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European Legal Studies
Etudes Européennes Juridiques

RESEARCH PAPERS IN LAW

7/2003

Ludwig Krämer

The Genesis of EC Environmental Principles

European Legal Studies/Etudes Européennes Juridiques
Dijver 11 | B-8000 Brugge, Belgium | Tel. +32 (0)50 47 72 61 | Fax +32 (0)50 47 72 60
E-mail law.info@coleurop.be | www.coleurop.be

The Genesis of EC Environmental Principles

Ludwig Krämer(*)

I. The birth

I.1 The origins

The EC Treaty in its present version contains a number of environmental principles. The following contribution will try to retrace the origins of these principles in the EC Treaty and how they were developed by the EC institutions and in particular by the Commission. This discussion concerns the principles of integration[1], prevention[2] and precaution[3], the principle that environmental damage should as a priority be rectified at source[4] and the polluter-pays-principle[5].

As is well known, the original EC Treaty of 1957 did not contain any provision on environment policy or law. In 1971, the Commission submitted a first communication to the Council on a Community policy for the environment[6] which was soon followed by a proposal for an environmental action programme[7]. Neither of these documents contained any reference to environmental principles. It was the German delegation which, in a Council note of 25 September 1972[8], requested that the Council's resolution should be based "on a general environmental conception"[9]. Therefore, the Council's document on environmental policy should contain "a general part which determines the basic principles of a European environmental policy" and an action programme with specific concrete actions. "The general part should contain general principles and objectives which are recognised in the same way for specific EC measures and as guidelines for specific actions in Member States..the basic principles should have long-term effects." The document formulated ten basic principles, among them the prevention principle, the polluter-pays-principle and the integration principle.

(*) The author only expresses his personal opinion.

Mid-October 1972 the Heads of State or Government of the Member States met in Paris and invited the EC institutions to elaborate an environmental action programme. On 31 October 1972 the EC ministers for the environment, at a meeting in Bonn, agreed eleven "principles of a Community environment policy" which took over the environmental principles mentioned in the German note and, in supplement, some wording on the necessity to rectify damage at source.

I.2 Principles in action programmes

The first EC environmental action programme followed the German proposal; it was split into a general part which dealt with objectives, principles and generalities of EC environmental policy and a specific part which gave a detailed description of the specific actions which were to be undertaken within the next two years[10]. The eleven "principles of a Community environment policy"[11], agreed in Bonn, were incorporated into the general part, without any clarifying wording.

The second, third and fourth EC environmental action programme also referred to these principles, though the repartition of the programme into a general and a specific part was abandoned[12]. There was neither any detailed discussion of the principles in these programmes. The Commission also showed in other documents which it issued in this period that it did not attach much importance to the principles, hardly ever mentioned[13].

EC environmental legislation between 1975 when the first environmental directive was adopted, and 1985 only mentioned any of those environmental principles, when this appeared convenient in order to justify the approach chosen[14]. There is not one single directive or regulation where the chosen approach was directly based on one of the principles. This attitude finds its explanation mainly in the fact that there was no explicit legal basis for environment measures in the EC Treaty and that legislation therefore proceeded very pragmatically and that the insertion of the principles in the programme had been done at the specific request of one Member State. In the same way, the legal literature prior to 1985 hardly discussed the environmental principles[15].

There was thus little scientific, administrative and political preparation of the ground for environmental principles, when in 1985, the EC Treaty was amended and a chapter on environmental policy (Articles 130r to 130t) was introduced. On the request of the Intergovernmental Conference, the Commission drafted provisions *inter alia* on principles which were incorporated in the final text without much discussion[16]. These principles correspond to those which are now enshrined in Article 174 EC, with two exceptions: the Maastricht Treaty of 1993 added the precautionary principle to Article 174(2) EC. And Article 130r in its version of 1987 also contained a provision on the integration principle which was, by the Amsterdam Treaty of 1999, placed into Article 6, as will be explained below.

II. The integration principle

II.1 Origins

The Commission's first proposal for an EC environmental policy programme stated that environmental concerns affected more or less all EC policies; it expressly mentioned commercial, agricultural, competition, social, transport, development, energy and regional policy[17]. The first environmental action programme then stated that "the activities of the Communities in the different sectors in which they operate (agricultural policy, social policy, regional policy, industrial policy energy policy etc..) must take account of concern for the protection and improvement of the environment. Furthermore, such concerns must be taken into consideration in the elaboration and implementation of these policies[18].

The second environmental action programme stated that without environment protection measures, it would not be possible to achieve the EC's objectives of Article 2 EC[19]; it discussed some activities in the agricultural, energy and social sector, but did not specify in detail any integration requirements. In 1983, the Council and Member States' Resolution on the third environmental action programme declared "that it is important for Community actions to be carried out particularly in the following areas: (a) integration of the environmental dimension into other policies"[20].

