The 'Environmental Guarantee' on the Rise? The Amended Article 95 after the Revision Through the Treaty of Amsterdam

Stefani Bär* and Silke Albin

A. Introduction

Environmental policy is traditionally considered to be of secondary importance and changes in the area of environmental policy made during the revision of the EC Treaties in Amsterdam were not subject to much general interest. However, environmental policy decisions with direct economic implications are regularly subject to greater public attention, and one provision modified by the Amsterdam Treaty has strong implications for the functioning of the Internal Market: Article 95 TEC, the former Article 100a TEC. This Article gives Member States the possibility of deviating from Community harmonization measures in the name of environmental protection and this may significantly affect the internal market. As a result, this provision – more so than any other in the EC Treaties – reflects the tension between economic and ecological interests. In Amsterdam, the 'opting-out' clause was the most controversial and discussed provision in the area of environmental policy. The result of the negotiations was a ten paragraph Article which, due to its indeterminate wording in many places, provides numerous points of speculation as to the correct interpretation of the provisions.[1] The following contribution is intended to provide an in-depth analysis of the regulative content of the newly revised article from an environmental policy perspective, with particular focus being placed upon the question of whether the amendments of Amsterdam ultimately result in the strengthening of the 'environmental guarantee' contained in the EC Treaties.

* Ecologic, Pfalzburgerstr. 43–44, 10717 Berlin.

[1] Art. 95 TEC after the amendments of the Treaty of Amsterdam have not yet been subject to a detailed analysis. Although Art. 95 TEC has been mentioned in L. Krämer, *EC Treaty and Environmental Law* (1998) at p. 121 et seq.; D. Ehlermann, 'Engere Zusammenarbeit nach dem Amsterdamer Vertrag: Ein neues Verfassungsprinzip?' in (1997) *EuR* 362 at p. 394; H. Lecheler, 'Die Fortentwicklung des Rechts der Europäischen Union durch den Amsterdamer Vertrag' in (1998) *JuS* 392 at p. 397; M. Schröder, 'Aktuelle Entwicklungen

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B. The Amendments Embedding the Revision of Article 95 TEC

The revision of Article 95 of the Treaty Establishing the European Community must be seen within the context of other modifications to the European Treaties which are also of considerable importance for national and European environmental protection.

From a general environmental perspective, the most important amendment is considered to be the introduction of the principle of sustainable development into the Treaty on European Union[2] and the Treaty Establishing the European Community.[3] The inclusion of the principle of sustainable development has been long advocated by environmentalists[4] and finally found its way into the Preamble and Article 2 of the TEU, as well as Article 2 of the TEC. (The new wording of Art. 2 TEC obliges the Community to promote a 'harmonious, balanced and sustainable development'.) Although the addition of this principle to the Treaties does not establish direct legally-binding obligations for the Community, the amendments clearly show the strong political will to highlight the importance of sustainable development and to direct the Community's action towards achieving this goal.[5] With this change, environmental protection has gained greater significance in European policy and is now viewed equally with the objectives of creating an internal market and an economic and monetary union.

Similar political significance can be attached to the new positioning of the so-called 'integration clause'. The Amsterdam amendments created a separate Article

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im europäischen Umweltrecht' in (1998) *NuR* 1 et seq.; Barents, 'Het Verdrag van Amsterdam en het Europees gemeenschapsrecht' in (1997) 10 *SEW* 351 at p. 353 et seq.; A. Duff, *The Treaty of Amsterdam* (1997) at p. 77 et seq.; H. von Meijenfeldt, *Vergroening van Verdrag van Amsterdam* (milieu&RECHT 1997) at p. 176; Langrish, (1998) *ELRev* 3 at p. 17; *G. Van Calster* et al. 'Amsterdam, The Intergovernmental Conference and Greening the EU Treaty' in (1998) *European Environmental Law Review* 12 at p. 16; J. Shaw, 'The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy' in (1998) *European Law Journal* 63 at p. 78; A. Jordan, 'Step Change or Stasis? Environmental Policy after the Amsterdam Treaty' in S. Baker and P. Jehlicka (eds.), *Environmental Politics* (vol. 7 1998, Nr. 1), 'Dilemmas of Transition: The Environmental, Democracy and Economic Reform in East Central Europe' at p. 227 et seq.; C. Thun-Hohenstein, *Der Vertrag von Amsterdam* (1997) at p. 86 et seq.

