.<sup>177</sup> In that case, the Council based a waste directive on Article 130s and the Commission filed an application for annulment on the grounds that the Council should have based it on Article 100a.<sup>178</sup> The Court rejected the Commission's application after determining that the directive's principal objective was environmental protection.<sup>179</sup> While acknowledging that some provisions of the directive did "have an impact on the functioning of the internal market,"<sup>180</sup> the ECJ held that

the sole fact that the establishment or the functioning of the internal market is concerned is not sufficient for article 100a EEC to apply. Indeed, as th[is] court has consistently held, the legal basis of article 100a is not justified where harmonization of the conditions of the market within the community are only ancillary to the act to be adopted.<sup>181</sup>

Because Article 130t requires less than Article 100a, Member States who

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175. Under the SEA, 130s measures required a unanimous vote by the Council "on a proposal from the Commission after consultation with the European Parliament and the Economic and Social Committee." SEA art. 25. Conversely, 100a measures required qualified majority voting by the Council "on a proposal from the Commission in cooperation with the European Parliament and after consultation with the Economic and Social Committee." SEA art. 18. The TEU retains this difference in voting procedures, albeit to a much lesser extent. Most 130s measures are now subject to the procedures described in Article 189c (the "cooperation" procedure), although some still require unanimity and others are subject to the procedures described in Article 189b (the "co-decision" procedure). Article 189b procedures govern all 100a measures. While 189b and 189c procedures differ slightly, both give Parliament a greater role in drafting legislation than the consultation procedure does. TEU arts. 130s, 189b, 189c.

176. This preference for different legal bases with their different voting requirements reflects the power struggle among the Council, Commission, and Parliament in creating Community legislation. The differing preferences also reflect the orientations of the institutions, as the more nationalist Council prefers unanimous voting (which preserves Member States' veto power), while the more supranationalist Commission prefers qualified majority voting (which eliminates veto power).

177. 1993 E.C.R. at 963. The ECJ recently confirmed this result in Case C-187/93, *Parliament v. Council*, 1994 E.C.R. 2857, 2882.

178. *Waste Directive*, 1993 E.C.R. at 965.

179. *Id.* at 968-69.

180. *Id.* at 968 (translation by author).

181. *Id.* (translation by author).

seek to enforce more stringent environmental measures should pressure the Commission and Council to base relevant Community legislation on Article 130s.<sup>182</sup> Taking a cue from the ECJ's decision in the *Waste Directive* case, Member States should argue that Article 130s is the appropriate legal basis when environmental protection is the "principal objective" of the legislation.<sup>183</sup> Moreover, because the voting requirements of these two articles are more similar under the TEU, the choice of legal basis matters less to the balance of power among Community institutions. The Commission and the European Parliament will therefore have less reason to oppose this choice of legal basis.<sup>184</sup>

C. *A Different Reformation: Cases Finding No Harmonization, Thereby Allowing Higher Standards*

Alternatively, a Member State may maintain its stricter environmental standards by persuading the national court considering the issue or the ECJ that Community legislation has not harmonized the area covered by the national legislation. In this way, the Member State could avoid the issue of whether it has met the requirements of Articles 100a(4) or 130t and instead need only prove that it has met the *Cassis de Dijon* requirements for derogating from Article 30. This possibility exists because virtually no Community legislation explicitly states, "This enactment harmonizes area X." Instead, Member States and courts usually are responsible for determining whether the legislation has left any space for national legislation. When determining the scope of legislation, they must look to its legal basis, its language, its objectives, and the comprehensiveness of its rules.<sup>185</sup> Resolution of this question of scope is often difficult, however, and creates an opportunity for result-oriented approaches.

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182. This difference and the incentive it creates may mean that the ECJ will adopt a similar interpretation of both provisions.

183. In the case of existing Article 100a legislation, the Member State might consider arguing that the legislation is invalid because it should have been based on Article 130t. However, the novelty of such an argument in this context and the vagueness of the "principle objective" test cast doubt upon the likely success of this tactic. An analogous argument appears in Case C-62/88, *Greece v. Council*, 1990 E.C.R. 1545, 1547-51, in which Greece unsuccessfully argued that Article 130s, and not Article 113, was the proper legal basis for a measure establishing the maximum allowable level of radioactive contamination for agricultural products coming from third countries.

184. Indeed, the European Parliament, in its traditional role as champion of high environmental standards within the Community, may be more willing to promote the use of Article 130t if it believes that a higher level of environmental protection will result. See Judge, *supra* note 52, at 209-10.

185. American courts analyze preemption questions similarly. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 78-79 (1941) (Stone, J., dissenting) ("Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution. To discover the boundaries we look to the federal statute itself, read in the light of its constitutional setting and its legislative history.").