II.2 Treaty amendments

In March 1985, the Commission presented to the meeting of Heads of State and Governments in Brussels a memorandum on an EC-wide environment policy[21] in which it asked the European Council to endorse three main guidelines of such a policy, the first of which declared: "Protection of the environment is to be treated as an integral part of economic and social policies both overall (at macroeconomic level) and by individual sector (agricultural policy, industrial policy, energy policy, etc.).." At the end of that Brussels meeting the European Council affirmed "its determination to give this policy (environmental policy, L.K.) the dimension of an essential component of the economic, industrial, agricultural and social policies implemented by the Community and by its Member States[22]". The discussions on the amended EC Treaty which started in the same year 1985, led to the provision of the new Article 130r (2.2) EC which entered into effect in 1987 and which stated that "environmental protection requirements shall be a component of the Community's other policies".

The Maastricht Treaty of 1993 reformulated this provision as follows: "Environmental protection requirements must be integrated into the definition and implementation of other Community policies". The Amsterdam Treaty of 1999 transferred this provision into the new Article 6 EC which now reads: "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". This transfer was a reaction to the Commission's request at the Intergovernmental Conference to insert a reference to environmental requirements into the chapters on agriculture, transport, competition etc.

The fourth environmental action programme, drawn up in 1985/86 at a time, when it was already apparent that there would be a chapter on environmental policy inserted in the EC Treaty, contained a full chapter on integration requirements[23] though it did not go beyond general statements that such integration was necessary. For the internal market aspects, the Commission set up a specific Task Force which came up with a detailed, thorough analysis on

the integration of environmental requirements in the internal market, but was poor as regards operational conclusions[24].

II.3 Procedures inside the Commission

In 1991, the Commission published guidelines for legislation in internal market matters[25] which generally suggested that future internal market legislation should fix strict, binding standards for a first period and at the same time guide standards which were to be reached in a longer period. The standards for the first period should be fixed by the Council, the standards for the second period by the Commission. Tax incentives for an accelerated application of the first and - in limits - the second set of standards should be allowed. These guidelines had the disadvantage that the Commission itself did not make one single proposal for legislation where it suggested their application. They quickly fell into oblivion.

In 1993, the Commission adopted a number of internal operational measures with the aim of reaching better integration of environmental concerns into its decisions[26]. The main measures suggested were the following:

- all Commission proposal were to be assessed on their environmental effects. Where such an impact was likely, an environmental impact assessment was to be made;
- proposals for new legal measures should, in the explanatory memorandum, describe and explain environmental effects and environmental costs and benefits;
- the Commission work programme had to identify with a green asterisk measures with a significant impact on the environment;
- in all Commission departments, contact persons for the integration of environmental requirements into that sector had to be designated;
- an environmental network of director generals was set up inside the Commission which was to ensure coordination of measures and the integration of environmental requirements;
- the Commission's annual report had to include, for key political areas, an indication of how environmental considerations were taken into account;

- a number of measures concerned the Commission's handling of its own waste management, waste recycling and purchase policy ("green accounting") were taken.

Overall, the effect of these measures on the orientation of the Commission's policy was insignificant. No environment impact assessment was made for any new proposal. Also other measures were not applied by the Commission administration and the guidelines were, with the political renewals of the Commission in 1995 and 1999, progressively forgotten.

II.4 Sectorial initiatives

Another attempt of integration was made under the fifth environmental action programme which ran from 1993 to 2000[27]. In this programme which had the heading "Towards Sustainability", the Commission selected five target sectors - manufacturing industry, energy, transport, agriculture and tourism - with a particularly significant impact on the environment. The programme fixed, for the very first time, a number of targets for each of these sectors which were to be reached by 2000.

The programme did not change EC's administrative and political practice and, in particular, did not lead to any specific initiative in any of the five sectors. In view of the modest results, the Commission's report which was to assess the results of the fifth action programme, did not examine these five sectors in any detail but, limited itself to mentioning that integration had had a "limited success" and, for the rest, preferred to look into the future[28].

Since the appearance of environmental provisions in the EC Treaty, one of the actions taken by the Commission was the publication of communications, greenbooks or white papers on the relation between specific sectors of EC policy and the environment. Probably the first of such papers dated from 1988 and concerned "Environment and agriculture"[29]. The thoroughness and quality of these communications differed greatly. Normally, the analysis of the interrelationship between the environment and the specific sector of policy was acceptable. However, since almost never any operational or political proposals for amending the sectoral policies were made, the communications had more an alibi effect than a significant impact.