2 Referred to as TEU.

3 Referred to as TEC.

4 For a review *see* Haigh, N., 'Introducing the Concept of Sustainable Development into the Treaties of the European Union' in *The Transition to Sustainability: Politics of Agenda 21 in Europe*, (O'Riordan, T. and Voisey, H., (eds.)) (London, Earthscan,1998),

5 S. Bär and R.A. Kraemer, 'European Environmental Policy after Amsterdam' in (1998) 10 *Journal of Environmental Law* No. 2.

containing this idea that was formerly found within Article 130r paragraph 2 TEC (new Art. 174). New Article 6, based on the former Article 3c, states that:

> environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.

The former wording was broadened by introducing the clause 'with a view to promoting sustainable development'. Sustainable development should thus take concrete form and be realized by integrating environmental protection requirements into all of the policy areas listed in Article 3 TEC. In legal terms, the change in position of the integration principle does not give priority to the environment, but it is hoped that the increased visibility will lead to environmental protection being more fully taken into account.

In addition, decision-making in environmental policy was amended in Amsterdam. The co-decision procedure was simplified and extended in particular to the legal basis of European environmental policy (Art. 130s para.1 TEC, new Art. 175 para. 1 TEC). However, the adoption of some types of environment legislation, including the introduction of environmental taxes, still requires a simple parliamentary hearing (rather than full parliamentary approval), and remain subject to unanimous approval by the 15 Member States in the Council.

Given the background of these various modifications with general implications for European environmental policy, we now turn our attention to Article 95 TEC, which contains amendments of particular legal significance for European environmental policy.

C. Article 95 TEC

Article 100a TEC (new Art. 95), which allows decisions to be taken by a qualified majority, was introduced into the Treaty with the Single European Act in 1987 in order to provide for the achievement of the internal market by 1992.[6] The Article contains a general measure to eliminate differences in the laws and administrative regulations of the Member States.

Since then, (former) paragraph 4 of Article 100a TEC has been one of the most controversial clauses of the EC Treaty.[7] Also referred to as the 'opting out' clause, Article 100a paragraph 4 allows Member States, under certain circumstances, to 'apply' stricter national legislation than defined in Article 100a.

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[6] J. Jans, 'European Monographics' in (1995) 12 *European Environmental Law* 106.

[7] *See* among others C.-D. Ehlermann, 'The Internal Market Following the Single European Act' in (1987) *CMLRev* 361 at p. 389; J. Jans, 'European Monographics' in (1995) 12 European Environmental Law 106; W. Kahl, *Umweltprinzip und Gemeinschaftsrecht* (1993) at p. 48.

The 'opting out' clause was introduced into legislation as a compromise during the negotiations of the Single European Act. It was inserted into the Treaty text 'at the last minute'[8] of the conference in order to reach agreement on the integration of majority voting for harmonization measures in Article 100a paragraph 1 TEC. With the clause in paragraph 4 environmentally progressive Member States were guaranteed the right to maintain more stringent national protection standards even if Community legislation is adopted in the relevant area. For this reason, the clause has often been referred to as the 'environmental guarantee', especially in the Scandinavian countries.[9] Since then, Article 100a paragraph 4 TEC has been the object of intense discussion in the scientific literature and its practical implications have caused debate between Member States and the Commission. At present, ten cases concerning Article 100a paragraph 4 have been notified to the European Commission by Member States, and an eleventh case was presented by Germany at the end of 1998.[10] The Commission has made three decisions[11] under this piece of legislation, one of which led to a case before the European Court of Justice.[12]

The frequent debate of this clause does not depict the frequency of its use, but it does indicate its importance of the decision process involved in the adoption of Community environmental legislation. During past negotiations on harmonization measures of environmental policy, Member States have threatened to make use of the option of maintaining higher environmental standards (and implicitly acting contrary to harmonization efforts) in order to force legislation at the European level to maintain a high level of protection.[13] The Amsterdam Treaty brought important changes to Article 100a. Certain legal controversies were resolved, improvements were introduced, but new ambiguities were created as well.

I. The Removal of the Qualified Majority Requirement

One clarification provided in the Amsterdam revisions is the discontinuation of the requirement that stricter Member State measures are only permitted in cases of adoption by the qualified majority. The amended paragraph reads:

> If, after the adoption by the Council or by the Commission of a harmonization measure, a Member State deems it necessary to maintain national provisions

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[8] B. Langeheine, 'Rechtsangleichung unter Artikel 100a EWGV: Harmonisierung vs. nationale Schutzinteressen' in (1989) *Europarecht*, 3, at pp. 235, 236.

[9] L. Krämer (1998) at p. 135.

