

EU Environmental Policy
Can free trade
and environment go together?

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EU's miljøpolitik
Kan frihandel og miljø føreues?

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Preface

This book on EU environmental policy is an edited translation of a book issued in Denmark in 1998. It is written from a Danish point of view, but we feel that it will be interesting also to readers from other European countries. Denmark is one of the member states which has had the broadest public debate on its EU membership with five referendums:

- 1972 (membership)
- 1986 (the Single Act)
- 1992 (the Maastricht Treaty)
- 1993 (the Maastricht Treaty with the Edinburg agreement)
- 1998 (the Amsterdam Treaty).

Especially since 1986 environment has played a major role in the Danish debate on EU. Many Danes have feared and still fear that EU will force Denmark to a less powerful environmental policy - and in specific cases concerning tradable goods it certainly has done so, which this book will illustrate. But on the other hand if a common environmental policy on a high level of protection can be adopted, this will have much more effect than national Danish legislation. This dilemma will be illustrated in the book and a more progressive EU environmental policy concerning products (tradable goods) will be outlined.

This book is about EU environmental policy in relation to trans-boundary trade. This means that it covers the environmental legislation concerning products of any kind, but it does *not* cover other parts of environmental policy like nature conservation, emission standards, integration of environment in the common agricultural policy, structural funds and other policy sectors.

The book was finished in April 1998, but certain sections, where there have been important developments during 1998, have been revised in April 1999.

We thank very much the Secretary General John Hontelez and EU Policy Director Christian Hey, European Environmental Bureau (EEB), for their comments.

INTRODUCTION

A frequent statement in Danish public debate is that EU regulatory measures are minimum directives, implying that we need not fear having to lower the national level due to EU directives. However, this is only true concerning one half of EU environmental policies, i.e. the part not concerned with trade across borders. The EU formulates environmental policies in two basically different ways, namely in the form of

- total harmonisation, imposing precise environmental requirements and preventing Member States from going beyond such requirements;
- minimum directives, enabling Member States to take the lead in introducing more stringent measures, should they so wish.

The latter are mostly adopted with reference to Article 130S of the Treaty. By contrast, the former (total harmonisation) approach refers to Article 100A and often gives rise to environmental disputes, since it is applied to several crucial environmental policy issues.

The present book will look into total harmonisation - the relationship between the environment and the Single Market - while referring to other literature regarding minimum directives, e.g. discharges to soil, air and water, and nature protection.

The total harmonisation approach was made a great deal more effective in 1987, when the Single Act was adopted, followed by the introduction of the Single Market. In EU terminology, the harmonisation of environmental requirements on commodities is called “the removal of technical barriers to trade” – the philosophy being that products traded across national borders should be subject to identical technical requirements.

It would seem quite logical to require the standardisation of electrical equipment, so that one country cannot bar the products of others by insisting on its own standard. However, when applied to environmental requirements, such a philosophy becomes questionable. Indeed, environmental demands spring – directly or indirectly – from political change. In some countries, environmentalist movements are relatively strong, and their trade unions have struggled for quite some years to provide a better working environment, as well as being concerned with the external environment. This does not necessarily imply that the demands of such environmen-

talist movements are met. However, the time lag between acknowledgement of pollution problems and actual intervention is often shorter, and in some cases includes the introduction of preventive measures.

Conversely, some countries focus single-mindedly on economic growth, leaving their environmentalist movements in a weak position. Typically, in such countries, politicians are not prepared to yield to environmentally-founded intervention in manufacturing and consumption without the irrefutable evidence of a 'corpse'!

On a global scale, environmental advances in various fields are often spearheaded by single countries. In the eighties, the USA took the lead in cleansing automobile exhausts. In treating stack emissions from power plants, Japan and Germany are in the forefront. The Scandinavian countries were the first to acknowledge that organic solvents cause brain damage. Once a country has demonstrated that environmental action is possible, the way ahead is paved for environmentalists in other countries to push through similar demands.

This is the mechanism which, in several fields, the EU tries to hold back. No one country is allowed to take the lead, compelling others to follow suit, with the resulting danger of the most progressive countries being restrained by common standards.

Practically, this is done by applying total harmonisation, in which case a majority of EU countries will decide how strict the environmental requirements are to be. Hence, individual countries can no longer impose more stringent demands.

In principle, total harmonisation applies only to environmental demands placed on commodities that may be traded across borders. Conversely, individual Member States are free to tighten up their demands on discharges from fixed installations, e.g. standards for waste water and air pollution from factories and power plants. The same is true of threshold limit values for the working environment not directly referring to any single product. For these areas, the EU merely sets minimum directives. However, such regulations will mainly apply to the non-preventive form of environmental protection, meaning that the import and manufacture of environmental pollutants are allowed, and subsequent problems are solved by attempts to clean up the damage.

Today, in principle, we are concerned with recycling and cleaner technology, with prevention rather than cure. However, this would require taking measures against allowing environmentally hazardous substances in products; and in smaller countries such as Denmark, with minimal self-sufficiency, prevention is impossible unless demands can be enforced on imported goods.

In most developed countries, the environmental policies of the 70s and 80s produced substantial reductions in the then considerable discharges of environmental toxins from some industries. However, the use of environmentally hazardous substances was allowed to continue, so diffuse discharges resulting from such products and their disposal continued. Thus, dump sites and waste incineration plants gradually became major polluters.

Since the Single Act - the 1986 decision concerning the Single Market - Danish authorities have repeatedly referred to Article 100A, Section 4, the objective of which is to enable national governments to adopt their own, more stringent environmental legislation. Nonetheless, both Denmark and other Member States have been quite modest in making use of the article. For this very reason, our experience regarding the scope of the article is very scarce. For agricultural products, 100A, 4 has no validity at all.

Conflicts between environmental concerns and the realisation of the Single Market are not merely associated with the issue of technical barriers to trade and the harmonisation of environmental requirements on products. They are also evident in harmonisation of levies and the removal of border controls, EU directives for the tendering of public procurement policy (purchases and services), increased transport following the introduction of the Single Market.

These matters are also addressed in this book. Finally, there is a brief survey of the WTO, where identical conflicts between environmental demands and the free mobility of commodities are found.

THE SINGLE MARKET AND THE ENVIRONMENT

1. Focus on products

One could say that the central point of pollution has shifted from process to product, or from a problem associated with discharges from industrial processes to a problem of commodities with “built-in” environmental toxins. This amply demonstrates the shortcomings of the traditional treatment strategy. Certainly, the treatment of waste water can be sophisticated, more filters can be installed in waste incineration plants, or dump sites can be equipped with better membranes. But this will merely relocate the problem. As of today, practically all waste water and waste is more or less environmentally hazardous. The cleansing process produces huge quantities of sludge, respectively, slag and fly ash, all of which are contaminated with environmental toxins, making them poorly suited for recycling.

In 1987, the Danish Parliament adopted an amendment to the Act on Chemical Substances and Products. The Minister of the Environment was authorised to require substitution of hazardous chemical substances, whenever technically and economically feasible. In addition, Danish Health and Safety legislation provided for substitution of substances endangering workers’ health. Most often, these same substances also adversely affect the external environment. Consulting the text of the law, it is not immediately obvious that the EU sets narrow limits on the extent to which Denmark may implement such substitutions on their own. At the same time, it is most often very difficult to go via the EU and obtain a majority vote for the introduction of an EU directive. Also voluntary agreements could be limited by the Single market, and this could, in fact, undermine the Danish arrangement with industry on reducing the use of PVC in packaging – or at least hamper its extension regarding imports – after the EU packaging directive came into effect in 1994 (see the relevant section).

Normally, the prevention of environmental damage will require intervention addressing product composition, while remedial action is possible by treating emissions to air, water, and soil. So for the most part, preventative measures would have to be adopted at

the EU level and by majority vote, which is usually quite difficult to achieve. In contrast, Member States are entirely free to adopt more stringent measures regarding remedial action, since, as mentioned above, these are covered by minimum directives only, a point which will later be demonstrated with a few examples.

The EU has as its basis the Treaty of Rome, amended by the later treaties, the latest being the Amsterdam Treaty⁽¹⁾ which, among other things, stipulates that member nations may not impose trade barriers (Article 30). In other words, they may not adopt any legislation barring the commodities of other EU countries from their domestic markets. However, there is an exemption clause, according to which such demands that serve solely to protect the health of individuals and animals, etc., may be imposed, provided that these demands are not intended as trade barriers (Article 36). In the Danish “bottle case” (see Appendix), the EU Court of Justice interpreted Article 36 to include environmental protection as an exemption case. However, this is valid only if not contradicted by any EU legislation (directives or regulations), see the section on Packaging.

The problem is that almost any environmental legislation may be considered from both viewpoints. One country may adopt legislation with a view to protecting the environment. Another country or industry, finding a less restrictive legislation adequate, may claim that a trade barrier has been imposed. Such disputes must be settled by the EU Court of Justice.

The EU has adopted relatively few directives regarding bans or restrictions on the use of hazardous substances. The Commission has accepted that a member state can adopt national legislation concerning a substance or product, unless an actual EU directive already exists covering that substance or product. This is contradictory to the labelling of hazardous substances, for which the EU has already been practising total harmonisation for several years, i.e. by adopting comprehensive, detailed EU regulations which Member States may not tighten nationally. In this area, harmonisation comprises not only all specified substances, but also all other substances, see the section on Labelling.

So a number of Danish environmental regulations restricting the use of certain chemical compounds could only be adopted because no relevant EU regulations existed at the time. This goes for the

regulation on formaldehyde emissions from chipboard and plywood sheets, bans on cadmium in plastics, paints, cadmium coating, etc. as well as bans on CFC («Freon») in aerosol cans, lead ammunition and mercury products.

2. From the Single Act to Amsterdam

Environmental concerns were not on the agenda in 1957 when the Treaty of Rome, the original legislative basis of the EU, was signed. Only in the late 60s did political focus on environmental issues emerge, and in 1973, the EU Commission presented its first Environmental Action Programme (EAP) plan, laying out the framework of a future environmental policy within the European Community. Thus, the treaty did not refer to environmental considerations – a fact that impeded the process of developing a specific EU environmental policy for several years. Only in 1986, with the adoption of the Single Act, were environmental considerations explicitly included in the Treaty. The following will give a brief outline of developments in EU environmental policies, starting with the 1986 adoption of the Single Act, over the 1992 Maastricht Treaty, the 1996 Edinburgh Summit, and finally the Amsterdam Treaty signed in 1998 and ratified in 1999.