II.5 Cardiff process; impact assessments

As the above-mentioned insertion of Article 6 in the EC Treaty once more underlined the importance of the integration principle, the European Council, meeting in Cardiff in June 1998 took a new start to that question. It invited the transport, energy and agriculture Councils to elaborate strategies for integrating environmental requirements into their sectors and to report on it. Later European Councils extended this request to the internal market, industry, development, fisheries, economic and general affairs Councils.

However, the work was not done by these Councils, but rather by the Commission which submitted a number of papers[30] that were subsequently "approved" by the different sectoral Councils and discussed by the Heads of State and Governments. Neither did the different Councils nor did the Commission feel bound by the papers and the subsequent political conclusions. And while this "Cardiff process" of developing and discussing "strategies" was never formally brought to a halt, it progressively turned more in political declamation than leading to a work programme with objectives, priorities and timetables[31]. This led the sixth environmental action programme to state that further integration efforts were needed and request that the different strategies produced under the Cardiff process "are translated into effective action"[32].

In 2003, the Commission started a new attempt. It submitted to an impact assessment all legislative proposals which had an economic, social or environmental impact and all non-regulatory proposals which had significant impacts. Where such impacts appeared, after a first scrutiny, to be likely, an extended impact assessment was to be made which included consultations with interested parties. This procedure which is more oriented on the "sustainable development" approach than on integration of environmental requirements, is still at its beginnings and it is too early to assess its effects. It appears, though, that the extended impact assessments might turn into a cost-benefit assessment of measures; and as there are still no means to precisely assess the economic impact of environmental impairment, there is a risk that the process will be limited to an assessment of economic costs for economic operators.

III. The principle of preventive action

The description of the evolution of this principle can remain short. Indeed, from the very beginning of the EC environmental policy, prevention of environmental deterioration, impairment and damage played an important role in all official documents. Thus, the first principle of the first environmental action programme stated[33]: "The best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects".

The second action programme repeated this principle. The third action programme declared it necessary "the preventive side of the environment policy to be strengthened in the framework of an overall strategy"[34]. And after the insertion of the preventive principle into the EC Treaty, the quoting of the necessity to take preventive action became even more frequent. A number of directives - such as on environment impact assessment, on industrial permitting or standards for products or installations - expressly saw their raison d'être in the application of the prevention principle - and quite rightly so.

IV. The precautionary principle

IV.1 Birth of the principle

Matters complicated when the Maastricht Treaty added to Article 174(ex Art.130r) EC the precautionary principle. This principle had not been mentioned in any of the EC environmental action programmes prior to 1991 nor, as far as I can see, in any other official EC document. The clause was proposed by Belgium[35] and apparently adopted without much discussion. As EC law is autonomous and cannot be interpreted by recurring to national notions or concepts, its interpretation is difficult, in particular as regards its relation to the prevention principle[36]. The question of the origins of the principle will not be discussed in this contribution which is limited to the tracing of the development of the principles.

IV.2 Precaution and prevention

At present, the precautionary principle is interpreted as concerning cases of scientific uncertainty[37]. Its - disputed - interrelationship with the prevention principle on the one hand, the German notion and concept of "Vorsorge" will not be discussed further. It appears, though, that prior to the insertion of the precautionary principle in the EC Treaty all cases of scientific uncertainty which are now subsumed under this principle were subsumed under the notion of prevention. The best illustration for this is the landmark judgment of the Court of Justice in the BSE-case. In that judgment, the Court upheld an export ban for British beef, because of the risk that British beef was infected with BSE and stated: "Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks becomes fully apparent. That approach is borne out by Article 130r(1) of the EC Treaty, according to which Community policy on the environment is to pursue the objective *inter alia* of human health. Article 130r(2) provides that that policy is to be based in particular *on the principles that preventive action should be taken* and that environmental protection requirements must be integrated into the definition and implementation of other Community policies" (emphasis added)[38]. The same approach is adopted in Directive 2001/18 on the deliberate release of genetically modified organisms where considerant four mentions the prevention and considerant eight the precautionary principle[39].

IV.3 Content

Even if a clear distinction line in law between precaution and prevention might not be able to be drawn and where the precautionary principle is understood as applying in cases of scientific uncertainty, the principle rsts open to broad interpretation. For this, it may be sufficient to compare the wording of the precautionary principle in the - USA-influenced - Rio Declaration[40] on the one hand, the definition of the Convention on the protection of the marine

environment in the North-East Atlantic (OSPAR), to which the EC adhered[41], on the other hand:

Rio Declaration: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damages, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

OSPAR-Convention: (The precautionary principle is a principle) by virtue of which measures are taken when there are reasonable grounds for concern that substances or energy introduced directly or indirectly into the environment may bring about damage to human health, harm living resources,..even where there is no conclusive evidence of a causal relationship between the inputs and effects".