[10] The decisions have concerned Directive 91/338/EEC (the Netherlands), PCP Directive 91/173/EEC (Germany, Denmark, the Netherlands, and Sweden), Directive 94/35-36/EC (Sweden), and Directive 95/72/EC (Denmark).

[11] OJ 1992 C 334/8 (PCP, Germany); OJ 1994, L 316/43 (PCP, Germany); OJ 1996 L 68/32 (PCP, Denmark).

[12] Case C-41/93 *France v. Commission* [1994] ECR I–1829.

[13] J. Schnutenhaus, 'Das Urteil des EuGH zum deutschen PCP-Verbot – schwere Zeiten für den Alleingang im Umweltrecht' in (1994) *NVwZ*, at pp. 875, 876.

> on grounds of major needs referred to in Article 36, or relating to the protection of the environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

According to the original wording of paragraph 4, Member States were only allowed to maintain more stringent[14] measures if the Council had adopted the corresponding harmonization measure by qualified majority. Following the amendment of this clause, it now makes no difference whether the harmonization measure was approved unanimously or by qualified majority.

At the same time it was always debated whether a Member State wishing to maintain a stricter national standard was obliged to vote against the harmonization measure. The wording was not clear whether the Member State, having voted for the harmonization measure, could later ask to maintain a stricter measure.[15] This debate has also been resolved by striking out the requirement of a qualified majority.

II. The Question of Timing within the Application of Paragraph 4

The second important clarification was made with respect to the question of when the 'opting-out' clause should be applied, ending a long-standing legal battle. According to the original version of Article 100a paragraph 4, Member States were allowed to 'apply' diverging national measures in spite of the adoption of Community harmonization legislation. However, it was not clear whether the term 'apply' referred only to the *maintenance* of national measures already in place or to the *introduction* of new, stronger national standards as well. While the Commission insisted on the first, more narrow interpretation,[16] the second, broader interpretation was supported by the relevant scientific literature, especially by the Germans.[17] This debate was ended by amendments to the Treaty which explicitly allow for the introduction of new measures. Paragraph 4 addresses the maintenance of Member State measures, while a new paragraph 5 covers measures introduced by a Member State which were not in place when the Community legislation was enacted.

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[14] According to common opinion, only *more stringent* national measures can be adopted within the context of diverging Member State legislation, since permitting diverging national measures would be contrary to the objective of an internal market. L. Krämer (1998) at p. 132. However, for the opposing position, *see* W. Haneklaus, 'Die Verankerung umweltpolitischer Ziele im EWG-Vertrag'' in (1990) *DVBl.* at pp. 1135, 1139.

[15] J.-P. Jaqué, 'L'acte unique européen' in (1986) *RTDE* 575 at p. 600; C.-D. Ehlermann, 'The Internal Market following the Single European Act' in (1987) *CMLRev* 361 at p. 394.

[16] L. Krämer (1998) at p. 130.

[17] D. Scheuing, 'Umweltschutz auf der Grundlage der Einheitlichen Europäischen Akte' in (1989) *EuR* 152–171; A. Middecke, 'Nationale Alleingänge' in H.W. Rengeling (ed.), *Handbuch des Umweltrechts* (1998) at pp. 954, 961; K. Hailbronner, 'Der ''nationale Alleingang'' im Gemeinschaftsrecht am Beispiel der Abgasstandards für PKW' in (1989) *EuGRZ* 101 at p. 117; F. Montag, 'Umweltschutz, Freier Warenverkehr und Einheitliche Europäische Akte' in (1987) *RIW* 935 at p. 940, but *see also* J. Jans, *European Environmental Law* (1995) at p. 108.

As a result of this expansion to include future stricter national measures, introduced by the Dutch presidency,[18] the 'opting-out' clause was considerably strengthened, along with the possibilities for stricter national environmental standards. With this clarification, the signing parties to the Amsterdam Treaty signalled their intention to allow for a broader divergence in Member State measures, in favour of a stricter level of protection, and to thus reach the highest level of environmental protection attainable.

III. Strengthened Duty to Demonstrate Reasons for Stricter Measures

The Treaties in Amsterdam made no significant changes in the requirements for the maintenance of stricter national measures according to paragraph 4. However, the duty of Member States to provide reasons for maintaining stricter measures was strengthened. According to the new requirements, the Member State must notify the Commission of the national measure it intends to maintain 'as well as the grounds for maintaining them' This stipulation is made in order to ease the job of the Commission, which must ensure that divergence from Community legislation is well-founded. This duty, which was placed on the Commission as a result of the PCP decision of the European Court of Justice,[19] can only be fulfilled if Member States provide reasons for the maintenance of stricter legislation beforehand. With this change, the burden of demonstrating the appropriateness of stricter national legislation is placed more clearly upon the Member States. Assigning the duty of communicating the reasons for stricter national measures to the Member States alone provides a normative clarification of their previously existing duty.[20]