3. The Single Act and the environment

In 1986, a major step was taken towards increased integration within the EU. The so-called Single Act was adopted as well as plans for the Single Market, to be realised by the end of 1992. The aim was to eliminate any remaining trade barriers, also meaning: no national environmental requirements imposed on commodities. This was not fully realised, though harmonisation has made considerable progress. What we have is an integration which, in some respects, is more comprehensive than in the USA on the federal level. For example, in the USA, the State of California was allowed to take the lead, imposing stricter state level requirements on car and truck emissions than those enforced at a federal level – which, by EU standards, would constitute a technical trade barrier.

In order to realise the EU Single Market objectives, Article 100A was inserted, empowering the Council of Ministers to adopt directives on the removal of technical trade barriers by a qualified majority, i.e. 612 out of 87 votes, each country having a specific number of votes according to its population with a maximum of

10 votes for the big countries. For example, Denmark has 3 votes out of 87 (these numbers have been valid since January 1, 1995, the admittance date of Austria, Finland and Sweden).

When it comes to being more progressive, respectively, less developed in terms of environmental issues, we find a relatively consistent trend among member countries. Most often, Denmark, the Netherlands and Germany were willing to advance the farthest and since 1995, they have been joined by Austria, Sweden and - to some extent - Finland. The voting rules are highly significant due to the fact that before 1995 Denmark, the Netherlands, and Germany did not command an adequate number of votes to block the passing of any new directives that these countries found unsatisfactory. Contrarily, the UK together with some or all the Mediterranean countries, were often able to present a blocking minority (or a majority) whenever they found a proposed directive too extensive. However, since 1995, the more environmentally progressive countries have at least had the possibility to muster a blocking minority of 26 votes. After the change of government in France and the UK - in autumn 1998 followed by Germany - the more progressive block in the EU has grown.

Also, a new exemption from the principle of total harmonisation for goods was adopted, the so-called "Environment clause", or Article 100A, Section 4 (cf. the section «The Environment clause»). The exemption is applicable when EU harmonises the regulations for industrial goods, though not for agro-industrial products such as pesticides.

4. The Co-operation Procedure

The 1986 Single Act gave the EU Parliament more influence in the decision-making procedure, through Article 100A. The so-called co-operation procedure was introduced, requiring two hearings of a directive proposal in the EU Parliament. After the first hearing, the Council of Ministers will adopt a so-called Common Position. This is submitted to the EU Parliament for a second hearing. If the Council of Ministers has disregarded the amendment objections of the Parliament during the adopted in first hearing, then the Parliament can uphold its amendments in the second hearing or reject the Council's Common Position. Should the Council still prefer to disregard these amendments, it can adopt the proposal only by consensus. So now it has become somewhat more difficult

The Co-operation Procedure:

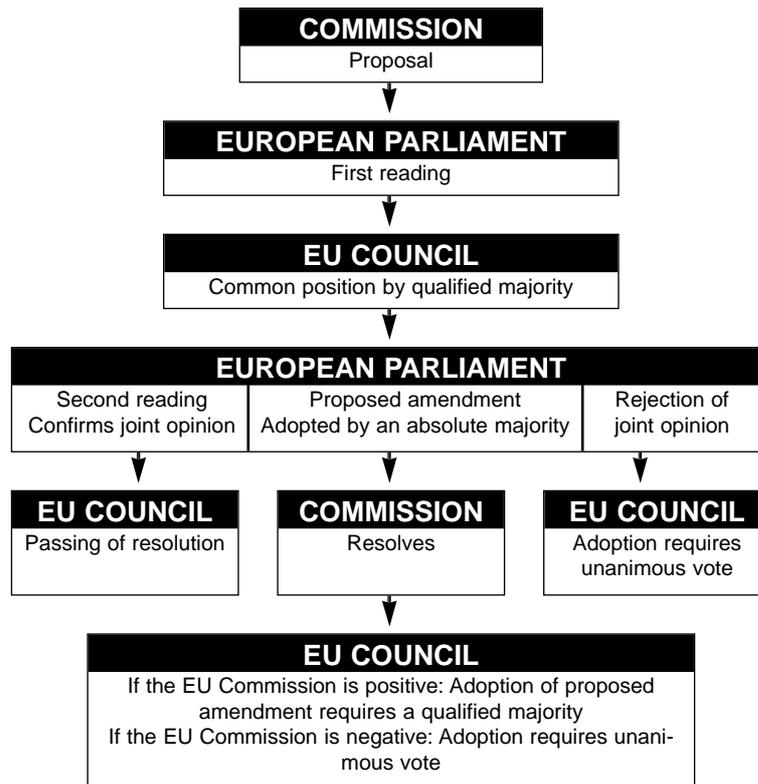


Figure 1. Diagram showing the EU decision-making processes according to the “co-operation procedure”.

for the Council and the Commission to disregard the wishes of the Parliament. However, in actual practice, it is not very easy for the EU Parliament to place itself in such a situation, since it would require that its own proposed amendment is adopted by the majority of all 624 MEPs, and not just members present. Often, too few members are present for such a majority to materialise.

This co-operation procedure, which is used with Article 100A directives, though not with other environmental directives (Article 130S), resulted in the EU parliament pressing to have as many

environmental directives as possible included under Article 100A, rather than Article 130S, for which (until the Maastricht Treaty) the co-operation procedure did not apply – which is still, to some extent, the case (see below.) As already mentioned, Article 130S is used with environmental directives with no direct implications for the exchange of goods. However, the EU Parliament and the Commission have often chosen interpretations according to which a given directive was not considered a “purely” environmental directive, but rather as a directive on technical barriers to trade – or at least a directive with the additional objective of creating equal competitive terms between Member States.

On this issue, the EU Parliament shared a common interest with the Commission, in that the latter regarded extensive harmonisation as its task, with a view to enabling the maximum free mobility of goods and equal terms of competition. This may be accomplished by transferring directives to Article 100A, thus making them into maximum directives, and precluding the introduction of stricter regulations by individual Member States. This eliminates the inherent dynamics of individual countries taking the lead and motivating others to follow.

The conflict led to several verdicts – the first one in 1991, regarding a directive on waste and waste water from titanium dioxide industries (see the Appendix.) The Council had adopted the directive according to Article 130S, since it did not affect the trade of commodities. However, the Commission and the Parliament wanted the directive adopted according to Article 100A, an opinion seconded by the Court. Hence, the directive could be made a directive for total harmonisation. The Court justified its verdict by a statement to the effect that the directive affects production and competition in the titanium dioxide industries, which in turn makes it relevant to the functioning of the Single Market.

The directive sets threshold limits to discharges, along with requirements on waste treatment which, obviously, are of economic consequence to the titanium industries. Using this line of argumentation, a considerable portion of the former Article 130S could be transferred to Article 100A. Thus, the verdict effectively established a precedent, indicating further restrictions on the latitude of individual Member States to establish more progressive environmental policies. At the same time, the Council responded by issuing a new directive under the provisions of Article 100A, but with

the addition that this would not prevent Member States from adopting stricter legislation.

The decision was followed by the so-called Wallonia verdict of July 9, 1992. The background was that Wallonia (a Belgian region) had a relatively low standard of environmental protection, and waste companies offered cheap treatment of imported waste. Therefore the government of Wallonia wanted to ban import of waste - hazardous as well as ordinary waste. The verdict established that waste material is a commodity, meaning that general bans on waste import cannot be introduced. Nevertheless, the verdict allowed for Wallonia to uphold its ban on the import of ordinary waste, acknowledging the validity of environmental concerns in the specific case. The reason why their permission covers ordinary waste only, and not hazardous waste - which seemed not very logical from an environmental point of view - is that the latter is regulated by a separate directive⁽²⁾, which was considered as total harmonisation, while ordinary waste was not covered by a specific directive. The verdict received a good deal of attention for what was considered its environmentally positive position, in particular because the Court had accepted restrictions on the import of waste even though it considered waste a commodity⁽³⁾ - because the Court found that the principle of proximity was valid concerning ordinary waste. However, environmentally speaking, the verdict had a considerable environmental drawback - that the Court did not accept national restrictions on the import of hazardous waste.

1993 rendered a verdict concerning the framework directive on waste. The verdict established that whenever the Single Market is not directly affected, the directive shall be in accordance with Article 130S. Though allowing a member state to create general restrictions on waste transfer, it was not made immediately clear whether the verdict rescinded the Wallonia verdict, i.e. to what extent general bans on the import of hazardous material can be adopted by individual Member States. The doubt arises since the verdict on the framework directive does not identify different types of waste as "ordinary", respectively, "hazardous" (4).

Nonetheless, in relation to both previous verdicts in the area, the verdict on the waste framework directive can be considered as one point up for the environment. The verdict established that the subject falls under Article 130S, thereby making it a minimum directive, even though the Commission, which started the case,

demanded that it be interpreted as a total harmonisation directive under Article 100A. The verdict does not imply per se that with regard to environmental issues, Article 130S will be used to a far greater extent in the future, but it does underline a principle: the fact that a directive has implications for the Single Market is not tantamount to refer to Article 100A. This is in stark contrast to the Commission's understanding so far – that anything concerning the mobility of commodities, or merely affecting fairness in economic competition, must be regulated under the provisions of 100A, i.e. total harmonisation.

Within the working environment, however, we do not find conflicts similar to those experienced with environmental issues, since the applicable Article 118A includes co-operation procedures and rule by majority vote, and since directives are adopted as minimum directives. Thus, the Commission and the Parliament have been far less reluctant to use Article 118A than they are to use Article 130S. The issue of a legal basis for working environment regulation has since 1986 been more satisfactory from a Danish point of view, in relation to that of the external environment. However, product requirements practically always fall under the jurisdiction of Article 100A, i.e. total harmonisation, also where the associated requirements regarding the working environment are concerned.