The EC rather follows the OSPAR-definition[42]. In 2000, the Commission adopted a communication on the precautionary principle where again it followed the broader definition of the OSPAR-Convention[43]. The prolonged discussions with the USA on a moratorium for the marketing of genetically modified products and of meat which contains chemical growth promoters (hormones) that took place in the context of the World Trade Organisations probable induced the Commission to elaborate that Communication. The Communication explained, how and to what extent it was intended to use the principle, established guidelines for its application, undertook to build a common understanding on it and warned against using this principle as a disguised form of protectionism.

It should be noted that under Article 95(5), the Commission - rightly - does not allow Member States to apply the precautionary principle, in order to introduce national legislation which deviates from common EC provisions that had been fixed under Article 95 EC; the Commission rather requests the conditions of Article 95(5) EC and in particular those of "new scientific evidence" to be complied with in full[44].

V. The rectification of environmental damage at source

V.1 Origins

This principle appears for the first time in the list of general environmental principles of the first environmental action programme[45] where the first principle states: "The best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects". The same idea is expressed in the second principle: "Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes". The wording of both principles indicate its proximity to the prevention principle.

However, nowhere in the first or, indeed, the second action programme was there any conclusion drawn from the existence of this principle. Also, the two reports on the state of the environment of 1977 and 1979[46] did not mention this principle, though there would have been good reason to do so. Indeed, the first report reported in detail on the controversy between the United Kingdom and the other Member States, whether discharges into water should be tackled on the basis of emission standards - this approach was, at that time, favoured by the Commission and eight Member States - or quality standards which were favoured by the United Kingdom[47]. One argument in favour of emission standards in this controversy would have been that environmental impairment should, if any possible, be rectified at source. However, this argument was neither raised in the directive on discharges itself[48] nor in the 1977 report on the state of the environment. In its chapter on air pollution, the 1977 report even used the title " reduction environmental pollution at source" and described measure on gas oil and used oil, without ever mentioning the principle[49]

The Council's resolution on the third action programme declared that EC action should be carried out particularly in the are of "reduction of pollution and nuisance if possible at source"[50]. With small drafting amendments, this formula became, in 1985/87, the principle in Article 174 (2)(ex Article 130r) EC. The fourth action programme discussed "source-oriented controls" without mentioning the principle[51] and without making any concrete proposals. The Council's resolution on this programme declared that the EC should concentrate, under the heading "pollution prevention" on the "reduction at

source of pollution and nuisance" regarding air, water and soil pollution and hazardous waste[52].

V.2 Application

The fifth and sixth environmental action programmes did not touch this principle any more, despite a judgment of 1992, where the Court of Justice declared that the principle of rectifying damage at source "means that it is for each region, commune or other local entity to take appropriate measures to receive, process and dispose of its own waste. Consequently, waste should be disclosed of as close as possible to the place where it is produced in order to keep the transport of waste to the minimum practicable"[53]. The Commission rightly considered that specific judgment to be politically influenced[54] and therefore did not generalise its conclusions.

An illustrative example of practical application constitutes Directive 96/61 on integrated pollution prevention and control. The Commission had made a proposal for a directive where it mentioned in the considerants all the principles of Article 130(2) and where it proposed that that permits for industrial installations exceptionally need not be based on the best available techniques where environmental quality standards could nevertheless be respected[55]. The European Parliament opposed this approach, invoking the principle that environmental damage should be rectified at source, and asked for a deletion of that clause[56]. The Commission did not amend its proposal[57], but the Council, while maintaining the mentioning of the 'rectification' principle, deleted the clause in the final version of Directive 96/61[58].

For the rest, the Commission never took any initiative to explain in detail the meaning and relevance of this "rectification at source"-principle or to examine, to what extent it required the elaboration of EC-wide emission standards rather than of quality standards, though this problem was discussed in legal literature. Generally, the EC orients itself, since the end of the eighties, towards quality rather than emission standards for water, air, and soil[59], without having established an explicit strategy in this regard.

Overall, the rectification principle has not played any significant role in the legislation and practice of EC institutions in the area of environmental policy.

VI. The polluter pays principle

VI.1 Origins

The polluter-pays-principle appears at a very early stage of EC environmental policy. This finds its main explanation in the fact that the Commission wanted to ensure Member States that the introduction of an EC environmental policy did not mean that their contribution to the EC budget would have to be increased. In its proposal for an environmental programme of 1972, the Commission therefore declared that market economy required that persons who damaged or polluted the environment should pay the costs of this pollution and for remedial measures[60].