IV. The Introduction of Stricter Environmental Standards

The new Article 95 paragraph 5 governs the requirements for the introduction of stricter environmental standards. Compared to paragraph 4, the stipulations laid down in paragraph 5 are more stringent. In particular, paragraph 5 states that:

Moreover without prejudice to paragraph 4, if, after the adoption by the Council or by the Commission of a harmonization measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonization measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

This paragraph leaves four words open for interpretation 'evidence', 'specific', 'arising' and 'working environment'.

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[18] H. von Meijenfeldt (1998) at p. 176.

[19] Case C-41/93 *France v. Commission* [1994] ECR I–1829.

[20] According to Krämer, this duty places a 'considerable supplementary burden on notifying Member States', (1998) at p. 133.

1. Scientific Facts/Scientific Evidence

The first stipulation which leaves room for interpretation is the requirement that a divergent national measure be based on 'scientific evidence'. Although this formulation is not defined anywhere in the Treaty, it must be considered within the context of the amended paragraph 3 of Article 95, which calls on the Commission to ensure a high level of protection in its harmonization proposals, 'taking into account in particular of any new development based on scientific facts'. In the French version of the Treaty, paragraph 5 refers to *preuves scientifiques*, while paragraph 3 speaks of *nouvelles évolutions basée sur des faits scientifiques*. In the German version, these terms are translated as *wissenschaftliche Erkenntnisse* in paragraph 5 and *wissenschaftliche Ergebnisse* in paragraph 3.

The different wording indicates that the terms are intended to have different degrees of meaning. From a teleological perspective, it can be assumed that the overriding objective is the adoption of Community-wide harmonization measures, if possible, without the appearance of divergent national measures which could interfere with the functioning of the internal market. As a result, the demands corresponding with the provision of 'scientific evidence' in paragraph 5 will be more stringent than those corresponding to the scientific facts, cited in paragraph 3, which are to form the basis of the Commission's harmonization legislation.

The question of whether the term 'scientific evidence' implies 'scientific proof' is, however, the most problematic. The term 'evidence' does not necessarily imply that a link to environmental damage must be proven. 'Evidence' could simply refer to one possible link between environmental damage and the issue at hand. Thus, in legal terms a certain mass of evidence is required in order to ultimately prove causation. It is also important to note that evidence can always be contradicted by other evidence, whereas proof requires both the presence of supporting evidence and the lack of significant contradictory evidence. As a result, given the requirement of providing 'scientific evidence', Member States would merely have to present evidence or an indication of a link to environmental damage, rather than have to prove such a link. This interpretation is also supported by the fact the clause, 'scientific evidence', was introduced by the Scandinavian countries who wanted to strengthen the possibility of implementing stricter national legislation[21] and used the formulations 'new knowledge'[22] or 'new circumstances'[23] in their proposals.

As further support for this interpretation, it can be pointed out that in the German version of the Treaty, which has the same legal status as all other language versions of the Treaty, the term *Beweis* (proof) was intentionally not used in translating the word 'evidence'. Instead, the term *Erkenntnisse* refers to findings which indicate a possible link between a cause and environmental damage.

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[21] L. Krämer (1998) at p. 135.
[22] Danish proposal from 16 September 1997, CONF 3904/96.
[23] Swedish proposal from April 1997.

Erkenntnisse do not have to be undisputed and above all do not have to provide 'proof'.[24]

Finally, the precautionary principle anchored in Article 174 paragraph 2 TEC (former Art. 130r) precludes a stricter interpretation of 'evidence'. The precautionary principle states that environmental measures can be adopted in cases where the link to environmental damage has not yet been proven.[25] This directly contradicts the interpretation that in order to implement more stringent national standards environmental damage must be proven.