5. The Environment clause (Environmental Guarantee)

We have already mentioned the so-called Environment clause, an exemption from the total harmonisation of the commodities sector. Two varieties exist:

- 1) a provision enabling national regulations for sectors not subject to EU harmonisation in a concrete way (Article 36 of the Treaty)
- 2) a provision enabling more stringent national regulation, even for sectors already subject to harmonisation under an EU directive (Article 100A, subsection 4.)

Both provisions have been highly important in the Danish debate.

5.1. Trade barrier and bottle verdict

According to the Treaty, Member States cannot create trade barriers, either directly or indirectly (Article 30). This means they cannot have legislation barring the commodities of other Member States from their own market. However, there is an exception that states it is permissible to make demands serving the interests of human and animal health, etc., provided such demands are not intended to create trade barriers (Article 36).

However, any environmental legislation can almost invariably be considered from both viewpoints. The country adopting the legislation considers that its objective is to protect the environment. Another country or enterprise, satisfied with a less stringent legislation, would maintain that it is a trade barrier. Such a dispute has to be resolved by the EU Court.

The most publicised verdict under this Article was given in the Danish “bottle case”. The Court ruled that, although not specified, environmental considerations can justify an exemption under the provisions of Article 36. The verdict, issued in 1988, conceded to two of the Danish counts of indictment. Denmark was allowed to:

- uphold a ban on canned beer and soft drinks,
- impose bottle deposits.

However, Denmark lost on the third count - the right to approve all new bottle types, introduced to contain the number of bottle types in connection with our returnable bottle system. In consequence, Denmark relinquished the approval requirement, which led to an explosion in the number of bottle types, thus making our returnable bottle system more costly and burdensome. Still, Denmark did prevail with regard to both of the major counts (cf. the Packaging section.)

Article 36 applies only where no EU legislation already exists (i.e. directives or regulations). Thus, the bottle verdict is no longer valid, since the EU adopted a packaging directive in 1994. The Commission has now instituted proceedings against Denmark in order to have cans allowed.

5.2. The Environment clause of the Single Act

As already mentioned, the Environment clause (Article 100A, subsection 4) applies to such areas for which EU measures already exist - if adopted with reference to Article 100A. According to Article

100A, 4, a Member State can refer to national statutes if, for instance, this is found to be required for environmental or working environment reasons. The EU Commission or any Member State may then bring the case before the EU Court of Justice, should they find that a Member State is unlawfully applying the Environment clause. The EU Court has the final word as to whether the legislation of the relevant Member State should be considered as a predominantly environmental provision or as a trade barrier.

From the time of their 1986 decision concerning the Single Market, Danish authorities have referred to the fact that the Environment clause warranted the option of adopting more stringent national environmental legislation. Nevertheless, as to their actual use of the Environment clause, changing Danish governments have been exceedingly modest – and did so only after the ice had been broken by Germany and the Netherlands – and after Germany's interpretation had been approved by the Commission in 1994. In total the 15 member states have only used the environment clause 10 times in the period from 1987 to 1999 - and 3 of these were related to PCP, see below.

The Environment clause was put to the test before the EU Court in 1994 – in a case concerning Germany's interpretation of it – but resulted in the clarification of only a few points. The Environment clause was referred to during a case on the use of PCP, a wood preservative, in which Germany chose to maintain its ban from 1987 in spite of EU introducing common rules on this issue in 1991. These common rules were not as extensive as the German ones (see PCP section), but Germany maintained its ban and voted against the proposed EU directive on the use of PCP, referring to the Environment clause.

Germany's right to maintain its own rules on this issue were acknowledged by the EU Commission; however, France, then an importer and producer of PCP, put the case to the EU Court - against the Commission who had approved Germany's use of the environment clause. On May the 17th 1994 the EU Court decided to rescind the Commission's approval of the German ban since the approval was considered to lack a well-motivated argument on the part of the Commission. Then the Commission wrote a more thorough explanatory statement, and this was not taken to court. So in the end Germany was allowed to use the environment clause

- not by the Court directly, but by the fact that the new statement was *not* taken to court.

The use of the Environment clause was a long way from being clarified by the verdict. It did, however, cause Denmark to re-evaluate its interpretation with regard to the time when more stringent national rules really can come into force. It was established that national rules are valid only upon confirmation from the Commission, and not necessarily from the time when a Member State has passed its legislation (6). The situation is, therefore, that lack of confirmation by the Commission will lead to a deferment.

Only in 1995 did the Danish government decide to follow the German example and refer to the Environment clause regarding PCP – the case in which Germany was allowed the use of the Environment clause. On two other occasions, Denmark referred to the clause in connection with creosote, another wood preservative, and two food additives, nitrite and sulphite.

We will come back to the interpretations of the PCP verdict in the section «The Amsterdam treaty» below.

6. The Maastricht Treaty and the environment

The Maastricht Treaty on a political and economic union in the EU contained only minor changes in the environmental area. Majority rule was partially introduced for votes on minimum directives regarding the environment (Article 130S), and the EU Parliament was given the same amount of influence in this sector as in the Single Market, with the following exceptions:

- introduction of environmental levies,
- physical planning and management of aquatic resources,
- choice of energy sources,

all of which still require unanimous decision. It is of particular significance that the introduction of environmental levies still requires unanimous votes. Above all, the Commission and several Member States (including Denmark) have for some time pressed for the adoption of a joint CO₂/energy tax, but this has been blocked by the UK and Spain. Once the status of the 100A and the 130A were made partially equal, the above pressure for transferring environmental regulations to the domain of the Single Market disappeared. The introduction of majority vote on environmental issues can only be considered an advance: entering binding environmen-

tal agreements makes good sense, provided they are minimum directives that do not prevent any member state from going further.

The Co-decision Procedure :

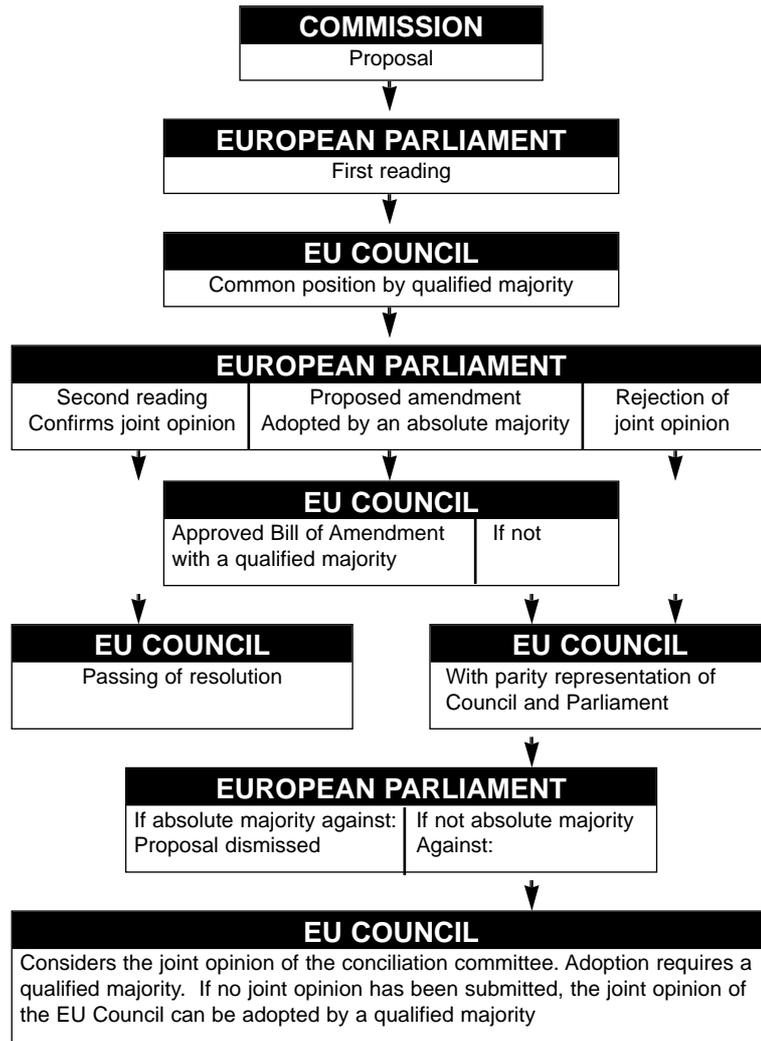


Figure 2. Diagram showing the EU decision-making processes according to the “co-decision procedure”.

In addition, a new procedure between the Council of Ministers and the EU Parliament was introduced, the so-called co-decision procedure, adopted for the Single Market (Article 100A). Firstly, the procedure has enabled the set-up of a conciliation committee in which the Council and the EU Parliament are equally represented. Thus, a platform has been formed where both parties have direct negotiations, with the Commission as a conciliation partner. Secondly, the powers of the EU Parliament have been strengthened, with the option of dismissing a proposal for a legal act. In that case, such an act can be adopted only upon a hearing in the conciliation committee.

The co-decision procedure according to Article 189B of the Treaty takes effect if, during its second hearing the joint opinion of the Council of Ministers is dismissed by a qualified majority of all votes among all members. (cf. section on the Single Act.) After motivating its dismissal, the EU Parliament will adopt proposed amendments to be forwarded to the Council. Should the Council not have adopted the proposal within three months, then the conciliation committee is convened and entrusted with drawing up a proposal on which both parties can agree. If the conciliation committee proves unsuccessful, the Council may confirm its original draft for a joint opinion, including any additions from the EU Parliament. However, in case the Parliament once more dismisses their opinion with a qualified majority, then the legal act will be deemed dismissed.

Finally, the general provisions of the Treaty were augmented with a passage to the effect that the EU will promote “sustainable and non-inflationary growth, respecting the environment”. Thus, environmental concerns were given a slightly more prominent role, though with a contradiction in terms, since the provision also emphasised economic growth.