The environmental principles of the first action programme included this aspect in principle 5: "The cost of preventing and eliminating nuisances must in principle be borne by the polluter. However, there might be certain exceptions and special arrangements, in particular for transitional periods.."[61] Subsequently, the polluter pays principle was discussed in two Council Recommendations addressed to Member States[62] and in a Commission Report[63]. Recommendation 75/436 explained it as "a principle under which natural or legal persons who are responsible for pollution must pay the costs of such measures as are necessary to eliminate that pollution or to reduce it. Environmental policy should not in principle depend on policies which rely on grants of aid and place the burden of combating pollution on the tax-payer[64]". The Recommendation also discussed possible charges for emissions and envisaged a harmonisation of such charges. Furthermore, it discussed exceptions to the application of the polluter pays principle.

VI.2 State aids

As these Recommendations were not binding and, furthermore, addressed to Member States, the Commission sent, in November 1974, a memorandum to Member States setting out its approach to state aids in environmental matters[65]. These provisions were to apply for a transitional time that ended in 1980; afterwards, it must be understood, the Commission intended to apply the polluter pays principle in full. As in the meantime, however, state aids in

environmental matters had increased rather than diminished, this transition period was prolonged by further six years[66]. This process was repeated in 1986[67]. For the first time the Commission then published, in 1994 "guidelines for State aid for environmental purposes"[68] which were renewed in 2001[69]; they are intended to apply until 2007. The guidelines state that environmental policy could no longer be understood as a corrective policy - which it had never been - but as a long-term policy with the aim of promoting sustainable development. "In general, the 'polluter pays' principle and the need for firms to internalise the costs associated with protecting the environment would appear to militate against the granting of State aid. Nevertheless, ..aid can be justified in two instances: (a) in certain specific circumstances in which it is not yet possible for all costs to be internalised by firms and the aid can therefore represent a *temporary second-best solution* by encouraging firms to adapt to standards; (b) the aid may also act as an *incentive* to firms to improve on standards or to undertake further investment designed to reduce pollution from their plants".

The guidelines constitute at present the basis on which the Commission assesses the compatibility of national aids for the environment with the requirements of the provisions of Article 87 et ss. and bind in this sense, in a way of self-commitment, the Commission.

VI.3 EC law

In primary law, the polluter pays principle was introduced into Article 174 (ex Article 130r) by the Single European Act 1985/1987, however with a rather different wording in the different languages[70]. In 1991/1993, the Maastricht Treaty added a paragraph 5 to Article 175 (ex Art.130s) EC, according to which the Council could, without prejudice to the principle that the polluter should pay" decide on financial support for a Member State, where an environmental measure decided under Article 175 EC "involved costs deemed disproportionate *for the public authorities*". The financial support was to be granted by the Cohesion Fund under Article 161 EC. The imperfect drafting of this provision which only took into consideration the costs for public authorities, but not the

costs of the measure itself, had as a consequence that until now this provision was not applied at all.

The Regulation which set up the Cohesion Fund[71] does not refer specifically to the polluter pays principle, though it also cofinances projects where the environmental impairment was caused by a specific polluter and where thus the polluter pays principle might be applied. No case is known, where EC authorities recovered clean-up costs in full or in part from a polluter.

The Regional Funds regulations[72] do not either refer to the polluter pays principle, though also under the regional policy the EC cofinances projects where specific, identifiable polluters or group of polluters may be responsible for environmental damage.

In my opinion, it would be appropriate, if both under the Cohesion Fund and the Structural Funds the polluter pays principle were applied in full: in cases where public funds are used for restoring an impaired environment and the polluter can be identified, the cost for restoration should be born by that polluter.

The polluter pays principle was mentioned, explicitly or implicitly, in all six EC environmental action programmes. In secondary law, it was mentioned in a number of directives, in particular in the waste sector[73]. Some more recent directives contain more detailed provisions which try to elaborate what costs should be born by polluters[74]; Directive 2000/59 on waste from ships[75] expressly deviates from the polluter-pays-principle without mentioning this, by requesting ships to pay a fee for port installations of ship waste independently whether they use the installations or not.

VI.4 Environmental liability

Early 2002, the Commission made a proposal for a directive on environmental liability[76], where it proposed, in particular that, as a principle, Member States "shall either require the operator to take the necessary restorative measures or shall itself take such measures" (Article 5). In certain cases Member States had even to "ensure that the necessary preventive or restorative measures are taken" (Article 6). Member States had to recover the costs incurred from the operator that had caused the environmental damage. The proposal expressly invoked the polluter pays principle[77]. In Council, this was considered to be too

far-reaching. The Common Position therefore stated that the operator should be liable: "..the remedial measures are taken by the operator" (Article 6); the "operator shall bear the costs for the preventive and remedial actions taken" (Article 8)[78]. Any reference to an obligation of Member States to restore the damaged environment was deleted.

