EC environmental law after Maastricht

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An assessment in the light of the Danish veto

The Treaty on European Union (hereafter the Treaty) was signed in Maastricht in the afternoon of 7 February 1992 by the 12 Member States of the European Economic Community. The Treaty, as stated in Art A of the preamble, "marks a new stage in the process of creating an ever-closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen". The Union "shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by [the] Treaty. Its task shall be to organize, in a manner demonstrating consistency and solidarity, relations between the Member States and their peoples".

One of the policies to which Art A preamble refers relates to the management of the Community's natural environment. The Treaty in fact contains an important number of new provisions which, building on the existing body of environmental law, are intended to serve the evolution of the Community's environmental policy. This article intends briefly to discuss the most important implications of these new provisions.

It might be argued that following the outcome of the Danish referendum on the Treaty, an analysis of the Treaty is only of academic interest. Indeed, any suggestion of a "Community of Eleven" would seem *a priori* unconstitutional (cf Art R final provisions, also Art 236 EEC) so that, at present, the future of the Treaty is extremely uncertain.

Yet, although at the time of writing it is impossible to predict the fate of the Treaty, there exists a consensus among all Member States that the Danish veto should not necessarily be decisive in this respect. In any event, some of the principles pronounced in the Treaty are already shaping relations within the Community, irrespective of the formal question regarding the coming into force of the Treaty itself. A good example in this respect is provided by the principle of subsidiarity (see below). In brief, there remain ample reasons to pay attention to some important provisions which have a bearing upon the Community's environmental policy.

Development and environment: the search for a new balance

Prior to the adoption of the Single European Act in 1986 the EEC Treaty referred to its objective as promoting a "harmonious development" and a "balanced expansion". This enabled the Community to pursue limited environmental goals, but the absence of any explicit reference to the environment in Part One of the Treaty (Principles) remains the cause of imbalance between the Community's economic objectives and its more recent environmental tasks. This imbalance has been addressed most recently in the fifth environmental action programme which, appropriately, has been entitled Towards Sustainability.

The Treaty on European Union replaces the current Art 2 of the Treaty of Rome in a way so as to include, *inter alia*, the phrase "sustainable and non-inflationary growth respecting the environment" amongst its objectives. As becomes clear from the fifth action programme, economic growth is not an end in itself, it should be "sustainable" with respect to the environment. It is noteworthy that the Community will bear the name European Community, instead of the present European Economic Community. Evidently, the reverse also applies: environmental protection is not sacrosanct as it should leave room for economic growth. Yet, for the first time unambiguously acknowledging the need for finding the right balance between development and environment as one of the principles of the Community, the Treaty falls into line with the conventions of modern constitutions to list environmental protection as one of the tasks of the State.

That the Community's "economic" objectives must compete with environmental imperatives (and *vice versa*) is also illustrated by the new Art 3 which contains a list of 20 objectives, one of which is the establishment of "a policy in the sphere of the environment". Finding the right balance will undoubtedly be one of the major themes of the coming decades.

The principles of solidarity and the environment

The European Court of Justice in a landmark case in 1963 ruled that European Community Law constitutes "a new legal order" (case 26/62 *Van Gend & Loos*, [1963] ECR 1) One of the most important characteristics that distinguishes Community law from public international law is that the former is built upon the principles of "solidarity" and "integration" rather than aspirations typified by the catchwords "peaceful coexistence". In this respect, the Treaty on European Union is even more articulate than the current Treaty. Reference has already been made to Article A of the preamble which states that the Union's task shall be to organise "in a manner demonstrating consistency and solidarity relations between Member States and their peoples." Similarly, the new Art 2 states as one the Community's objectives to promote "... social cohesion and solidarity between Member States."

What are the implications of the

principles of "solidarity" and "social cohesion" for the Community's environmental policy? There is a general prohibitive obligation of customary international law to the effect that activities carried out on the territory of one State must not damage the territory of other States, known by the maxim *sic utere iure tuo ut alterum non laedas*. This is equally manifest in the context of EC environmental law. However, the principle of solidarity implies a much more positive attitude on the part of the Community, going well beyond traditional international law of transfrontier pollution. In particular, it is submitted that, even in the absence of cross-frontier implications, the Community has the duty to maintain a minimum environmental quality throughout its territory in much the same way as it must maintain a minimum level of economic performance throughout the Community. Seen in this light, it follows that ultimately the Community should have powers in respect of the designation of, *inter alia*, protected areas in the context of the habitat directive or vulnerable zones for the purposes of the Nitrates Directive.

Evidence of the Community's responsibility is found in Art 130S(5) of the Treaty which envisages financial support from the Cohesion Fund for certain Member States for whom the implementation of Community environmental law involves disproportionate costs. One of the Treaty's most important accomplishments is the unambiguous acknowledgment of a shared responsibility for the well-being of the whole of the Community's environment.

Environmental competence and the principles of subsidiarity

The Treaty's Title XVI (currently Title VII), which includes the provisions relating to the Community's environmental policy, has not brought about any spectacular changes. The objectives which are listed in Art 130R(1) are phrased somewhat differently, but are by and large identical to the present provisions. The addition of "promoting measures at international level to deal with regional or worldwide environmental problems" as a Community objective is a codification of a principle previously stated in the environmental action programmes.