7. The Edinburgh Summit - Subsidiarity

The Edinburgh Summit in 1992 is in Denmark associated with the Danish exceptions to the Maastricht Treaty. As a consequence of the Danish rejection of the Maastricht Treaty, an agreement was made during the 1992 Edinburgh session of the EU Council that Denmark would be exempted from Union provisions regarding the defence dimension, Union citizenship, Phase 3 of the EU Economic and Monetary Union, and its legal and police co-opera-

tion. None of these exemptions concern the environment. However, within the summit framework, there was also a debate on the need for clarification and concretisation of the subsidiarity principle, which has bearings on environmental policies.

As stated in Article 3B of the Treaty, the subsidiarity principle expresses an attempt to limit the competencies of the Community, respectively, individual Member States. It also says that the Community will take action only "... to the extent necessary to achieve the objectives of this Treaty" (the Maastricht Treaty; Eds.). As their interpretation, the Commission emphasised that the free mobility of commodities is within the jurisdiction of the sole competence of the Community, meaning that in this case, competence cannot be delegated to Member States based on the subsidiarity principle. The Edinburgh Summit agreed on the following concretisation of the subsidiarity principle:

"If it is found necessary to have standards laid down at Community level, minimum standards should be established, and Member States should be free to adopt more stringent national standards, *not only* for such sectors for which these are required by the Treaty (Articles 118A and 130T), but also for other areas, as long as they do not conflict with the objectives of the envisaged measure or the Treaty." (Authors' emphasis.). The emphasised phrase is particularly interesting, since it indicates a wider application of minimum standards than seen previously. This can be taken to express that the Council wished to enable Member States to work out more stringent national regulations (i.e. regarding the environment), provided these are not contradictory to other EU legislation. However, this interpretation of the proximity principle is not legally binding on the EU Court, and more concrete vestiges of this resolution are hardly found in the later practice of the Council. Yet, it can be taken to hint that total harmonisation shall be applied only in relation to any legislation influencing the free mobility of commodities.

8. The Amsterdam Treaty and the environment

The Amsterdam Treaty means some potential changes to environmental policy. From an environmentalist viewpoint, the Amsterdam Treaty offers some minor improvements, though not primarily associated with an extension of article 100 A, part 4, called «the Environment clause» or the environmental guarantee – a point

Danish politicians have especially stressed. There may even be one or two steps backwards; however, there is no saying as to their practical implications, due to certain unclear formulations in the new treaty which provide a great deal of latitude for future interpretation, by both the Commission and the Court.

The Amsterdam Treaty introduces the following improvements regarding the environment:

- more influence on environmental matters to the EU Parliament,
- more specific reference to environmental considerations in the general provisions of the Treaty,
- demands to the Commission for environmental assessments of initiatives within other areas of policy with potential environmental impacts; e.g. transportation, energy and agricultural policies,
- some strengthening of the Environment clause, since it can be made applicable to Commission directives, and also under a number of preconditions be used for introducing new regulations. Finally, a time limit has been set for Commission approval of the application of the Environment clause («environmental guarantee») by individual Member States.

A few other changes were introduced, interpreted as progressive by the Danish government, though their more manifest consequences are difficult to see:

- The demand for “environmental protection to be integrated in the design and implementation of Community policies in other sectors” is transferred from Article 130R (Environment) to the general introductory Articles.
- The demand for “a high protection level” (Article 100A, subsection 3) is extended, from applying to Commission proposals only to include directives adopted by the Council and the EU Parliament.

The following vague formulations, possibly steps backward, were introduced:

- An addition to Article 100A, subsection 4 (now subsections 4-9) to the effect that the use of the Environment clause by any Member State “may not impede the functioning of the Single Market”.
- Article 100A, subsection 3, which reads that Commission proposals for Directives should be based on a high protection

level, was given the addition that these should be based on “scientific evidence”.

We will discuss these later.

8.1. The influence of the EU Parliament

Presumably, the most important advance for the environment lies in the changed decision-making procedure, now to be used for the major part of the environmental sector – that is, the area for which majority vote was introduced by the Maastricht Treaty (cf. previous sections). This means that in the future the co-decision procedure incorporating the possibility of a conciliation committee will be used between Council and Parliament. The procedure grants more influence to the EU Parliament than the previous one. In terms of environmental policies, the EU Parliament has clearly been the most progressive EU body so far, and there are no indications that this will change in the near future. Moreover, and contrary to the Council and (especially) the Commission, the EU Parliament has a very open attitude or culture for the reading of proposals.

8.2. General provisions regarding environmental concerns

The introductory sections have been augmented with considerations for sustainable development, instead of the previous term “sustainable growth respecting the environment”. This is an improvement. The initial sections may be of some significance, e.g. when the Court is to resolve a conflict between the environment and the Single Market. However, when it comes to such general statements, are often not worth the paper they are written on is cheap. For instance, regarding the statement added to the treaty in 1987, that with respect to the environment, etc., Commission proposals should provide for a “high protection level” (Article 100A). The statement never hindered the Commission from submitting proposals that Denmark and countries of similar disposition found to be at a low protection level.

8.3. Environmental assessment of political initiatives

The Council of Ministers has issued a declaration to the Treaty, inviting the Commission to have impact assessments performed whenever submitting proposals possibly involving major environmental consequences. Presumably, this is a step forward. In recent

years, national or regional authorities - urged by the Commission - have to some extent carried out such impact assessments, when appropriating Structural Fund grants to Southern European infrastructure projects. This is now made statutory by the Treaty.

8.4. Environmental concerns with other policy sectors

This passage has been transferred to the general provisions of the Treaty. The Danish government among others insists that this transfer makes it firmer, yet it remains unchanged as to content. Until now, its existence in the Treaty has had very limited impact. In policies for e.g. transportation and agriculture, environmental considerations have played a very minor role. However, in 1997 the Agenda 2000 was issued, with a blueprint for a reform of the EU Agricultural Subsidies schemes. It was later followed up by a more specific Commission proposal, suggesting that regarding agricultural subsidies schemes, far higher priority should be given to environmental concerns.⁽⁵⁾ After long negotiations the reform was adopted in March 1999, but the environmental part was not so strongly emphasised in the final reform.

8.5. “New scientific evidence”

The phrasing of the Treaty, that Commission proposals should be at a “high level of protection”, has now been augmented with the words “in particular duly considering any new development based on scientific evidence”. The formulation “Scientific evidence” is precisely the phrase that Denmark fought to avoid in article 100A,4 (the Environment clause - see below). The fact that it was included here must be seen as a backward step. The Danish argument was that if scientific evidence or solid proof was made a prerequisite, action would be excluded for a number of cases for which there were merely well-founded suspicions. In its present form, the article practically reads that the Commission shall disregard the precautionary principle, made explicit elsewhere in the Treaty. This, of course, is difficult to imagine in actual practice, but the phrasing could certainly be used to that end.

8.6. “High protection level”

Furthermore, there is an addition that not only the Commission but also the Council and the EU Parliament must strive for a high protection level. This could be an improvement. However, it has

not typically been the case that the Council and Parliament deteriorated the Commission proposals. Sometimes, the problem has been that the Commission submitted proposals at a low level of protection, notwithstanding the content of the said article – and even if such proposals were improved especially by Parliament readings, some remained at a low level, seen from the point of view of the more progressive countries.

8.7. Introduction of new rules?

According to the interpretation of the Danish government, the Environment clause from the Single Act (1986) will always make it possible to set up more stringent demands – that is, to introduce or maintain more stringent rules, provided the objective is not protectionist. The EU Commission, however, finds that Article 100A, 4 can be used only to maintain present rules in a Member State and not to introduce new, more stringent environmental demands. The Commission also considers that the clause can only be used in the case of special national circumstances implying that the environmental or health problem is greater than in other Member States. These questions have never been clarified – and several of them will never be, after Maastricht has been replaced by the Amsterdam Treaty. From now on, other rules will apply. (See below.)

The Amsterdam Treaty specifies that the original Environment clause, now carried over, is valid only for regulations to be *maintained*. The possibility of *introducing* new, more stringent rules is added. However, for such new rules to be introduced, a few conditions must be fulfilled:

- new scientific evidence of an environmental problem must have come to light;
- the problem must be specific to the Member State in question;
- it must have emerged after the EU directive was adopted.

The first condition was subject to tough negotiations, during which Denmark attempted to avoid the wording “scientific facts”. The Danish government feared that the required precautionary principle would lose force, i.e. that scientific proof of health damage would be demanded. However, it has been queried as to how great the difference between both wordings is, especially in the English version, which uses “evidence” instead of “facts”.

Taken literally, the second condition can very rarely be complied with. Few environmental problems are specific for a Member State,

in particular not those connected to products sold across country borders – and this is exactly what Article 100A is all about. It appears, however, that the Commission is willing to accept rather far-fetched arguments for the specifics, such as those applied by Denmark and Germany in the PCP case. On the other hand, we do not know the court's attitude since the more detailed argument in the PCP case was not brought to court (see section on PCP).

Also, the third condition, taken literally, can seldom be complied with. Most likely, it will be familiar environmental problems being taken more seriously, e.g. because of new scientific documentation, as mentioned in the first condition.

8.8. Time limit for Commission confirmation

As mentioned, the PCP verdict showed that more stringent rules introduced by a Member State with reference to the Environment clause are not valid until confirmed by the Commission. Hitherto, there was no time limit imposed on the Commission, and in several cases, they procrastinated for years. In future, the Commission must decide within 6 months whether it will accept national rules. In special cases, the time window can be prolonged to 12 months. This time limit must be regarded as a small but unequivocal step forward.

8.9. Commission Directives

Normally directives must be adopted by the Council and Parliament. But to many directives a number of annexes or adaptations are added, and these are often adopted by the Commission, meaning a technical committee led by the Commission. Therefore these directives are called commission directives. They do not only include technical details, but also lists of restricted chemical substances, labelling of specific substances etc.

Previously, the Environment clause could be made applicable only to directives legislated by the Council. In future, it will also be possible to apply it to Commission directives, see below. This will be a step forward. For example, it can be invoked in the classification and labelling of individual chemicals, something that has not previously been possible, see sections on Classification and Labelling.