The ECJ's decision in the *Enichem* case exemplifies such an approach.<sup>186</sup> In that case, the Court addressed the scope of harmonization imposed by a Community waste disposal directive. The applicants, producers of plastic containers, wrappings, and bags, challenged a decision by the mayor of the municipality prohibiting the sale or use of plastic bags and other nonbiodegradable containers.<sup>187</sup> The applicants argued that the directive had harmonized the area, precluding the municipality from enforcing its law.<sup>188</sup> However, the ECJ rejected that argument and found instead that the national law did not encroach on any Community competence because it concerned the sale and use of plastic bags, not waste disposal.<sup>189</sup>

The *Enichem* court noted that the Community directive did not prohibit Member States "from imposing such prohibitions in order to protect the environment," and that "any different interpretation would conflict with its objectives."<sup>190</sup> This condition revealed that "the directive is intended *inter alia* to encourage national measures likely to prevent the production of waste. Limitation or prohibition of the sale or use of products such as non-biodegradable containers is conducive to the attainment of that objective."<sup>191</sup> Adopting this "purpose-oriented" approach permitted the Court to read the directive narrowly and uphold the stricter national law.

The ECJ was nevertheless unwilling to apply its *Enichem* approach one year later in the *Scottish Grouse* case.<sup>192</sup> It concluded that a Community directive aimed at protecting wild birds had harmonized the area and prevented the Netherlands from enforcing a law prohibiting the sale of wild birds even though, as in *Enichem*, the stricter national law had the same underlying purpose as the directive. Yet the ECJ based its finding on the fact that the directive protected only migratory species and endangered birds while the bird in question, the red grouse, was "neither a migratory species nor a seriously endangered species."<sup>193</sup> The Dutch law therefore did not fall within the directive's safeguard provision allowing Member States to adopt stricter measures.<sup>194</sup> Consequently, one interpretation of *Scottish Grouse* is not that the Court has modified the approach it used in *Enichem*, but rather that the specific facts in the later case constrained its interpretation of the Community legislation.

The ECJ could have clarified its approach on these issues in *Regina v. London Boroughs Transport Committee ex parte Freight Transport Association*

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186. Case 380/87, *Enichem Base v. Comune di Cinisello Balsamo*, 1989 E.C.R. 2491.

187. *Id.* at 2513.

188. *Id.* at 2513-14.

189. *Id.* at 2515.

190. *Id.*

191. *Id.*

192. Case C-169/89, *Criminal Proceedings Against Gourmetherie Van den Burg*, 1990 E.C.R. 2143 [hereinafter *Scottish Grouse*].

193. *Id.* at 2164.

194. *Id.* at 2163-64.

*Ltd.*<sup>195</sup> Unfortunately, the case never reached the Court because the House of Lords denied the request for an Article 177 reference on the grounds of the *acte claire* doctrine.<sup>196</sup> *London Boroughs Transport* involved a challenge to a noise control ordinance issued by the London transport authorities that banned the nighttime circulation of heavy-goods vehicles in residential London streets. Only vehicles equipped with an air brake noise suppressor were exempt. A haulers' association brought the action based in part on Community law, arguing that the ordinance's imposition of a noise suppressor requirement violated Community directive 71/320 on vehicle brakes<sup>197</sup> and directive 70/157 on sound levels.<sup>198</sup>

While the haulers' association succeeded in the Divisional Court<sup>199</sup> and Court of Appeals,<sup>200</sup> the House of Lords rejected this argument.<sup>201</sup> Unlike the lower courts, the House of Lords concluded that the Community had not harmonized the area covered by the London noise ordinance. Lord Templeman explained that the brake directive harmonized only the technical and safety requirements for brakes, not their sound level, while the sound level directive harmonized sound levels for vehicles and exhaust systems, but not for air brakes. Moreover, the local noise ordinance aimed to protect the environment and to regulate traffic rather than vehicles.<sup>202</sup> Lord Templeman reached this result after reviewing Articles 100 and 130r(4) and concluded that

[t]he attainment of the Community object of preserving, protecting and improving the quality of the environment requires action at the level of individual member-States. A vehicle which complies with all the weight, size, sound level and other technical requirements and standards of directives issued by the Council pursuant to Article 100 and is therefore entitled to be used in every member-State throughout the Community is not thereby entitled to be driven on every road, on every day, at every hour throughout the Community.<sup>203</sup>

He also cited data on noise pollution from the Commission's Green Paper on

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195. House of Lords, U.K., 1 C.M.L.R. 5 (1992).