2. *A Problem 'Specific' to that Member State*

The second difficulty for environmental policy that is built into the wording of Article 95 paragraph 5 of the Amsterdam Treaty is the unclear meaning of the new stipulation that Member States identify 'a problem specific to that Member State' or in the French version, *un problème spécifique de cet Etat Membre*. The wording does indicate that an environmental problem in a Member State is considered a 'specific problem' if it arises as a result of specific circumstances in the particular Member State. However, exclusivity, in the sense that a specific problem must be limited to this one Member State, cannot be specifically derived from this terminology. In fact, Article 95 paragraph 7 TEC stipulates that whenever stricter national measures are approved, the Commission must determine whether Community rules themselves should be brought in line with the higher national standards. The interpretation of this statement, 'specific problem' seems to be misunderstood within the Treaty itself, because if the statement were to apply, the review of the Commission would be unnecessary.[26]

It is still undetermined which parameters should be used to identify what constitutes a 'specific problem'. A restrictive interpretation could limit the types of specific circumstances to local geographical or geo-political conditions. However, contrary to such a narrow interpretation it can be argued that such specific problems of geographical or geo-political nature would rarely appear in the area of *product-related* environmental protection which typically[27] falls under Article 95 paragraph 1

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[24] *See* C. Thun-Hohenstein, *Der Vertrag von Amsterdam* (1997) at p. 86 et seq.

[25] *See* H. von Meijenfeldt, *Vergroening van Verdrag van Amsterdam* (milieu&recht 1997) at p. 176.

[26] In this sense, *see* Thun-Hohenstein, *Der Vertrag von Amsterdam* at p. 87.

[27] It should not be overlooked that, contrary to a widespread belief, not only product-related but also production-related environmental protection falls under Art. 95 (former Art. 100a TEC – *see* Case C-300/89, *Commission v. Council* – Titaniumdioxide Directive, [1991] ECR I–2867 (2901). In the area of production-related environmental protection, local geographical circumstances creating a 'specific problem' are imaginable (e.g. requirements for certain production conditions, such as filter technology, could vary according to local geographical conditions, such as the absorption capacity of the local soil). Thus, a narrow interpretation would still allow for unilateral measures in the field of production-related environmental protection, although this cannot be the intention of this stipulation.

(former Art. 100a para. 1 TEC). Since products and the corresponding transport and trade are normally removed from such 'specific' conditions, a restrictive interpretation in this manner would render paragraph 5 almost completely meaningless, since a specific problem of this type could hardly be demonstrated. Again, the meaning of 'specific problems' must be understood as having a very broad definition.[28]

This conclusion is not only supported by the previous statements but also by examining the changes that were made during the drafting of the Treaty. The initial draft of paragraph 5 used the more exact term 'regional' in place of the word 'specific'.[29] This was intentionally changed in the final version and, accordingly, the Member States were to be given the opportunity to act unilaterally in cases going beyond regional problems and involving broader 'specific' problems.[30] Based on this knowledge, it is apparent that in order to allow a broader meaning of the statement the drafters of the Treaty purposefully sacrificed clarity.

As apparent in the legislation of the Commission and the Member States, this interpretation does not differ from the established meaning of the former Article 100a paragraph 4 TEC. Since the PCP decision of the European Court of Justice,[31] Member States, as well as the Commission in reaching its decisions,[32] have made efforts to demonstrate the particular domestic circumstances which would justify unilateral action on the part of a Member State. Thus, even the decisions of the Commission predating the entry into force of the Amsterdam Treaty ultimately addressed the question of whether a specific problem in a Member State could be demonstrated. The Amsterdam Treaty simply puts this de facto policy into a formal legal framework.

3. The Problem 'Arising' After the Adoption of the Harmonization Measure

Another problem of interpretation becomes apparent as the sentence in paragraph 5 continues: 'a problem specific to that Member State *arising* after the adoption of the harmonization measure.' This raises the question of what the word 'arising' means in

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[28] As argued by Krämer (1998) at p. 136; *see* with respect to the PCP decision of the ECJ, J. Schnutenhaus, (1994) at pp. 875, 876.

[29] The three draft versions from 3, 4, and 5 June 1997 included the wording 'on grounds of a regional problem'.

[30] A specific, but not necessarily regional, problem exists when the public in a Member State – influenced by national media – is particularly sensitive to an environmental problem and purchasing behaviour is affected.

[31] C-41/93 *France v. Commission*, 1994, ECR I–1829.

[32] *See* the Decision of the Commission from 14 September 1994 on the German ban on Pentachlorphenol (PCP), OJ 9 December 1994, L 316, p. 43, as well as the Decision of the Commission from 26 February 1996 on the Danish ban on Pentachlorphenol (PCP), OJ 19 March 1996, L 68/32, p. 36. With respect to the second case, the Commission had commissioned a report with the following formulation of the question: 'Does a special situation exist in Denmark with respect to the protection of the environment and human health?'.

this context. Seen in connection with 'new scientific evidence', the term 'arising' cannot be interpreted to mean that the problem must 'occur' after the adoption of the measure. Therefore, this statement must be understood to mean that the problem was only discovered after the harmonization measure was enacted.