8.10. “Hinder the functioning of the Single Market”

According to the original Environment clause (100 A,4), the more stringent national rules may not be discriminative or an expression of “a hidden limitation of trade”. In the Amsterdam Treaty, it is now stated that national rules may not be a hindrance to the function of the Single Market. This addendum refers to the original Environment clause (section 4) making it possible to maintain rules, as well as to the new one (section 5-9) making it possible to introduce new rules.

It is difficult to see the purpose of the addendum. Any use of the clause would be a hindrance to the function of the Single Market with regards to the commodity in question, since the Member State would hinder the import of commodities complying with EU demands only, but not respecting the more stringent national demands. More adequate, in this connection, is the previous wording about the “hidden” limitation, referring to cases in which the Commission and the Court hold that the environmental requirement is an excuse for keeping foreign imports out.

At best, the new sentence is meaningless; however, it has extended the Commission’s and the Court’s scope of interpretation.

9. Commission directives and standardisation

In the work of the Council and the Commission, there is a democratic deficit due to the lack of openness. On the other hand, the work of the EU Parliament is completely open. This is one reason why we consider the increased influence of the Parliament on environment directives beneficial.

However, not all directives dealing with the environment will be treated by the Council or the Parliament. Increasingly, only more general directives are being legislated in the Council, while the so-called technical supplements are legislated in closed meetings under the auspices of the Commission – the so-called Committee procedure. In the chemicals sector, the Council has often delegated competence to the Commission to draw up technical details issued as Commission directives and adaptations. This means that the formulation of vital supplements to the directives is done by a committee procedure led by the Commission – without being heard or approved by the EU Parliament. Hence, the possibilities for a democratic debate have been considerably reduced. The prob-

lem is evident when a position is taken in matters such as the labelling of hazardous materials, involving the question of whether organic solvents can cause brain damage, which of course is not a technical detail; see sections on Classification and Labelling.

The problem is even more obvious for sectors in which standardisation agencies are entrusted with providing technical stipulations - often with major consequences for the protection of the environment. The Council will stipulate the fundamental provisions using the so-called new method for the formulation of directives ("new-approach-directives") with warrant in article 100A, i.e. total harmonisation. Thereafter, their technical specification is left to CEN and CENELEC, the European standardisation agencies. As an example, the toys directive, see the section «Heavy metals in toys» could be mentioned. In this directive it is up to a CEN committee to adopt limit values for release of heavy metals etc.

Both organisations are dominated by trade and business interests. A few authority representatives and, in some cases, a few representatives of environmental and consumer organisations, have seats. Access to the committees is available to everybody but, in practical terms, so resource demanding that seats are dominated by those industries with a direct economic interest in the subject.

The so-called new method was introduced to make the EU political bodies more effective by releasing them from having to deal with technical details. The general picture, however, is that the standardisation organisations work even more slowly than the institutions of the EU, making it difficult to find an argument in favour of continuing to tender part of the legislation work to such private organisations.

10. Agriculture and environment

In the agricultural sector, total harmonisation is used without the possibility of the exemption given in Article 100A, ParagraphSection 4. Directives covering e.g. pesticides - pesticide trade, as well as pesticide residues in foodstuffs - are adopted with reference to Article 43.

Additionally, the EU parliament merely has the right of consultation procedure - proposals are submitted from the Commission/Council to Parliament. Therefore the Parliament's say on Article 43 directives is as limited as on article 130S directives

before the amendments of the Maastricht Treaty; by contrast, Article 100A directives (and some post-Maastricht 130S directives) are legislated according to the so-called co-decision procedure, see section on Single Act. The Article 43 procedure virtually embodies the worst elements of the other procedures found in the Treaty:

- the EU Parliament, so far usually more environmentally progressive than the Commission and the Council, has little influence;
- individual Member States, by being voted down, may be forced to a lower level of protection.
- a Member State has no possibility of applying permanent, more stringent regulations for environmental reasons.

It has been argued that the absence of an Environment clause was not a problem, since a so-called Safeguard Clause, containing the same provisions as Article 100A, ParagraphSection 4, was included in individual agricultural directives. This, however, is not correct since a Safeguard Clause merely enables a Member State to tighten its regulations temporarily. A time limit, typically 6 months, is specified, after which the Commission puts the question before the Member States in an auditing committee, which then votes on the subject. Should the Member State be voted down, there is no possibility of appeal before the Court. Hence, the latitude for environmental protection in the agricultural sector (referring to Article 43) is less than for the other remaining sectors.

After the removal of internal borders in the EU, it may be even more difficult to maintain national regulations – also for areas not yet formally harmonised. For example, Danish farmers could go to Germany to buy pesticides legally banned in Denmark. In reality, this form of “border trade” – as far as is known – has not been sizeable. This partly owes to the fact that the German feedstuffs union has agreed to refuse invoicing any purchases by Danish subjects of pesticides banned in Denmark, which in turn makes bulk purchases unprofitable since the farmer cannot deduct VAT. Therefore it is not very attractive for Danish farmers to buy pesticides in Germany (7).

11. Environmental taxes

Today it is assumed that use of economic instruments such as green taxes often are more to the point than bans or proscriptions. For such taxes to have a preventive effect, the better option is often to

impose them on the purchase of environmentally hazardous products – rather than on their disposal, for example. However, for most products – with the exception of basic foodstuffs – the import fraction is considerable, meaning that the implementation of such green taxes can be made difficult by the open market.

In addition, the EU is endeavouring to harmonise taxes and duties, which, however, requires unanimity. But this right of veto is difficult to use for maintaining a higher level of levies since border controls between EU Countries have, in principle, been abolished. This means that a Member State wishing to keep higher duties than a neighbouring country is in danger of being overrun by across-border trade. On the other hand, the right of veto is effective for countries wishing to avoid duties (e.g. the UK and Spain) with regards to the CO₂/energy taxes/levies.

Certainly, Denmark has been adjusting its taxation level on beer, wine and video tapes, etc. But the Danish state has a so-called “recessed border control”, with duty collection at local customs offices and spot check control. In this way, Denmark has been able to maintain already legislated environmental taxes on certain disposable packaging, throwaway tableware, etc. There is, however, a great reluctance to impose new environmental levies on products. Instead, environmental levies not “sensitive to cross-border trade”, such as water, energy and waste disposal taxes are, is preferred.

An introduction of environmental taxes must be notified to the Commission, which will then establish whether they are in conflict with the Treaty. The Danish green taxes therefore have also been evaluated by the Commission. Generally, the Commission accepts the introduction of green taxes. However, it is difficult if the revenue from taxes is being used for the promotion of environmental purposes in the Member State industries, this being considered state subsidies to national industries, to the detriment of industries in other EU countries (8). But often their very objective is to obtain a dual effect: Green duties are intended to make non-viable behaviour more expensive; at the same time, part of the revenue is made available for conversion to more viable behaviour or technology.

France has introduced a levy on petrochemical products, the revenues of which go to an institution for energy saving measures. France has, on its own accord, enquired whether such a levy was in

conflict with EU legislation. In 1992 the EU Court of Justice stated that, in principle, the introduction of such a levy was not in conflict with EU legislation. Quite another question is whether the subsidy for which the revenue is used will favour domestically manufactured rather than imported goods. It was, amongst other things, established that a duty imposed on imported as well as domestic products, whereby the revenues were exclusively or even partially used to subsidise domestic products, will be considered as customs duty, and thus in conflict with the open borders of the Community and Article 12 of the Treaty. Furthermore, depending on the use of the revenue, this form of taxation may be considered a subsidy, and thus an infringement of Article 92 of the Treaty.

In the Amsterdam Treaty, the possibility of a majority vote on the subject of environmental taxation (e.g. the CO₂/energy tax, for years blocked by UK and Spain) was not added. The Danish government tried to procure a protocol listing a number of environmental taxes that could be adopted by majority vote. However, since it did not prevail, the Danish government helped to block the introduction of majority voting on environmental taxes in general. This was due to the fear of the Danish government that following this path, the EU would start to determine our tax policy – a fear difficult to understand since taxes legislated according to Article 130S of the treaty are invariably minimum taxes. See also the section «CO₂/energy-taxes».

12. Green public procurement policy

An important new strategy introduced into environmental policy, among others the Danish, is the green public procurement policy. Today, a green procurement policy is mandatory for Danish state institutions, while being optional for counties and municipalities. It is a slow process to realise, considering their broad scope of purchases; but we do find a number of concrete examples, both at state level and in counties and municipalities. The policy covers all types of products, such as ecological foodstuffs in cafeterias and other dining facilities, more environmentally friendly vehicles, PVC-free products for offices and hospitals, or energy and water-saving devices. Examples include purchases by public institutions, as well as products bought by private firms in connection with *public tenders*, e.g. cleaning agents, waste collection vehicles, and construction equipment.

Public procurement by *EU tender* is often regarded as a barrier to green procurement policy. As a primary rule, purchases and services exceeding 200.000 ECU and building and construction projects exceeding 1 million ECU must be tendered in the EU. As yet, it is not entirely clear to what extent EU regulations will in fact limit the introduction of green procurement policies, since no cases in this area have been up before the EU Court of Justice.

It is, however, clear that certain phrasings must, respectively *cannot* be included in an EU call for tender. Thus, a buyer must state in his tender that “the economically most advantageous offer” will be chosen rather than the “most favourable price”, thereby making it possible to consider factors other than price. Additionally, in his tender schedule, the buyer must also state any environmental requirements or evaluation criteria to be applied. If he fails to do so, he may have a problem if he ends up deciding for a more expensive offer with reference to environmental considerations.

As a primary rule, provided no environmental requirements regarding the relevant product group are found in directives or standards at the European level, the buyer may include specific demands in the tender. Presumably, on the other hand, if such directives or standards exist, *demands* diverging from these cannot be included. However, there is another possibility, namely by stating that *preference* will be given to a product more closely meeting the defined criteria – weighted against price, quality, etc.