One can well see the reasons behind the Council's decision, though in my opinion an obligation for public authorities to restore the damaged environment and then to recover the costs from the responsible operator, is not in contradiction with the polluter pays principle.

VII. Concluding remarks

1. The environmental principles which are now laid down in Articles 174(2) and 6 EC were, in substance, all laid down in the first EC environmental action programme of 1973 and in subsequent programmes, with the exception of the precautionary principle.

2. Between 1972 and 1986, EC environmental policy hardly attached any importance to the existence and meaning of environmental principles. A recommendation on the polluter pays principle of 1975 remained without significant effect at EC level.

3. It does not appear the express introduction of environmental principles in Article 174 EC in 1987 led to a significant change in EC environmental policy or with regard to specific files.

4. The integration principle - now Article 6 EC - which was a principle of environmental policy since 1973 and was established in 1987 in Article 174 (ex Art.130r) EC, remained a subject of political declamation rather than changing policy orientations.

5. Its transfer to Article 6 EC in 1999 increased its visibility and led to some efforts by the Commission to make it operational. A final assessment of its effect cannot yet be made.

6. The precautionary principle which was inserted in Article 174 in 1993, had no explicit antecedents in EC law. Probably due to international developments, the Commission issued a communication on its meaning. Nevertheless, the precise legal contours of the principle remain open for interpretation.

7. Where the EC has legislated and taken into account the problems of scientific uncertainty, Member States may not introduce different legislation by invoking the precautionary principle. Rather, they are confined to the application of Article 95 EC.

[1] Article 6 EC Treaty: "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".

[2] Article 174(2.2) EC Treaty: "It (Community policy) shall be based ..on the principles that preventive action should be taken"

[3] Article 174(2.2) EC Treaty: "It (Community policy) shall be based...on the precautionary principle.."

[4] Article 174(2.2) EC Treaty: "It (Community policy) shall be based..on the principles..that environmental damage should as a priority be rectified at source.."

[5] Article 174(2.2) EC Treaty: "It (Community policy) shall be based on the principles..that the polluter should pay."

[6] Commission SEC(71) 2616 of 22 July 1971.

[7] Commission proposal, (1972) OJ C 52/1.

[8] Council, R/1879/72 (ENV 37) of 25 September 1972.

[9] "umweltpolitische Gesamtkonzeption"(all translations, also in the following, by the author). In 1972, English was not an official EC language.

[10] Programme of action of the EC on the environment (1973) OJ C 112 p.1.

[11] These principles were: 1.Preventing the creation of pollution or nuisances at source; 2. Taking into account of effects on the environment at the earliest possible stage in planning and decision-making processes; 3. Avoiding exploitation of natural resources or of a nature which causes significant damage to the ecological damage; 4. Improving standards of scientific and technological knowledge; 5. Polluter-pays-pricniple; 6. Activities in one State should not cause degradation of the environment in another state; 7. Taking into account of the developing countries; 8. Improving regional and global cooperation and research; 9.Improving information and education on environmental issues; 10. Intervening at the most appropriate level (local, regional, national, EC); 11.Coordination environmental policies within the EC.

[12] Second environmental action programme (1977) OJ C 139 p.1; third programme (1983) OJ C 46 p.1; fourth programme (1987) OJ C 328/1.

[13] Commission, State of the environment: first report, Luxembourg 1977; Second report, Luxembourg 1979; Progress made in connection with the Environment Action Programme and assessment of the work done to implement it, COM(80)222 of 13 May 1980.

[14] See for examples below the discussion of the specific principles.

[15] See for instance House of Lords, Select Committee on the EC: EEC Environment Policy. (1980)London; H.v.Moltke a.o., Grenzüberschreitender Umweltschutz in Europa (Heidelberg 1984) E-Rehbinder-R.Stewart, Environmental Protection Policy. Berlin-New York 1985; R.Romi L'Europe et la protection juridique de l'environnement, Paris 1990.

[16] See also J.de Ruyt, L'Acte Unique Européen. Bruxelles 1987, p.216.

[17] Commission (n.7) p.6 et s.

[18] First action programme (n.10) p.11 et s. These phrases are placed in Title III, chapter 2, outside the section on principles of environmental policy which constitute Title II.

[19] Second programme (n.12)p.5.