196. For an explanation of the *acte claire* doctrine, see Case 283/81, Srl C.I.L.F.I.T. & Lanificio di Gavardo SpA v. Ministry of Health, 1982 E.C.R. 3415, 3435-37 [hereinafter *C.I.L.F.I.T.*] (Opinion of Advocate General Capotorti). In that case, the ECJ interpreted paragraph three of Article 177, which states that Member States' courts of last resort "shall" refer questions of Community law to the ECJ, see TEU art. 177. The Court in *C.I.L.F.I.T.* read this provision as imposing no duty to refer when "the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved." 1982 E.C.R. at 3430.

197. Council Directive 71/320, 1971 O.J. (L 202) 37, 37.

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

199. Regina v. London Boroughs Transp. Comm. *ex parte* Freight Transp. Ass'n Ltd., 1 C.M.L.R. 229 (Q.B. Div'l Court 1990) (U.K.).

200. Regina v. London Boroughs Transp. Comm. *ex parte* Freight Transp. Ass'n Ltd., 3 C.M.L.R. 495 (C.A. 1990) (U.K.).

201. 1 C.M.L.R. at 5 (1992).

202. *Id.* at 14-15.

203. *Id.* at 16. Judge Krämer has drawn a similar distinction between Community competence for setting technical standards and Member State competence for regulating the use of goods meeting those standards. Krämer, *supra* note 136, at 114.

*The Urban Environment*<sup>204</sup> and determined that the data supported the London noise ordinance, which he held to be consistent with Article 130r.<sup>205</sup>

Lord Templeman's rejection of the applicant's request for an Article 177 reference was consistent with his resolution of the harmonization question:

Since the Court of Appeal did not appreciate the fundamental distinction between the control of vehicles and the regulation of local traffic I do not attach significance to their decision on Community law. In my opinion it is clear that the Order of 1985 and condition 11 [the London ordinance] are concerned solely with the regulation of local traffic. No plausible grounds have been advanced for a reference to the European Court of Justice.<sup>206</sup>

While Lord Templeman's approach to the harmonization issue is a questionable application of the *acte claire* doctrine,<sup>207</sup> it does implicitly create another means for allowing stricter national laws. This approach differs from the derogations provided by Articles 100a(4) and 130t in that it depends on a finding that the area in question has not been harmonized. Thus, analytically it belongs within the framework of Articles 30 and 36 and *Cassis de Dijon*. Indeed, the measure still must be analyzed under that framework even after a finding of no harmonization has been made. Nevertheless, provided that the measure meets the requirements of either Article 36 or *Cassis de Dijon*, the effect of this approach is somewhat similar to that of Articles 100a(4) and 130t because it allows the stricter national law to remain in force.

#### V. THE THEORETICAL ARGUMENT FOR PERMITTING HIGHER NATIONAL ENVIRONMENTAL STANDARDS

As set forth above, the Community's commitment to environmental protection has led it to amend the Treaty of Rome, adopt environmental protection measures, and, on most occasions, interpret Community law in a way that furthers this commitment. Authorizing Member States to impose stricter environmental standards is not only consistent with this commitment, but also crucial to its attainment. Several reasons support this conclusion. First, higher standards will improve environmental protection in Member States that opt for them. Next, the availability of this derogation mechanism should make passage of Community environmental measures easier by minimizing opposition from States that support stricter measures, and therefore should

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204. Communication from the Commission to the Council and Parliament: Green Paper on the Urban Environment, COM(90)218. This paper reports on problems faced in urban areas throughout the Community, including noise and air pollution, and suggests various solutions.

205. 1 C.M.L.R. at 16-19 (1992).

206. *Id.* at 21.

207. The application is questionable because the doctrine is meant to apply only when resolution of the Community law question is "so obvious as to leave no scope for any reasonable doubt." *C.I.L.F.I.T.*, 1982 E.C.R. at 3430. Moreover, the ECJ stressed that before the national court reaches this determination it must be convinced that the matter would be equally obvious to the courts of the other Member States and the ECJ. *Id.*

improve protection on a Community level. Finally, States that have imposed stricter measures may indirectly contribute to the adoption of higher standards on a Community-wide basis by facilitating the compilation of statistics about the costs and benefits of such measures and by providing an example of a feasible level of protection. In this manner, the Community can eventually adopt standards originating on the national level and thereby maximize environmental protection in the long run.

This approach is consistent with the objectives set forth in Article 130r(1) because it protects the quality of the environment and human health at an even higher standard than the Community and therefore reflects a more "prudent and rational utilization of natural resources."<sup>208</sup> It also fulfills the Community's goal of "aim[ing] at a high level of protection" while still "taking into account the diversity of situations in the various regions of the Community."<sup>209</sup> Moreover, national measures that impose more stringent environmental standards would represent a valid application of the precautionary principle and could constitute application of the "rectification of pollution at source" or "polluter pays" principles.