Even observing these basic rules there are, according to Danish as well as EU competition authorities, limitations to the public green procurement policy. The Danish Council of Competition/Ministry of Industry, has stated in a memorandum (9), that environmental demands cannot be imposed on imported products with reference to production methods, instead of specifications regarding the product itself proper and its disposal. This is very important because many environmental effects are linked to the production method - e.g. the use of pesticides in the production of cotton. Normally there will be no residues of pesticides in cotton after the chemical treatment at textile factories. Therefore a demand of organic cotton cannot be justified in terms of absence of pesticide residues. It must be a demand of pesticide free growing of cotton. Another example could be furniture produced without - or with low - use of organic solvents. Solvents will be evaporated during the production process. You might ask: why should a pub-

lic institution set demands for pollution in the exporting countries? But it is neither realistic nor fair to set demands for domestic producers and not for foreign.

However, the Danish Council of Competition “assumes” that it is permitted to *prefer* products meeting certain factual environmental criteria in terms of production process. The secretariat expects that the EU is most likely to accept such an interpretation in cases involving transboundary environmental impacts caused by the relevant manufacturing processes.

This may prove a serious limitation depending on how narrowly “transboundary environmental impacts” are defined. The memorandum does not specify the point. If, for example, pesticide spraying or the release of organic solvents is not defined as transboundary pollution, implications are that no demands can be made for ecologically grown cotton, or for furniture, handicap aids, etc., manufactured with the lowest possible use of organic solvents. These are all environmental problems of the production process, not primarily linked up with the finished product or its disposal. Conversely, if it is possible to state that for product selection, products complying with certain defined criteria will be *preferred*, then the limitation may prove less serious.

Equally, the EU Directorate of Competition, the General Directorate XV, is of the opinion that no demands may be made with reference to production methods, unless the method affects product characteristics. For example, DG XV finds it permissible to place demands on ecological foodstuffs in an EU call for tenders, since these are considered a different product than conventional foodstuffs. In a similar way, demands may be set on recycled paper which is considered a different product than new paper. On the other hand, as for the rapidly emerging liberalised power market, DG XV does not find that demands can be made for purchasing electricity produced by renewable energy sources, since electricity is considered a single product, whether produced on the basis of fossil energy or renewable energy sources.

In our point of view, this distinction is subtle since, in the case of paper as well as foodstuffs, the primary environmental problem is associated with the production process, and in practice, recycled paper and new paper, or ecological foodstuffs and other foodstuffs can be differentiated by their labelling only.

The EU Court has no clear precedent in this area. We are familiar with three cases; however, they all involved a major component of “buy Danish”, “buy Italian” and “buy Irish”. In the Danish case (Great Belt Bridge), Denmark withdrew when the Commission threatened legal action, while the Irish and the Italian cases were tried before the EU Court. On the other hand, no Member State has been overruled so far when imposing environmental demands, provided they let their own products and imports enjoy the same status. However, in Denmark a tendency to self-censorship is evident, meaning that whenever EU regulations are not quite clear, we willingly adopt the most restrictive interpretation. The philosophy is that Denmark should be in the forefront with regard to the free movement of goods in order to more strongly influence France and others to dispense with their technical trade barriers. But so doing, we may very well clip the wings of an otherwise rich-in-perspective environmental parameter such as green public procurement.

13. EU and WTO - free trade and environment

Both on the EU level and globally there is a demand for free trade. The World Trade Organisation (WTO) influences the environmental policy that may be conducted in the EU and, hence, the environmental policy we are able to pursue in Denmark. The WTO organisation sprang from the GATT agreements (General Agreement on Tariffs and Trade). It has approx. 125 members, and since its foundation in 1995 all WTO decisions concerning trade disputes are binding.⁽¹⁰⁾

As for trade and environment, the roles played by the WTO, and respectively the EU are very different. The EU decides harmonised legislation on matters of environment, including maximum harmonisation for environmental legislation regarding products and goods. In contrast, the WTO does not decide harmonised legislation, but primarily aims to secure free trade and prevent trade conflicts. The environment plays a very minor role in the WTO treaty; it does, however, have Article 20 providing for certain deviations from the principle of free trade, provided these are in support of environment or health. The wording of the article is quite similar to that of the EU Environment clause (Article 100A, Section 4). Article 20 is called “General exemptions” (i.e. from the demand of free trade). It states that Member States are permitted to make provisions that are

- vital for the protection of the life and health of humans, animals and plants;
- related to the preservation of non-renewable resources, provided that restrictions are also applied to home market consumption and production.

But such provisions must not lead to random discrimination of products from other countries, or to hidden limitations to international trade. If the WTO does demand the annulment of a given national environmental legislation, this could very well be worse for the environment than EU harmonisation. While EU harmonisation at its worst may produce a lower level of protection in the more progressive countries, a reversal by WTO might lead to no environmental ruling in the sector at all.

The first conflict dealing with the environment was settled in the beginning of 1996 by a WTO panel. The USA imposed certain requirements on petrol quality that could not be met by petrol from Venezuela and Mexico. The USA lost the case because the WTO panel did not consider that the demands were imposed for environmental reasons. The case points to a typical state of affairs when dealing with environmental cases in the WTO: according to the WTO system, the country imposing the demands must be the one to prove or at least, by scientific arguments strongly render probable, that the demands are necessary for reasons of environment or health. This can be difficult, since reactions are often based on mere suspicions.

The so-called hormone beef case exemplifies how the WTO demand for environmental and health requirements to be based on scientific proof tends to impede the application of the precautionary principle by EU members in such cases. As early as 1989, the EU prohibited beef containing growth hormones - and even before 1989 there was a temporary ban. The EU did not conduct a risk assessment of hormone beef, but instead pointed to the fact that from a health viewpoint, European consumers do not wish to eat meat so treated. The USA found the EU ban on, amongst others, American and Canadian hormone beef to be in conflict with global trade rules, since no scientific proof indicated that beef with growth hormones constituted a health hazard not present in other meat. In the beginning of 1996, the USA took legal action against the EU at the WTO. In May 1997, the WTO panel made a ruling in favour of the USA. It was resolved that the European ban was in

fact a technical trade barrier and an infringement of WTO rules. The European arguments about the consumers' demands and animal welfare were not accepted.

When it comes to actual controversies between member states, the rulings of the WTO are binding. The ruling left the EU with three possibilities: to lift the import ban, to pay economical compensation to, amongst others, the USA, or to give up on the previous ban and legislate another based on renewed scientific research.

However, the EU brought the ruling before a WTO court of appeal which, at the end of 1997, made a ruling more accommodating for the EU. The ruling stated that the EU had another year to produce more detailed scientific material regarding the possible health hazards associated with growth hormones. This deadline was fixed to be in May 1999. The EU has started new scientific investigations, but these will not be finished until the end of 1999. The USA says that they will introduce heavy duties from May 99 on a number of goods from EU countries, until the EU permits hormone beef.

In December 1996, the WTO held a summit in Singapore. The agenda included the preparation of a more adequate agreement to secure environmental considerations in a free trade world. Very little, however, was settled at the summit, partly due to clashes of interest between the rich countries and the Developing Countries led by the high-growth economies of Southeast Asia - the 'Tiger' economies.

DEVELOPMENT IN INDIVIDUAL SECTORS

1. Chemicals – general trends

Chemical regulation is one of the most harmonised sectors of the EU, limiting the scope for national legislation. National regulation is possible only according to special rules of exception, often limited to temporary, more stringent regulations. One option is to make use of the Environment clause; see section on this. A marked feature of the chemicals sector is its frequent conflicts between, on the one hand, environmental and health concerns, and, on the other hand, considerations regarding the free movement of commodities. If an importing country places environmental or health demands on commodities which are more stringent than those found in the country of origin could be at odds with the EU prohibition of technical trade barriers.

Globally, the production of organic chemical substances has risen from 7 million tons in 1950 to 250 million tons today. The use of chemical substances provides a number of economic and practical benefits, but also a number of problems related to public health and the environment. At present, between 20,000 and 70,000 substances are being offered in Denmark. Of these, some 5,000 single substances are already classified as hazardous by the EU, while the majority have not been evaluated.

1.1. Limitations on the marketing and use of hazardous substances in the EU

Limitations on the use and marketing of a hazardous substance are given in directive 76/769/EEC – often simply called the 76 Directive. For the hazardous substances listed in the directive annexements, it is a maximum directive, meaning that, as a primary rule, Member States cannot impose further limitations. However, for hazardous substances not listed in the directive, Member States are free to adopt national rules. These must then be notified to the Commission, which may delay them for a year while deciding whether to take steps to harmonise regulation in the relevant area.

Denmark, on the other hand, interprets the entire directive as a “quasi-minimum directive”. This means that Denmark insists on its right to go further and introduce more stringent national legislation, including for listed substances (11). Denmark stands alone with this interpretation.

In the EU, efforts to limit the use and marketing of chemical substances have practically come to a full stop. This is in part due to the lack of consensus between Member States as to what substances should be regulated. Also, in the last few years, the strategy has been to await risk assessments of substances under suspicion of being hazardous. In reality, due to limited capacity, individual risk assessments of all these substances cannot be done at a sufficient pace. (See section on the assessment of existing substances.)(12).

As seen in the following review, the 14th, 16th and 17th amendments to the directive on usage limitation are not actual measures against hazardous substances, but rather a mere updating of the list to match other EU directives. When Austria and Sweden joined the EU in 1995 a number of substances were banned in one or both countries, but not in the EU. Sweden and Austria obtained a transitional arrangement until 1 January 1999. By that date some of the substances were still not regulated in the EU, and the two countries had their transitional arrangement prolonged. This may eventually lead to the EU having to limit the use of a number of substances already prohibited or restricted by Austria and Sweden.

The following section is partly an overview of the 9th to and including the 17th amendment of the directive, and partly giving for the major ones a more detailed explanation. of a few major amendments.

Overview of limitations on the use of hazardous substances in the EU. Amendments made to the EU directive 76/769:

Amendment 9

1991: *Pentachlorophenol (PCP)*, wood preservative. The amendment resulted in a partial ban on the substance; for this substance, Germany, The Netherlands and later Denmark made use of the Environment clause for maintaining their total ban.

Amendment 10

1991: *Cadmium*. Denmark has upheld more stringent legislation than the EU, but did not use the environment clause. Denmark interpreted the 76 Directive as a minimum directive, in opposition

to the Commission and the other member states. (could not find out what the improvement was)

Amendment 11

1991: *PCB substitutes*. The amendment limits the use of certain substances used to replace PCB, which was prohibited in the EU. The Netherlands introduced more stringent legislation, which was later followed by EU legislation for this sector.