With this revision, the logical meaning of the statement is simply verified. The Member State should unilaterally address only those problems which arise or become visible after the adoption of a harmonization measure, but not those which the Member State could have brought into consideration during the negotiations on the measure. Logically, if the problems had been discovered beforehand there would be no reason for unilateral action.

4. The Protection of the Environment and the Working Environment

Another ambiguity lies in the scope of protection laid out in paragraph 5. In paragraph 4, the protection of the environment and the working environment are listed as grounds for maintaining stricter national legislation and an additional reference is made to the 'major needs,' described in Article 30 (former Art. 36).[33] Yet this reference to these additional justifications is absent in paragraph 5.

A strict interpretation of these two paragraphs in combination with one another would dictate that the grounds laid out in Article 30 TEC – the protection of health and life of humans, animals or plants, public policy or public security, or public morality – could not be used to justify stricter national measures introduced after the adoption of Community harmonization legislation. With this interpretation of paragraphs 4 and 5, stricter national measures can only be justified on grounds of protection of the environment and protection of the working environment.

Simultaneously, the question is raised whether the politically significant area of public health policy falls under the term 'environment'. From a semantic perspective, the term 'environmental protection' refers to the protection of the natural and modified environment, not to the protection of human health from harmful environmental influences.

The broader Community definition of environmental policy, however, supports the inclusion of public health protection. This definition is laid out by the aims found in Article 174 paragraph 1 (former Art. 130r para. 1 TEC) and includes both conservation and protection of the environment and protection of public health. Given the fact that public health is a much more politically sensitive policy area, it would also be difficult to accept the narrower interpretation of paragraph 5 that

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[33] Art. 30 TEC reads as follows: The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit on grounds of public morality, public policy, or public security; the protection of health and life of humans animals or plants; the protection of national treasures possessing artistic, historical or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

stricter national measures would be permitted in cases of environmental protection, but not in cases of public health. In fact, paragraph 6 sentence 3 provides for a special status of public health policy, precisely due to its sensitive nature. If public health problems arise in a Member State, quick policy responses are usually required and waiting for the normally cumbersome Community legislative process to react would rarely be justified. As a result, the 'opting-out' clause is of particular importance to the Member States in the area of public health policy.

This interpretation could be countered with the argument that paragraph 8[34] introduces a separate procedure for dangers to public policy which calls on the Commission to ensure that harmonization measures are brought in line with public policy needs.[35] This paragraph stipulates that if a Member State becomes aware of a special public health problem in a policy area already subject to Community harmonization measures, it must notify the Commission, which in turn is required to determine whether Community action should be initiated. The existence of this special procedure in the public policy area could be interpreted to exclude the possibility of Member States adopting divergent public health measures on the basis of paragraph 5.

Contrary to the conclusion that paragraph 8 limits the definition of 'working environment', this procedure instead represents an additional possibility for strengthening 'dynamic environmental protection'[36] (i.e. Member States spurring Commission activity) which is established in the provisions allowing for stricter national legislation. Paragraph 7 explicitly provides for this 'dynamic' approach by requiring the Commission to determine whether Community harmonization measures need to be brought in line with stricter national measures which have been approved. However, this procedure only applies to those cases which satisfy the narrow conditions laid out in paragraph 5, in particular the 'specific problem' condition. For this reason, it was necessary to create an additional procedure for potential health problems arising in several or all Member States (and not limited by the 'specific problem' condition), in order to allow the Community to react as quickly as possible. The interpretation that the existence of the procedure in paragraph 8 removes public health protection from the procedure found in paragraph 5 (and 6) is therefore inconclusive.[37]

A further argument for the inclusion of public health protection measures in the measures covered by paragraph 5 is the teleological consideration that it would make little sense to allow more stringent national public health measures to be maintained, but not introduced after adoption of harmonization measures. In view of the urgency

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[34] Art. 95 para. 8: When a Member State raises a specific problem on public health in a field which has been the subject of a prior harmonization measure, it shall bring it to the attention of the Commission which shall immediately examine whether to propose appropriate measures to the Council.

[35] *See* Ehlermann at pp. 362, 394.

[36] *See* former Art. 100a para. 4 TEC; D. Waelbroeck, 'Le rôle de la court de justice dans la mise en oeuvre de l'Acte Unique Européen' in (1989) *CDE* 41 at p. 58.

[37] *See* Ehlermann at pp. 362, 394.

of public health risks, a differentiation between whether stricter national legislation was passed before or after the adoption of harmonization legislation would be hardly justified.