The principles of subsidiarity and shared responsibility, which the TEU emphasizes, also support stricter national laws. The environment is an area in which the Community shares its competence with Member States. Based on the subsidiarity principle, however, Community action is limited to areas in which the Member States cannot sufficiently achieve the proposed action. Environmental action constitutes such an area, which "by reason of the scale or effects of the proposed action [is] better achieved by the community."<sup>210</sup> This structure contemplates action on both the Member State and Community levels, depending on which would be more effective. When combined with the Community's environmental objectives, application of this principle of stricter national laws should maximize environmental protection by promoting the most comprehensive and effective regulation of the environment.<sup>211</sup>

The primary objection to permitting Member States to enforce their stricter

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208. TEU art. 130r(1).

209. TEU art. 130r(2). The contrary argument is that this provision is meant to ensure Community rather than Member State action at the highest level. However, this argument ignores the fact that the provision employs the phrase "Community policy," a phrase that incorporates actions on both a Community and Member State level, and not "Community legislation" or "Community action," which would denote action only on the Community level. Consequently, the response to the argument is that permitting Member States to enforce their stricter standards is part of "Community policy" and hence complies with Article 130.

210. TEU art. 3b.

211. See Krämer, *supra* note 136, at 114-15, 142-43; cf. Colin Hines, *The Green View on Subsidiarity*, FIN. TIMES, Sept. 16, 1992, at 15 (arguing that "[g]reen subsidiarity" would be defined as confining EC intervention to those areas where it will be more effective than national action in ensuring maximum protection of the environment"). See generally Koen Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 FORDHAM INT'L L.J. 846 (1994) (asserting that principle of subsidiarity does not threaten level of environmental protection in Community).

standards on a national level is concern that these standards would conflict with the fundamental principle of the free movement of goods.<sup>212</sup> The only response to this objection is to acknowledge that allowing Member States to enforce stricter environmental measures would indeed necessarily affect free trade in the Community. Accepting such an approach therefore means accepting environmental protection as an "essential objective" of the Community, an objective that will, provided certain conditions are met, limit the fundamental Community objective of free trade. As detailed in Part III, the SEA, TEU, the ECJ, and other Community institutions themselves actually urge this approach. Nevertheless, stricter national laws in the environmental sphere would not necessarily always prevail over free trade concerns; this approach simply argues that where the requirements of nondiscrimination and proportionality are met,<sup>213</sup> permitting Member States to enforce environmental legislation furthers the Community's goals and is consistent with Community law.

Another objection is that this approach would hinder rather than promote the adoption of higher standards because it would relieve the pressure on Member States favoring stricter standards to champion them on a Community level. According to this position, forbidding derogations from Community standards would place a greater burden on Member States to press Community institutions to adopt the stricter measures.

This argument has two weaknesses. First, it erroneously assumes that Member States view environmental problems from a national perspective — "as long as we can enforce the standards we want in our country, we are not concerned about the standards enforced in neighboring countries." Environmental problems, however, are classically non-nationalist. They typically have "spillover" effects in other countries that demand solution on a regional, or even global, basis. Enforcement of high standards in one country hence does not guarantee that the level of environmental protection will be higher even in that country. Instead, effective protection often requires that neighboring countries adopt the same measures.<sup>214</sup>

Thus, Member States that favor high environmental standards will not be satisfied with enforcing such standards only on a national level. These States will tolerate lax Community standards as an interim measure, but they will still press for the adoption of their higher standards on a Community level. In

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212. See, e.g., *PCP*, 1994 E.C.R. at 1834 (Opinion of Advocate General Tesauro).

213. See *Wallonia Waste*, 1992 E.C.R. at 4479-80 (citing these two requirements but finding national law consistent although it failed nondiscrimination test, because of special environmental risk posed). Other environmental cases demonstrate that meeting the proportionality test is not an insurmountable obstacle. See, e.g., *Danish Bottles*, 1988 E.C.R. at 4630-31 (finding test met as to part of law but not as to other part of law); *ADBHU*, 1985 E.C.R. at 549.

214. The protection of water quality is an appropriate example. Unless a body of water is wholly within one country, with no groundwater percolation from other countries, one country's enforcement of high standards will be undermined if countries contiguous to the water do not employ similarly stringent measures.

addition, because adopting higher environmental standards typically results in higher costs, a Member State that adopts such standards will want other Member States to abide by the same rules so that it suffers no competitive disadvantage. This economic rationale, together with Member States' interest in minimizing spillover effects from lax environmental standards in neighboring countries, ensures that Member States will continue to pressure the Community to adopt stricter standards.