Amendment 12

1994: *Nickel*. The amendment was tabled by Germany when, in 1991, it they stated that it they intended to introduce more stringent legislation in the area. Their German regulations were largely based on Denmark's legislation at that time. The amendment implies a ban on nickel in earrings and other products intended for direct and prolonged skin contact.

Amendment 13

1994: *Carcinogenic substances, etc.* The amendment contains a partial prohibition of substances including creosote and three chlorinated solvents. As for creosote, Germany, The Netherlands and Denmark refer to the Environment clause in order to uphold more stringent national legislation.

Amendment 14

1994: *Addition to catalogue of substances* classified as carcinogenic, mutagenic or teratogenic (damaging to reproduction) - in total called CMR-substances - in Directive Annex Supplement 1. The proposal was to ensure that substances classified as CMR substances are not offered for retail sale. The Commission proposal included all substances that were or would be classified as CMR substances; however, the EU Parliament unfortunately succeeded in having the proposal changed to include already classified substances only. This example shows that the Parliament is not always more progressive than the Commission and Council.

Amendment 15

1994: *Hexachlorethane*. The amendment rules that hexachlorethane is not permitted in the production or handling of non-ferrous metals. The amendment is a direct consequence of the Paris Convention on the prevention of land-based pollution of the marine environment. The substance is not used in Denmark, meaning that the amendment will only be relevant for possible future use.

Amendment 16

1997: *Updating of the catalogue of CMR substances*. The amendment is a consequence of an amendment to the corresponding catalogue of directive 67/548, regarding the classification and labelling of hazardous substances.

Amendment 17

Proposal: *Addition to the catalogue of Amendment 14*. The Commission submitted the proposal to the Council on the 8th November 1996, and the European Parliament gave its opinion in January 1997 without proposing any amendments. The proposal is an extension and consolidation of the existing ban on the private use of CMR substances. The proposal will entail a ban on approximately 800 new substances, primarily classified as carcinogenic in category 2. The proposal has already been implemented in Danish legislation, since Denmark in 1995 chose to prohibit all chemical substances classified as CMR substances (whether in category 1 or 2) for private use. In 1995 Denmark informed the Commission that Danish implementation has a wider coverage than EU legislation. So far, the Commission has not made any objection. (13)

1.2. Pentachlorophenol

Pentachlorophenol (PCP) is a toxic pesticide used, in particular, for wood protection. It is contaminated with various dioxins and on combustion it releases large amounts of dioxin. In 1977, Denmark introduced a ban on the use of PCP for purposes other than wood protection. A threshold value of 1 ppm was set for dioxin in PCP to be used for that purpose, which practically precluded its use due to the technical qualities then available. From 1981, wood preservatives were included among pesticides subject to pre-marketing approval, and since then the use of PCP has not been allowed anymore in DK.

In 1987, the substance was also prohibited in Germany. The authorities estimated that 20,000 people had suffered detrimental effects to their health from the use of PCP in Germany. Moreover, the authorities indicated that far more dioxin (measured as dioxin-equivalents) was emitted from PCP each year than from all German incineration plants together. Finally, the German authorities found that excellent alternatives to PCP were available.(14) Also The Netherlands banned the use of PCP from 1989, while it

remained permitted in the other nine Member States. France continued to import and also produce PCP until the mid-90's, and manufacturers were extremely active in trying to influence the EU against legislating a ban.

In 1991, PCP was regulated in the form of the 9th amendment to the 76 Directive.⁽¹⁵⁾ In principle, PCP was prohibited, but with the exception of important key sectors, such as the wood processing industry. On this occasion, a threshold value for dioxin content in PCP was stipulated at 4 ppm, i.e. four times the DK 1977 limit.

The Netherlands, Denmark and Germany voted against the directive, but being an Article 100A directive, it could be adopted by qualified majority vote. The three Member States gave council declarations stating that they intended to maintain their present legislation regardless of the directive. Germany and The Netherlands would do so with reference to Article 100A, Section 4, the Environment clause.⁽¹⁶⁾

Germany was the first Member State to apply Article 100A, Section 4, and thus gave rise to the case which terminated with the so-called PCP verdict of 17th May 1994. At first, Germany's invocation of the Environment clause was approved by the Commission. However, France, then a producer and importer of PCP, held that such an approval was not legal, since the German ban constituted a disguised trade barrier, at variance with the Treaty (the Single Market). France demanded that the approval be rescinded since it did not meet the demands of a well-argued basis, meaning that Commission approval was not based on satisfactory in-depth argumentation. Reference was also made to other fundamental problems about the validity of the approval. The EU Court conceded to France on the first complaint, but it did not take a stand on the other charges.⁽¹⁷⁾ Germany maintained its ban on PCP. Finally, the case was concluded to the advantage of Germany since the German PCP prohibition was approved by the Commission in September 1994, only this time on a more well-argued basis.

Contrary to the other Member States, Denmark interpreted the 76 Directive as a "quasi-minimum directive", enabling individual Member States to have more stringent legislation without needing to invoke the Environment clause. The Danish authorities pointed to the fact that the directive contains neither free trade nor safety

clauses. This view was supported by the legal service of the EU Council: “Member States, as far as they abide by the rulings of the directive, may, under the control of the Court, let hazardous substances and compounds mentioned in the Directive Supplement be encompassed by regulations more stringent than those of the Directive, in particular to secure a better protection of human health”.(18) The statement was made in connection with the 5th amendment to the 76 Directive, making it unclear whether the wording is also valid for later amendments of the directive.

However, further to the 9th amendment, the Council’s Legal Service stated that they “confirm that products not covered by this directive may be subjected to national legislation, provided such rules are not in conflict with the rulings of the Treaty”(19) - which precisely does not cover PCP, since it *is* covered by the directive. The Danish Government insists that this statement does not directly convey that the Member States may not have more stringent regulation of substances listed in the directive.

The Commission instituted a so-called opening procedure against Denmark, with a respite to answer by the 31st of January, 1995. The Danish Government then decided, after all, to make use of the Environment clause. On the 26th of February 1996, the Commission confirmed that Denmark may maintain the more stringent national legislation with reference to this clause. What the Commission is stating is that Denmark has acknowledged that the Commission’s interpretation of the PCP directive was correct - meaning that the PCP directive cannot be interpreted as a minimum directive, allowing Denmark to legislate its own more stringent conditions.

Denmark also motivated the use of the Environment clause with reference to special national circumstances, which was in concord with the Commission’s up to then interpretation of Article 100A, Section 4, the Environment clause. The grounds given were that practically all the drinking water in Denmark is taken from underground resources, meaning that we are more vulnerable to subsoil contamination, and also that in a few cases PCP concentrations in groundwater resources have exceeded the limit stipulated for drinking water. The Danish ban was supported by Finland, Germany, Sweden, Luxembourg, and Portugal – the latter with some hesitation.

2. Heavy metals

Cadmium, mercury and lead are heavy metals. All are widespread environmental toxins. Cadmium is subject to a partial prohibition in the EU, and mercury is limited to a few usages - though with far more restrictions in Denmark. As for lead, EU regulations do not impose major restrictions on the use. In Denmark, a new statutory order in this area will be issued by the end of 1998. This puts Denmark far ahead of EU regulation in this field.

2.1. Cadmium

Cadmium is a heavy metal and one of the most widespread chemical toxins. In 1980, the Danish Environment Protection Agency published a report showing that cadmium pollution was so widespread that most essential foodstuffs were contaminated. The Danish average intake of cadmium was not appreciably below the standards applied by the World Health Organisation (WHO). It was calculated that several thousand Danes had already exceeded the limit, meaning that they were likely to incur permanent kidney damage because of cadmium.(20)

Sweden took the lead by introducing a ban, in principle, on the use of cadmium. Thereafter, a long list of exceptions was drawn up in which the continued use of cadmium was permitted for a number of years or even for an indefinite time. The use of accumulators (rechargeable batteries) was not covered by the legislation, nor was the use of substances naturally contaminated with cadmium, such as coal and fertilisers containing phosphate. But apart from these areas not covered by the legislation, the rules are interesting in that they adopt a positive list principle, i.e. that any usage not listed as exemption is prohibited.

Denmark followed suit with a legislation closely resembling the Swedish equivalent, also using the positive list principle, and largely with the same exceptions. This was in the form of a statutory order, stating that the ban would come into force step-by-step from 1987 and onwards. The use of cadmium was in fact reduced - despite widespread opposition to the Danish and Swedish legislation on the part of national industries, who claimed national markets were too small for any legislation to affect the use of cadmium in such globalised trades. For instance, large quantities of cadmium were used by the automobile industry, both in varnish, for metal

coating, and as a stabiliser in PVC-packaging (see section on Packaging).

Other Member States followed. The Netherlands put forth a proposal for a stringent limitation in the use of cadmium, and Germany was about to do the same. The EU Commission tried to halt national regulations by presenting a proposal for an EU directive restricting the use of cadmium, which was passed in 1991. It was, however, far less extensive since it followed a negative list principle, meaning that any use not banned in the draft directive proposal was legal. This is a crucial difference since - given the complexity of modern society - it is hardly possible to enumerate all conceivable uses of a substance such as cadmium. If regulations follow a negative list principle, certain industries are likely to find other attractive uses of cadmium, thus making it necessary to start all over again with the legislation process.

Denmark and The Netherlands made a joint council declaration expressing their intention to maintain more stringent rules. Denmark, implementing the Community's legislation, adopted a statutory order, while maintaining the principle of a positive list and, for several sectors, lower threshold limit values than those set by the directive.(21) Hereby, Denmark has chosen to maintain regulations more stringent than those of the EU. Denmark did not, however, invoke the Environment clause, but did uphold her interpretation of the directive as being a minimum directive.

Germany did not affiliate itself to Denmark's and The Netherlands' declaration, since the government found that it could reach an agreement with German industry to phase out the use of cadmium. The government estimated that most of the cadmium consumed in Germany was produced domestically. Therefore the government did not find it necessary to have rules more stringent than those set by the EU.