Although the needs of public health protection can certainly be seen as an integral part of environmental protection and thus covered by paragraph 5, these arguments cannot provide a conclusive interpretation in view of the additional grounds laid out by Article 30. The question of whether or not all of these additional grounds can be interpreted as being covered by paragraph 5 – despite the lack of an explicit referral to Article 36 – remains to be clarified by a judicial decision.[38]

V. The Procedure under Article 95 paragraph 6 TEC

The wording of the former EC Treaty was also changed in terms of how unilateral actions by the Member States would be handled by the Commission. According to Article 95 paragraph 6 TEC, the Commission must decide within six months whether to 'approve or reject' stricter national provisions of a Member State. The former wording of the TEC required that the Commission 'confirm' stricter national measures. There was disagreement as to whether this confirmation was of a constitutive or of a purely declarative nature, i.e. whether the confirmation was necessary for the application of a national measure, or whether Member States were allowed to apply the rule before the Commission had confirmed it. This legal disagreement was ended by the European Court of Justice in its PCP decision, in which the Court decided that a Member State can apply its notified national measures only after having received confirmation of the measures from the Commission.[39]

The rewording of the Treaty made it absolutely clear that Community law always applies until the Commission decides otherwise. In doing so, the drafters of the Amsterdam Treaty have simply followed the precedent set by the European Court of Justice in its PCP decision. If this stipulation did not exist, Community law would be essentially void since the Member States would have the ability to create unilateral laws without the authorization of the Commission.[40]

VI. Verification of Obligations of the Commission

Following the adoption of the Treaty amendments, the Commission is now required to verify that national provisions are not a means of 'arbitrary discrimination or a disguised restriction on trade' between Member States and that they 'do not

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[38] Informally, observers and participants in the Inter-Governmental Conference have expressed the view that this omission is simply an editorial mistake resulting from the extreme complexity of Art. 95 TEC.

[39] ECJ Decision of 17 May 1994, Case C-41/93 *France v. Commission*, [1994] ECR I–1829 (subpara. 30). *See also* R. Hayder, in (1994) *EuZW* 407.

[40] *See* ECJ Decision of 17 May 1994, Case C-41/93 *France v. Commission*, [1994] ECR I–1829 (subpara. 29).

constitute an obstacle to the functioning of the internal market'. The latter stipulation, literally inserted into paragraph 6 during the 'last minutes of negotiations' as a typical compromise found at the closing meeting, presents a significant problem of interpretation. According to paragraph 1, Article 95 applies to all measures which have to do with the functioning of the internal market. Exceptions provided for in paragraphs 4 and 5 will necessarily influence the functioning of the internal market. If the wording in paragraph 6 is strictly applied, the maintenance or introduction of divergent national measures would not be permissible. Such an interpretation would completely contradict the entire scheme and objective of Article 95.

The requirement that stricter national legislation, which was already in place before the Amsterdam amendments, must not be a means of arbitrary discrimination or a disguised restriction to trade, is intended to protect the economic interests of the other Member States. The European Court of Justice has interpreted these stipulations as having their concrete form in the principle of proportionality.[41] The proportionality principle implies that the provisions necessary for the protection of the environment should be weighed against the resulting restrictions on the internal market.

The objectives and logical sense of Article 95 TEC would thus be restored if the new paragraph 6 were to be understood within the context of the proportionality principle, i.e. that divergent national measures are only permitted in cases where they do not have a *disproportional* effect upon the internal market.[42] Given this interpretation, the new stipulation created by the Amsterdam amendments, protecting the 'functioning of the internal market', can be seen as a repetition and clarification of the requirements laid out in the preceding paragraphs.

VII. Ratification of Measures by Inaction of the Commission

A long-standing source of irritation for the Member States was removed by the new sentence 2 of paragraph 6 in Article 95 TEC. Before the amendment, Member States often had to wait an extremely long time for the Commission to confirm notified divergent national provisions.[43] Some cases have been pending for over six years without the Commission giving its confirmation.[44]

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[41] Case 178/84 *Commission v. Germany*, [1985] ECR at 1227, 1274; joined cases C-13, 133/91 DEBUS, [1992] ECR I–3617, 3641. Although this decision addressed Art. 36 (new Art. 30), general opinion is that it also applies to former Art. 100a TEC. Middeke at p. 968, Kahl at p. 49, Hailbronner at p. 31.

[42] Krämer (p. 134) argues that the terms 'inadequate' or 'inappropriate' can be inferred from the Treaty text. According to Thun-Hohenstein (p. 88) only 'serious disruptions' (*gravierende Störungen*) should be considered grounds for nullifying divergent national provisions.