The argument's second weakness is its failure to consider the difficulty of achieving a Community-wide consensus on environmental measures. Because EC nations do not desire the same level of protection and differ in their ability to maintain a given level of protection, some Member States will continue to favor stricter standards than other Member States. To enact Community environmental legislation despite this diversity of opinions, Member States must make compromises; arguing that a Member State favoring a strict standard must hold out for that standard at any cost will not solve the problem. Were a Member State to hold out, needed environmental legislation might never be passed, thereby permitting further deterioration in the environment. Indeed, such concerns were the very impetus for introducing Article 100a with its qualified majority voting requirement and the possibility for derogations under Article 100a(4).

A final justification for ensuring the ability of Member States to enforce stricter environmental measures arises not from Member States' imposition of higher standards than the Community, but rather from Member States' failure to transpose or enforce Community environmental standards.<sup>215</sup> As the head of the legal service in the Commission's environmental division has observed, "[t]he complete implementation and application in practice of the 200 or so Directives and Regulations passed by the Community on environmental matters is a problem in all Member States except Denmark."<sup>216</sup> This failure to implement Community law is a significant obstacle to the achievement of the Community's environmental objectives and has led the Commission to commence a number of cases against Member States.<sup>217</sup> Not all infractions will be redressed, however, which contributes to a perception that Member States can ignore Community environmental policy with impunity.<sup>218</sup> The

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215. KRÄMER, *supra* note 5, at 59-60; *see also* Eleventh Annual Report to the European Parliament on Monitoring the Application of Community Law, 1993 O.J. (C 154) 42-51 (listing numerous environmental directives that have not been transposed into national law, are incorrectly transposed, or are erroneously applied by Member States); Fiona Gaskin, *The Implementation of EC Environmental Law*, 2 REV. EUR. COMMUNITY & INT'L ENVTL. L. 335, 338 (1993) (tabulating complaints concerning noncompliance or incorrect implementation).

216. KRÄMER, *supra* note 5, at 59-60.

217. *Id.* Such cases include Case 134/86, *Commission v. Belgium*, 1987 E.C.R. 2415; Cases 96, 97/81, *Commission v. The Netherlands*, 1982 E.C.R. 1791 and 1819; Joined Cases 30 to 41/81, 1981 *Commission v. Italy*, E.C.R. 3379.

218. KRÄMER, *supra* note 5, at 59 ("Nothing discredits a policy more than the introduction of rules that are not observed.").

continued recession in Europe accentuates this problem as environmental measures, and their attendant costs, could be seen as unaffordable luxuries under current economic conditions.

In light of these concerns, Member States should not be prevented from enforcing stricter environmental standards. Such enforcement both is consistent with and furthers underlying Community policies. Moreover, unlike the typical case in which a Member State seeks to enforce different rules than the Community in order to benefit local industries,<sup>219</sup> environmental protection measures generally do not confer competitive advantages on that particular nation's industries.<sup>220</sup> To the contrary, stricter environmental standards are likely to impose competitive disadvantages because firms will incur costs in complying with the measures that make them less competitive with firms in Member States that do not have to incur those costs.

#### VI. PERMITTING MEMBER STATES TO IMPOSE STRICTER REQUIREMENTS THAN COMMUNITY ENVIRONMENTAL STANDARDS

##### A. *Interpreting the Scope of Articles 100a(4) and 130t in Light of the Community's Commitment to Environmental Protection*

As outlined above, the derogations provided by Articles 100a(4) and 130t give rise to several questions about the scope of these articles. Resolution of these questions will significantly affect the ability of Member States to rely on the articles to enforce their stricter standards. This Article suggests resolving these questions in the environmental sphere to maximize Member States' ability to derogate from Community-wide standards. This approach is consistent with, and perhaps mandated by, the repeated expressions in the TEU of the Community's commitment to a high level of environmental protection. Thus, when the scope of the derogations provided by Articles 100a(4) and 130t is uncertain, the Community's strong commitment to the goal of maximum environmental protection should guide resolution of the debate.

##### B. *The Corollary: A Presumption Against Finding Harmonization*

The corollary to a rule favoring a broad application of Articles 100a(4) and 130t is a rule stating that when the scope of an area's harmonization is ambiguous, the Community should resolve that doubt in light of its

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219. In many Article 30 cases, Member States have attempted to impose technical standards to give a competitive advantage to domestic products at the expense of foreign goods. *See, e.g.*, Case 174/82 *Officier van Justitie v. Sandoz BV*, 1983 E.C.R. 2445; *Dassonville*, 1974 E.C.R. at 837.