[20] Third action programme (n.12), p.2; see also European Parliament, Resolution of 20 November 1981(1981) OJ C 327 p.83 which strongly pleads for integrating environmental requirements in all other relevant EC policies.

[21] Bulletin of the EC (1985) 3, p.101.

[22] European Council, Bulletin (n.21) p.13.

[23] Fourth action programme (n.12), 9 et ss, chapter 2(3), p.

[24] Task Force Report: 1992 - The Environmental Dimension. Bonn 1990.

[25] Bulletin of the EC (1991) 3, p.49 no.1.2.156.

[26] Commission, SEC(93) 785 of 2 June 1993; see also Written Question E-0649/97 (Carmen Diez de Rivera Icaza) (1997) OJ C 367 p.33.

[27] Fifth environmental action programme (1993) OJ C 138 p.1.

[28] Commission, Europe's environment: what directions for the future? The global assessment of the EC programme of policy and action in relation to the environment and sustainability development, 'towards sustainability', COM(99)543, section 9.

[29] Commission, COM(88) 338 of 8 June 1988.

[30] Commission, COM(98)716 of 1 December 1998 and COM(99) 640 of 1 December 1999(transport); COM (98) 571 of 14 October 1998 (energy); COM(99) 22 of 27 January 1999 and COM (2000) 20 of 26 January 2000 (agriculture); COM(99) 263 of 8 June 1999 (internal market); COM (99) 36 of 28 January 1999 and COM (2000) 264 of 20 May 2000 (development); COM(2001) 143 of 16 March 2001 (fishery); COM (2000) 576 of 20 September 2000 (economic questions); SEC(2002) 271 of 7 March 2002 (external affairs).

[31] See the statement of the then environmental Commissioner, R.Bjerregaard, of 26 November 1998 (quoted after ENDS Environment Daily of 27 November 1998 p.1): "a few nice words about the environment, but it's not what we are looking for"(referring to the strategies for energy, agriculture and transport).

[32] Decision 1600/2002 laying down the Sixth Community Environment Action Programme (2002) OJ L 242 p.1, Article 3(3).

[33] First action programme (n.10) p.6.

[34] Council Resolution on the third action programme (n.12) p.2.

[35] J.Cloos-G.Reinesch-D.Vignes-J.Weyland, Le Traité de Maastricht. Bruxelles 1993, p.321

[36] Sevenster, Milieubeleid en Gemeenschapsrecht. Deventer 1992, mentions that environmental organisations had suggested, in a publication, to substitute the prevention principle by the precautionary principle. Other sources refer to the German principle of "Vorsorge" as model for this principle.

[37] See, for instance, T.Christoforou, The origins, content and role of the precautionary principle in European Community Law, in: E.Freytag-T.Jakl-G.Loibl-M.Wittmann (eds.) The role of precautions in chemical policy, Vienna 2002, p.23: "The precautionary principle is about scientific uncertainty".

[38] Court of Justice, cases C-157/96 R.v.Ministry of Agriculture (1998) ECR I-2211, paras 63-64. It is interesting, but also significant that the English version of this judgment only refers to the prevention principle, whereas the German and other language versions mention both the precautionary and the prevention principle.

[39] Directive 2001/18 (2001) OJ L 106 p.1

[40] Rio de Janeiro Declaration on Environment and Development, 16 June 1992, Principle 15

[41] Convention on the protection of the marine environment in the North-East Atlantic (1998) OJ L 104 p.3.

[42] See for example Directive 1999/39 on baby food (1999) OJ L 124 p.8, fourth considerant: "Whereas, taking into account the Community's international obligations, in cases where the relevant scientific evidence is insufficient, the precautionary principle allows the Community to provisionally adopt measures on the basis of available pertinent information, pending and additional assessment of risk and a review of the measure within a reasonable period of time".

[43] Commission, Communication on the precautionary principle, COM(2000) 1 of 2 February 2000.

[44] See Commission Decision of 3 September 2003, by which a request from Austria was rejected which intended to introduce regional legislation in Oberösterreich according to which the fragile Alpine environment was to be temporarily protected against the import of genetically modified plants or animals.

[45] First environmental action programme (note 10), p.6.

[46] See above n.13

[47] First report (n.13) p.42.

[48] Directive 76/464 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, (1976) OJ L 129 p.23.

[49] First report (n.13). p.75.

[50] Resolution on the third action programme (n. 12)p.1

[51] Fourth action programme (n.12) p.19, no.3.4.

[52] Resolution on the fourth action programme (n.12).

[53] Court of Justice, C-2/90, Commission v. Belgium, (1992) ECR I-4431, para.34.