[43] Only in two of the ten applications to date has the Commission confirmed stricter national legislation, i.e. the two formal requests made by Germany and Denmark with respect to the PCP Directive.

[44] One example is the request by the Netherlands to maintain a national standard with cadmium limit values stricter than those laid down by the Directive 91/338/EEC. The

According to the amended text, the affected Member State can assume approval of its divergent national standard if the Commission does not reach a decision on the case within six months. This mechanism strengthens both the legal certainty and the pressure on the Commission to reach a decision, and thus provides an instrument for speeding up the approval process.

However, the question remains as to when the six month time period begins. The wording in the Treaty does not provide any clues to the answer. One possible answer is that the time period begins as soon as the first documents for the Member State request are handed over to the Commission. The other possibility is that the decisive time period only begins when all documents relevant to the decision by the Commission are presented. Under the latter interpretation, the start of the time period could be almost indefinitely postponed by requests for additional documents.

In practice, the question will only play a minimal role. If a Member State fails to quickly provide the Commission with all documents relevant to the case, its request will be regarded as not providing sufficient grounds and therefore rejected. It is thus in the interest of the Member State to provide all relevant materials with its initial request. In doing so, the quality and quantity of the documents will have little effect upon the start of the time limit period, but rather much more relevance for the Member State to provide sufficient grounds for its request. For this reason, the start of the six month time period will correspond to the receipt of the Member State request.

VIII. Extending the Decision Time Limit

The Amsterdam amendments also provide for the possibility that the deadline for a decision by the Commission be extended by an additional six months. This is, however, only allowed if human health is not endangered[45] and if the issue at hand is very complex. The burden of proof for these two conditions lies with the Commission, which judges the request according to its own discretion. In cases of newly introduced national measures, the existence of a 'very complex' issue should not be difficult to confirm in view of the complex formulation of Article 95 paragraph 5. In contrast, the question of whether human health is endangered does not always have a clear answer. All in all, it is likely that extending the time limit will not be particularly problematic in view of the ambiguous legal terms and wording present in Article 95.

IX. Potential for Innovation by Member States (Art. 95 paras. 7 and 8)

Paragraphs 7 and 8 represent a complete novelty. In paragraph 7, the Commission is given the duty of regularly determining whether Community rules should be brought in line with approved stricter national standards; this applies to all national

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cont.

request was presented to the Commission on 22 May 1992 and has not been decided upon up to the present day.

[45] This is not the case where nature is endangered.

standards adopted before or after the introduction of Community harmonization legislation. This stipulation creates a potential for Member State innovation and a duty for the Commission to examine possible needs for stricter legislation. The Commission bears the burden of proving that there is no need for a national measure to be extended to the Community level. This procedure ensures that internal market standards keep up with scientific progress, and that a high level of protection is preserved throughout the Community.

This novelty has clearly positive implications for environmental policy. By means of a *virtuous circle of increasing protection levels*, the Member States are given an incentive to undertake stricter national standards and to promote innovation in the area of environmental protection, despite harmonization measures, while the Commission is obliged to continuously examine the necessity for adapting Community legislation to the higher protection standards.

A similar intention is found in paragraph 8, which stipulates that a Member State is obliged to inform the Commission if it becomes aware of a specific public health problem in an area in which harmonization measures already exist. The Commission is then obliged to examine whether a proposal should be made to the Council to address the problem at the Community level.[46] This new procedure is intended to allow the Commission to react quickly at the Community level to public health problems which arise in a Member State. Moreover, the European Community is granted increased powers in dealing with issues of public health policy.

D. Conclusion

The above analysis demonstrates that the modification of the 'opting-out' clause has resulted in an overall strengthening of the position of environmental policy concerns. In particular, the clarification of previously unresolved disputes surrounding the scope and applicability of the former Article 100a TEC has given Member States clearer criteria for stricter national legislation, criteria which should also simplify the future application of the provisions contained in Article 95 TEC. Although the new provisions seem at first glance to contain stricter legal wording in several places, the above analysis shows that the explicit listing of 'opting-out' conditions in paragraph 5 does not de facto present increased hurdles for national measures, but rather reflects a norm which was already implicitly in effect as a result of ECJ

[46] It is possible that this paragraph was added in response to the BSE controversy. According to this new paragraph, Great Britain would have been obliged to inform the Commission as soon as it was aware of the first evidence of the connection between the mad cow disease BSE and the Creutzfeldt–Jakob Disease. The Commission would then have had to consider which Community measures – including restrictions on British exports – would be necessary to prevent the spread of the disease.

decisions but not yet explicitly laid out. All in all, the newly revised article can be embraced as a positive development for environmental policy concerns.