220. One could, of course, argue that greater environmental cleanliness confers the competitive advantages of benefiting industries such as tourism and recycling and benefiting those residents who prefer cleaner environments despite the higher costs. In general, however, the imposition of higher national standards will impose net economic costs on the implementing Member State.

commitment to a high level of environmental protection. If the Community were to apply such a rule, Member States would not need to comply with the requirements in Articles 100a(4) and 130t, and more stringent national measures would be permissible. Indeed, the only inquiry would be whether the national measure violated Article 30. Where Community legislation is vague about the scope of a minimum standard, the presumption should be that the legislation creates a minimum standard from which Member States may freely derogate in order to enact more protective measures.<sup>221</sup>

The treatment of harmonization in *Enichem* and *London Boroughs Transit* is consistent with this proposed rule. Furthermore, *London Boroughs Transit's* resolution of the Article 177 quandary, although criticized as a misapplication of the ECJ's *C.I.L.F.I.T.* ruling, is an application of the same anti-harmonization principles. However, at least one scholar has criticized this approach on the grounds that it inappropriately relies on Article 130r rather than Article 100, which is the legal basis of the directive in question.<sup>222</sup> In light of the need to take the Community's environmental commitment into account when interpreting Community law, this criticism is unpersuasive.

Because harmonization questions are often difficult to resolve, they provide an opportunity for result-oriented approaches. As one scholar has commented, "this process in a sense involves discovering the intent of the Community legislator, which immediately puts one on notice that it may be a process of some sophistication, not to say sleight of hand."<sup>223</sup> Indeed, after the ECJ's narrow reading of Article 100a in the *PCP* case, courts in other Member States have great incentive to follow the United Kingdom's lead and conclude that an area has not been harmonized, that Article 100a(4)'s requirements are therefore not relevant, and that no reference to the ECJ is warranted. In this manner, the harmonization issue could create a back door allowing Member States to escape the effect of the Court's overly-restrictive interpretation of Article 100a's requirements in the *PCP* case. Because such a result would threaten the Community's legal structure by limiting the possibility of judicial review, the better solution is for the national court to allow the Article 177 reference and for the ECJ to confirm this approach to harmonization issues in the environmental sphere. This result would ensure that the Community's environmental protection objectives guide the resolution of harmonization questions and that the structure of the Community's legal order

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221. This rule would resemble the rule in American jurisprudence of a "presumption against preemption" in areas traditionally regulated by the states. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (stating that federal law does not supersede traditional state power unless pursuant to clear and manifest purpose of Congress). This presumption includes such areas as health, education, and the environment. In American law, concurrent regulation of such areas at the federal and state level is therefore the norm; exclusive federal regulation is the exception. Although such a rule goes beyond what is suggested here, it serves as a useful guide to the structures that have been found to work elsewhere.

222. Stephen Weatherill, *Regulating the Internal Market: Result Orientation in the House of Lords*, EUR. L. REV. 299, 315-16 (1992).

223. *Id.* at 308.



remains intact.

C. *The Heresy: An Exception Permitting Member States to Impose Stricter Environmental Standards*

Articles 130t and 100a(4) are the only explicit exceptions to the rule that Member States cannot adopt more stringent measures in areas in which the Community has already acted. Member States can rely on these exceptions only when one of those articles is the legal basis of Community legislation and the Member State has complied with the requirements of those articles. When the Community bases its legislation on other Treaty articles or when the legislation does not meet the conditions of Articles 100a(4) or 130t, then exclusive harmonization exists and Member States face the general prohibition of more stringent national measures.

Creating an additional exception to the general prohibition would close this gap. Such an exception would allow Member States to adopt or maintain stricter national laws in a harmonized area even when they may not rely on Article 100a(4) or 130t, provided that the stricter laws aim at environmental protection.<sup>224</sup> This argument relies on the reasoning that justifies a broad interpretation of Articles 100a(4) and 130t and a presumption against harmonization. That is, the Community's commitment to environmental protection justifies an interpretation of Community law that allows the enforcement of stricter environmental measures. The environment retains its "special status" even when Community legislation is based on provisions other than Articles 100a and 130s. Therefore, the same derogations arguably should apply when legislation relies on these other provisions. A Member State should not be precluded from enforcing a national law that would better protect the environment simply because the Community legislation is based on a different provision.<sup>225</sup>

The primary argument against creating such an exception is that it would threaten the cohesiveness of the Union by favoring unilateral Member State action even if confined only to the environmental sphere. Nevertheless, the

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224. The ECJ could adopt such an exception as a matter of policy and implement it on a case-by-case basis. Member States favoring such an exception might also wish to lobby for its express inclusion in the Treaty at the 1996 intergovernmental conference scheduled to amend the Treaty.