[54] The case considered a temporary import ban of hazardous waste into Wallonia. The Court did not discuss the fact that the temporary ban already lasted for nine years; it did not discuss, why a principle of Article 174 (ex Article 130r) EC applied to national measures and not only to EC measures; it did not discuss whether the measure was discriminating, as waste from other Belgian regions was not covered by the ban; it quoted the Basel Convention on the shipment of hazardous waste in support of his reasoning, though the EC was not party to that Convention at the time of the judgment; and it did not distinguish between waste that was shipped for being recycled and waste that was to be eliminated; etc.

[55] Commission (1993) OJ C 311 p.6, first considerant and Article 9.

[56] European Parliament (1995) OJ C 18 p.82; in the same sense Economic and Social Committee (1994) OJ C 195 p.54 which considered the proposal "not in tune with the objectives of Article 130r of the EC Treaty, as amended by the Maastricht Treaty (prevention principle, high level of protection, combating of environmental pollution at source)".

[57] Commission (1995) OJ C 165 p.9.

[58] Directive 96/61 on integrated pollution prevention and control (1996) OJ L 257 p.26.

[59] See in particular Directives 96/61 (n.45); 96/62 on air pollution (1996) OJ L 296 p.55; and 2000/60 on water (2000) OJ L 327 p.1.

[60] Commission proposal (n.7), p.5.

[61] First action programme (no.10) p.6; see also p.9 where the EC requests to work out EC-wide details of that principle and exceptions, in order to avoid distortion of trade and investment, and p.31et s., where measures for allocating the costs of anti-pollution measures are announced.

[62] Recommendation of 7 November 1974, (1974) OJ C 68 p.1; Recommendation 75/436 of 3 March 1975 (1975) OJ L 194 p.1.

[63] Commission, Fourth Report on Competition Policy, Bruxelles-Luxembourg 1975, no.175 et ss.

[64] The English version uses the word "Community" which is, however, just an incorrect translation of "collectivité" or "Allgemeinheit".

[65] A resumé of this memorandum is found in the Fourth Competition Report (n.63 above) no.181.

[66] Commission, 10th Report on Competition Policy, Bruxelles-Luxembourg 1981, no.222 et ss.

[67] Commission, 16th Report on Competition Policy, Bruxelles-Luxembourg 1987, no.259 et ss.

[68] (1994) OJ C 72 p.3.

[69] Guidelines for state aid for environmental purposes (2001) OJ C 37 p.3.

[70] The wording is as follows: English: principle that the polluter should pay; German: Beruht auf dem Verursacherprinzip (is based on the causer principle); French: est fondée sur le principe du pollueur-payeur (is based on the polluter-payer principle); Italian: é fondata sul principio "chi inquina paga"(is based on the principle "who pollutes pays"); Dutch: berust op het beginsel dat de vervuiler betaalt (is based on the principle that the polluter pays); Danish: bygger paa principperne at forureneren betaler (builds on the principle that the polluter pays); Greek: stirisetai stin archi "o ripaínon plirónei"(builds on the principle "the polluter pays"); Spanish: se basará en el principio de que quien contamina page (will be based on the principle that the polluter pays) Portuguese: fundamenta-se no principio do poluidor-pagador (is built on the principle of the polluter-payer).

[71] Regulation 1164/94 (1994) OJ L 130 p.1; amended by Regulations 1264/99 (1999) OJ L 161 p.57 and 1265/99 (1999) OJ L 161 p.62.

[72] Regulations 1260/1999 on general provisions (1999) OJ L 161 p.1; 1261/1999 on the Regional Fund (1999) OJ L 161 p.43; 1263/1999 on a financial instrument for fishery (1999) OJ L 161 p.54.

[73] See among others, Directive 75/439 on waste oils, (1975) OJ L 194 p.31, Article 15(2); Directive 75/442 on waste (1975) OJ L 194 p.47, Article 11; Directive 91/156 on waste (1991) OJ L 78 p.32 ; Directive 94/62 on packaging and packaging waste (1994) OJ L 365 p.10, Article 15; see also Directive 96/61 (n.58) first considerant.

[74] Directive 2000/60 (n.59) Article 9; implicitly also Directive 1999/31 on waste disposal installations (1999) OJ L 182 p.1 (Article 10).

[75] Directive 2000/59 (2000) OJ L 332 p.81, Article 8.

[76] Commission (2002) OJ C 151E p.132.

[77] Commission (note xxx), Articles 5 and 6 and considerants 2, 14 and 15.

[78] Council, Common Position of 19 September 2003 (not yet published). See also considerant two: "The prevention and remedying of environmental damage should be implemented through the furtherance of the "polluter pays" principle, as indicated in the Treaty and in line with the principle of sustainable development. The fundamental principle of this Directive should therefore be that the operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced".

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