Some interesting changes are included in the guiding principles of Art 130R(2), however. In the first place, this provision now refers to a "high level of protection" and thus removes inconsistency with Art 100A(3). Any doubt as to the possible maximum "quality" of environmental standards adopted under Art 130S, as contrasted with those based upon Art 100A, has therefore now been removed.

The second change that deserves attention relates to the inclusion of the "*precautionary principle*" as a principle of Community environmental law. As the principle that preventive action should be taken (which has conditioned EC environmental policy since its inception) has been maintained in the Treaty, this implies that the precautionary principle should be given the meaning it is afforded in modern literature on the subject of international environmental law. In other words, Community environmental action will now be based on the principle that (legislative) measures should be taken even before a causal link can be demonstrated between environmental degradation and certain pollutants. Evidently, by embracing the precautionary principle, the Community has taken a very important step which could have far-reaching consequences.

Apart from amendments to allow environmental decision-making to be facilitated in certain areas (about which some brief remarks below), Title XVI for the remainder closely resembles the current regime.

By virtue of the inclusion of the precautionary principle and majority voting in a number of areas, it appears that the Treaty will extend Community powers in the field of the environment. However, the question as to the impact of the principle of subsidiarity on the exercise of these powers remains unclear. This uncertainty stems first and foremost from the ambiguity of the principle itself. In Art 3b it is formulated thus:

> "The Community shall act within the limit of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

Although it is unclear how this principle will be applied to concrete proposals, the fifth environmental action programme (Com(92) 23 final) may provide some indications as to its general impact in the field of the environment. From the most recent action programme it would appear that this impact may turn out to be negligible. (see p. 114 supra).

Environmental decision-making

As noted above, one of the most important changes the Treaty intends to bring about is the introduction of qualified majority voting in a wider range of environmental issues. At present, qualified majority voting in the field of the environment only applies to proposals which are intended to further the establishment of the internal market (Art 100A). This procedure is extended to the whole field of the environment with the exception of:

- provisions primarily of a fiscal nature;
- measures concerning town and country planning, land use (with the exception of waste management and measures of a general nature), and management of water resources;
- measures significantly affecting a Member States' choice between different energy sources and the general structure of its energy supply.

Leaving aside what exactly must be understood by the phrase "management of water resources", in conjunction with "measures of a general nature", it is likely that future water Directives would be adopted by a qualified majority. This, of course, could accelerate the implementation of, for example, Directive 76/464 on discharges of dangerous substances in the aquatic environment of the Community.

While, on the positive side, the Treaty facilitates environmental decision-making in a number of import-

ant areas, the picture that emerges is an extremely complicated one. On the one hand, there will be environmental measures that continue to be adopted on the basis of Art 100A (where a "co-decision procedure" with an enhanced role for the European Parliament as provided in Art 189B will apply), on the other hand, there are the measures which will be adopted on the basis of Art 130S(1), where decisions are to be taken by a qualified majority in accordance with Art 189C to which, however, there are exceptions for which unanimity will be required. On balance, therefore, the advantages brought about by qualified majority voting are partly outweighed by the unnecessary complexity and confusion of three different decision-making procedures.

The implementation of environmental Directives

Considerable attention has been paid to the proper implementation of Community (environmental) Directives. In the Final Act of the Conference, a Declaration was made on the implementation of Community Law. It was recognised that "it must be for each Member State to determine how the provisions of Community law can best be enforced in the light of its own particular institutions, legal systems and other circumstances, but that in any event in compliance with Art 189 [... it is] essential ... that measures taken by the different Member States should result in Community law being applied with the same effectiveness and rigour as in the application of their national law". To this end, the Conference called on the Commission "to ensure ... that Member States fulfill their obligations".

Although the legal significance of the Declaration would seem to be limited, evidencing the awareness of the importance of the problem by the Member States themselves, the statement must be welcomed.

Yet, in respect of the implementation of Community environmental Directives, the importance of the Treaty is not limited to non-binding statements of a general nature. Most significantly, Art 171 of the Treaty envisages the imposition of financial sanctions on Member States which fail to comply with a judgment of the European Court of Justice. In view of the growing number of judgments for non-implementation of a sentence by the European Court, limited powers to impose sanctions would seem a necessary innovation.

Conclusion

From this brief discussion, it may be concluded that the Treaty on European Union seeks to bring about a number of important and largely positive changes.

Community financing of the implications of high EC environmental standards in Member States where these standards otherwise cannot be afforded, for example, seems a necessary and logical step in accordance with the founding principles of the Community.

A gradual move from the principle of prevention to the more cautious "precautionary principle" similarly fits the current state of thought in respect of the most efficient strategy to safeguard the environment.

The extension of qualified majority voting to most areas of Community environmental policy may break a number of deadlocks which have inhibited progress in certain important spheres. Finally, the Court's power to penalise recalcitrant Member States may be regarded as a necessary supplement to the right individuals enjoy to claim compensation for damage suffered as a result of the non-implementation of Community Law (case C–6/90 and C–9/90, *Francovich*, not yet reported, [1992] *Water Law* 35)

Although the Treaty leaves some uncertainty as to the extent of the changes it brings about, it represents a significant improvement in the mechanism for giving effect to Community environmental policy. Consequently, it is to be hoped that the Danish veto will not prove to be an insurmountable obstacle to the eventual entry into force of the Treaty.

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