225. Community environmental legislation would normally be based on Article 100a or 130s although the latter has become more common since the Court's *Waste Directive* decision, 1993 E.C.R. 964 (finding Article 130s was correct legal basis for waste directive because its primary purpose was environmental protection), and the changes in the voting requirements under Article 130s. See *supra* note 15 and accompanying text. However, Community environmental legislation might rely on other Treaty provisions such as Articles 75 or 113. See Paul Demaret, *Environmental Policy and Commercial Policy: The Emergence of Trade-Related Environmental Measures (TREMS) in the External Relations of the European Community*, in *THE EUROPEAN COMMUNITY'S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION* 305, 345-61 (Marc Marescau ed., 1993) (identifying Article 113 as proper legal basis for TREMS).

judicial creation of exceptions favoring greater Member State autonomy is not unprecedented. The *Cassis de Dijon* jurisprudence created a category of exceptions to Article 30 (in addition to those listed in Article 36) that permit derogation from Community law. More recently, the ECJ's decision in *Wallonia Waste* seems to have opened the *Cassis de Dijon* door a little wider.<sup>226</sup> Articles 100a(4) and 130t have likewise expanded the possibility for Member States to derogate.

The "heresy" suggested here is that the environment's special importance for the future of the European Community, as well as for the entire world, justifies creating an exception to the rule mandating uniformity.<sup>227</sup> To minimize any threat to the cohesiveness of the Union, this exception would need to be limited. One possibility is to follow the approach offered by *Cassis de Dijon* as applied in the *Danish Bottles* case: the stricter law must be necessary in order to achieve environmental protection, proportionate to the burden placed on free trade, and nondiscriminatory.<sup>228</sup> The proposed exemption would require courts to apply similar tests when analyzing the "competence" question (does the Member State have competence to pass this stricter measure?) and when analyzing the "compatibility" question (is this law compatible with the free movement of goods?).

If the Community were to adopt this approach, the shift in thinking would mirror a change that some scholars have argued has occurred in U.S. constitutional law: the merging of questions of preemption (the U.S. equivalent of the "competence" question) with questions of the burden on interstate commerce (the U.S. equivalent of the "compatibility with Article 30" question). One commentator describes the parallelism in the following manner:

Other cases in this area lend support to the theory that the [United States Supreme] Court has adopted the same weighing of interests approach in pre-emption cases that it uses to determine whether a state law unjustifiably burdens interstate commerce. In a number of situations the Court has invalidated statutes on the preemption ground when it appeared that the state laws sought to favor local economic interests at the expense of the interstate market. On the other hand, when the Court has been satisfied that valid local interests, such as those in safety or in the reputable operation of local business, outweigh the restrictive effect on interstate commerce, the Court has rejected the pre-emption argument and allowed state regulation to [stand].<sup>229</sup>

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226. See *Wallonia Waste*, 1992 E.C.R. at 4471.

227. The Community's commitment to the subsidiarity principle, as well as its preference for including safeguard clauses in new legislation pursuant to the Council Resolution on a "New Approach to Technical Harmonization and Standards," 1985 O.J. (C 136) 1, should gradually diminish the need for recourse to such an exemption. See Weatherill, *supra* note 222, at 302. Nevertheless, the *Scottish Grouse* case demonstrates that even where a safeguard provision exists, the Member State may not always rely on it. Weatherill favors greater use of the minimum harmonization technique combined with a duty on the Member States to share any innovations with other Member States. *Id.* at 303-04.

228. Whether Article 100a(4) also applies this test is still unclear after the *PCP* decision.

229. Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 220-21 (1959) (emphasis added) (footnotes omitted).

This shift in approach is significant because it occurred in a genuine federal system whose federal government enjoys far greater power than the Community institutions, as opposed to the Community's hybrid system. Moreover, the free movement of goods and supremacy of federal law are also preeminent concerns in the U.S. system. If such a system can maintain unity within the nation, despite providing for derogating state law, the European Community should be able to achieve this result as well.

In addition, holding fast to the current rules may not preserve peace within the Community. The current rules are likely instead to produce great dissent within the Community as a result of the added voices of new Member States and the EEA countries, all of whom have traditionally emphasized high environmental standards. Those countries have stricter environmental laws than the Community in several areas and fear having to lower their standards to meet harmonized Community norms.<sup>230</sup> The Court's *PCP* decision has heightened such fears. Not only will these countries be loath to relinquish their higher standards, but they may also seek to impose these standards on a Community-wide basis. Member States that are unable to afford these standards or that prefer lower standards for other reasons, such as the inability or unwillingness of domestic industry to comply with higher standards, will oppose such a program. In light of this likely scenario, an alternative approach, addressing the needs of these new Union members and the EEA countries, would be politically feasible and would preserve unity within the Union.

## VII. CONCLUSION

While giving Member States the ability to enforce stricter standards promotes the Community's objective of achieving a high level of environmental protection, the optimal solution is the adoption of high environmental standards on a Community rather than Member State level. This result would ensure the most effective level of environmental protection and would not endanger either the supremacy of Community law or the free movement of goods, services, or persons. Community-wide standards would not require altering the accepted wisdom concerning stricter national standards in harmonized areas or creating new exceptions to well-established rules. However, because of the diversity of opinion among the Member States and their differing abilities to support the cost of such measures, the Community cannot yet achieve this goal.

The question, therefore, is what to do in the interim. What will best insure the attainment of the Community's environmental policies in light of this diversity? Where the Community cannot reach a consensus regarding high standards, Member States must still have an opportunity to impose such standards on a national level. Allowing Member States this opportunity to

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230. See Høyer, *supra* note 12, at 3.

enforce stricter standards can take several forms. Where legislation is based on either Article 100a or 130s, Member States should be able to rely on the derogations in Articles 100a(4) and 130t without having to meet high evidentiary burdens. Further, the Community should resolve uncertainty about the scope or requirements of Articles 100a(4) and 130t in favor of the Member States' ability to maintain stricter standards.

Alternatively, if a Member State is unable to rely on one of those articles, either because the relevant Community legislation has another legal basis or because even under the suggested interpretation of those articles the Member State has not met their requirements, the relevant question is whether the Community legislation constitutes total harmonization in the area. This Article suggests that when doubt exists regarding the scope of harmonization imposed by a Community environmental measure, that doubt should be resolved against harmonization. This method of analysis would expand the opportunities for Member States to enforce more stringent standards without requiring them to rely on Articles 100a(4) and 130t.

Finally, where harmonization of an area is unquestionable and reliance on Articles 100a(4) and 130t is not possible, this Article suggests carving an exception out of the general rule. Such an exception would permit Member States to enforce stricter environmental laws even in harmonized areas if they are necessary, proportional, and nondiscriminatory.<sup>231</sup> While the proposed exception would constitute a significant departure from established Community law, the Community's recognition of the environment's special importance and its commitment to achieving a high level of environmental protection justify this change. Like other modifications of established Community law, this change would not only assist the Community in achieving its stated goals, but might also prove politically necessary to resolve conflicts among the Member States over Community legislation.

These suggestions all aim at judicial solutions; legislative and administrative means for promoting this same objective already lie within the reach of the Member States themselves and the Community's legislative institutions. Member States should seek to persuade the Community's institutions to use 130s as a legal basis for high environmental standards, rather than 100a, because of the former's less burdensome requirements for derogation. Community environmental measures should include express provisions that permit Member States to impose higher standards.<sup>232</sup> Finally, Member States should seek to establish concrete means for ensuring observance of Article 130r(2)'s commitment to a "high level of environmental protection" and its mandate to integrate environmental protection requirements

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231. The proposed exception would go beyond *Cassis de Dijon* because it would allow derogations from Community law even after an area has been harmonized.

232. The directive at issue in *Scottish Grouse* contained such a provision although in that case the Member State's law did not fall within the derogation. 1990 E.C.R. at 2163-64.

into Community policies.<sup>233</sup>

The central objection to allowing Member States a broader opportunity to enforce stricter environmental standards is that this opportunity would subvert the objective of free trade and thereby jeopardize the Community framework. This objection, while serious, must be evaluated in terms of the Community's development as a whole and the changes to the Treaty of Rome reflecting that development. While guaranteeing the free movement of goods will always be an important Community objective, the promotion of free trade at the cost of other objectives would ultimately limit the Community and its goal to develop into a true Union. Preserving the traditional hierarchy of Community objectives not only frustrates the Community's own expansion, but also contradicts the spirit and purpose of the changes the SEA and TEU made to the Treaty of Rome. By contrast, an approach that balances free trade goals against other important Community objectives such as environmental protection would allow the Community to broaden its scope and fulfill its commitments under the Treaty. From this broader perspective on the Community's objectives, the suggestions offered in this Article are consistent with both the Treaty and the Community's own development.

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233. The Commission's Internal Communication of June 2, 1993 requires the designation of an official within each Commission DG who is responsible for ensuring respect of the integration requirement in Commission policies and proposals. See Cameron & Mackenzie, *supra* note 11, at 16-17. Member States should monitor whether such designations are an effective means of fulfilling this requirement. Member States should also consider lobbying for an administrative rule that DG XI (the Commission's environmental division) have primary responsibility for evaluating Article 100a(4) notifications that are based on environmental grounds. The present system, by contrast, allows the Commission's Secretary General to decide which DG is responsible for evaluation and preparation of the Commission's draft decision. Such a rule would better ensure that these evaluations give environmental considerations proper weight.