The Netherlands opted to maintain its their national, more stringent rules, with reference to the Environment clause, but as yet, the Commission has not confirmed its acceptance of their use of the Environment clause(22) - although more than seven years have passed.

In the first half of the 90s, nickel-cadmium accumulator (NiCd) production developed into the largest cadmium-consuming industry. When, in 1991, the EU passed a directive concerning batteries

and accumulators, it did not amount to a ban, but merely provisions for labelling and collection.(23) In this context, a particularly tricky problem should be mentioned - the handling of nickel-cadmium accumulators.

Many producers of electrical appliances have found it profitable to integrate accumulators in their products, meaning that consumers cannot replace them on their own. This means that once the appliance has ceased to function, e.g. because the batteries can no longer be recharged, the entire product is disposed of. Previously, such appliances could not be delivered to battery collection points, which is why they ended up as household waste – including their cadmium content. In 1992, Denmark introduced a collection system for NiCd batteries. It was part of a voluntary agreement, but did not yield the expected result. Consequently, in the early summer of 1995, the Danish Government introduced a new control system, imposed green taxes on NiCd batteries and tightened up on the collection such that a payment is made according to collected quantities.

All Member States have run into problems with battery collection. Denmark attempted to have integral NiCd accumulators banned when the EU battery directive was adopted in 1991. This was partly successful, but ended as a compromise limiting, though not quite prohibiting built-in accumulators. According to the DK statutory order implementing this directive, appliances with integral batteries may be sold only “... if these are easily removed by the consumer before discarding the device”.(24)

According to the DK Ministry of Environment, this provision, combined with a green tax on nickel-cadmium practically put an end to devices with integral NiCd batteries on the Danish market. The green tax caused NiCd batteries to be replaced by (mainly) nickel-metal-hybrid batteries, with the exception of tools where such batteries are less suitable. In addition, manufacturers of electrical appliances have learned to install batteries in such a way as to make it possible for consumers to remove them. The Commission is now preparing an amendment to the battery directive according to which nickel-cadmium will be completely prohibited. It will also explicitly state that consumers should be able to remove batteries containing such hazardous substances *without the use of tools*.(25)

2.2. Mercury

Mercury is known to be an even more potent neurotoxin than cadmium. The most extensive use of mercury in the 1980s was in batteries. Sweden and Switzerland took the lead in legislative measures, followed by Norway. In particular, the mercury content in alkaline batteries was reduced from 1% in the early 1980s to 0.3% in 1987, and to 0.025% in 1992. In 1991, the EU adopted the battery directive (see section on Cadmium), wherein the limit was also set to 0.025%, valid from 1993.

Denmark issued a ban on the sale of mercury and mercury products, valid from July 1st 1994.(26) In this statutory order, the positive list principle is used, that is, a general ban with exceptions listed. In by far most instances, such as the use of mercury in fluorescent tubes, no precise time limits are set for the exemption period. However, a time limit was stated for the use of mercury by dentists (in amalgam fillings) in order to encourage research in possible alternative substances. The set deadline was 1999. The statutory order is now under revision.

Unfortunately, the Danish EPA will lift the deadline concerning amalgam fillings. This is due to the fact that the Danish Health Agency has not yet found the amalgam substitutes now available to be adequate for certain types of fillings.

In addition to the above-mentioned directive on batteries, the EU has also regulated the small-scale use of mercury compounds in a number of cases, e.g. for waterproofing heavy-duty industrial fabrics, wood protection and treatment of industrial waste water.(27) But all in all, by Danish standards, this is a very narrow regulation.

In November 1997, the results of an extensive study of 900 Faroe islands children were published. Their mothers had been exposed to mercury through foodstuffs. The study showed that each time the exposure of the mother is doubled, the development of her child is set back by 1-2 months. Globally, the most important source of mercury contamination is the combustion of coal, and (at a low estimate) the contribution of burning coal is more than four times the contribution from batteries and other mercury products.(28) As early as 1995, the US Environment Protection Agency (EPA) reduced the limit value for mercury content in hair to 1.1 micrograms, based on the precautionary principle - 1/10 of the WHO limit value.(29)

2.3. Lead

For a long time, lead has been known as a noxious heavy metal. For many years, lead in petrol constituted a major, though much underrated health hazard. In the 1930s, the USA began to add lead to petrol to increase the octane rating, despite warnings from independent researchers. It was also the USA, in 1975, which were the first to introduce unleaded petrol together with catalytic converters to treat automobile exhausts. Japan quickly followed suit, while the EU tried to keep lead-free petrol as well as catalysts out of the European market. It was not until 1985 that the EU decided to allow Member States to demand that lead-free petrol be made available on the market, and by 1989 it was an EU-wide requirement. The use of leaded petrol has not been abolished in most EU Member States as yet. However, Denmark has successfully limited consumption by placing a higher tax on leaded than on lead-free petrol, and the use of leaded petrol has now come to a total stop. But a few member states will continue to allow leaded petrol until the year 2002.

In addition, Denmark adopted more stringent national regulation on lead used in other sectors. A total ban on lead shots was introduced, to be in force by 1st April 1993.⁽³⁰⁾ The Netherlands also introduced what practically amounted to a total ban, effective from 1993, and encountered no problems with EU legislation in this context. Furthermore, a Danish statutory order banning the import, sale and production of lead and leaded products is expected to be issued by the end of 1999. This statutory order is modelled on its counterparts covering mercury and cadmium, i.e. as a general ban combined with a list of exemptions.

EU legislation only covers leaded caps for wine bottles⁽³¹⁾ and, up to now, the Commission has abstained from applying its right to block national legislation. Hence, the Danish EPA does not expect the more stringent Danish rules to create a problem with the EU-Commission. ⁽³²⁾

2.4. Flame retardants

In 1991 the Commission put forth a proposal including an immediate ban on seven flame retardants. 'Brominated flame retardant' is a generic name for several fire-restraining chemicals used in television sets, personal computers, copy machines, etc. Since the

1980s, fire-restraining chemicals have been under suspicion of causing environmental and health damaging effects. When incinerated, electronic waste containing brominated flame retardants produces large amounts of noxious dioxins. - The 1991 proposal was never approved, since the Member States were unable to reach an agreement.

A Swedish survey done in 1997 by the Institute of Environmental Chemistry, Stockholm University, showed that in particular two types of brominated flame retardants, PBDE and TBBPA, are leaked from computers, television sets, etc. Researchers used to believe that the chemicals adhered to the materials; however, the survey showed that the chemicals will leak whenever the computer or television set warms to 30-40 degrees.

Such flame-restraining chemicals have been detected in human blood samples. Researchers suspect flame retardants of having hormone-like qualities, since their chemical structure resembles that of PCB - a substance known to affect embryonic development in humans as well as animals. PCB is prohibited in the EU (see section on PCB).

Hence, the use of bromine flame retardants is associated with serious health and environmental problems. According to the Danish EPA, the general picture is that brominated flame retardants are persistent and biologically cumulative. They are widespread in the environment and in several animal species, and environmental concentrations appear to be on the increase.⁽³³⁾ At the beginning of 1998 - seven years after the proposal was first made by the Commission - regulations exist only for a few individual flame retardants, prohibited in textiles.⁽³⁴⁾ With respect to other applications of flame retardants, Denmark is awaiting a risk assessment conducted by the EU. In the meantime, the Danish EPA has been requested to survey the use of flame retardants in Denmark, and concurrently have an environmental assessment of the chemicals carried out.

2.5. Carcinogenic substances (creosote etc.)

In June 1990, the German authorities notified the Commission that they intended to take steps towards limiting the marketing of creosote and creosote-treated wood. The Commission decided to work out a proposal for Community legislation. Therefore, accord-

ing to EU legislation, Germany had to postpone its plans for regulation.

In addition to creosote, the Commission proposal included two other groups of substances: chlorinated solvents and carcinogenic, mutagenic and teratogenic (embryotoxic) substances and preparations. The proposal was compiled as the 13th amendment to the directive on limitations to the marketing and use of certain hazardous substances and preparations.⁽³⁵⁾ The proposed regulation of creosotes was not least spurred by the fact that these substances contain aromatic compounds, some of which are carcinogenic, together with phenols known to be harmful to the aquatic environment.

Creosotes are primarily used for industrial treatment of wood. Previously, consumers could also buy these substances for domestic use. As for their industrial use, the Commission was not prepared to impose a ban, since it considered that necessary alternatives did not exist. So creosote was to remain permitted as a wood protector, though under controlled conditions. The Parliament declared that, in general, it was in agreement, but insisted on a total prohibition on any use other than wood protection, without any further threshold limit values.⁽³⁶⁾

The directive did, however, introduce a few limitations regarding the use of creosote-treated wood, i.e. a limitation on the *import* of such treated wood (an area for which Denmark had no previous restrictions).⁽³⁷⁾ In Denmark, creosote is subject to mandatory approval under the statutory order on pesticides; however, industry never applied for an approval, implying that the use of creosote is prohibited.

Industry uses considerable amounts of chlorinated solvents, in particular as degreasing agents in larger industrial plants. The Commission proposal set certain milestones before the final ban on the substances could come into force. Denmark regarded such deadlines superfluous, since a few of the solvents were suspected of being carcinogenic; moreover, the Danish experience showed that other substances, such as cooking oil, could be used as degreasing substitutes.⁽³⁸⁾

The Commission proposal did not cover all relevant chlorinated solvents. Originally, the proposal involved another three, all used in private households. But the industry involved succeeded in having

them deleted during a hearing within the Commission framework, since they argued that substitution was problematic. The Commission has stated its intent to “have the use of these substances analysed three years after the adoption of the directive”.(39)

The last group consisted of carcinogenic, mutagenic and teratogenic substances and compounds. A long list of these substances were banned for private use.

The overall Danish attitude to the directive is that it is not far-reaching enough, especially considering the absence of a ban on creosote and too extensive time-limits for the continued use of several other substances. According to the directive, creosote regulation will be based on a negative list, meaning that a great many loopholes could enable industry to use creosote for purposes not specified in the directive. In Denmark’s opinion, the directive should apply the positive list principle to impose more stringent restrictions on the use of creosote, since alternatives(46) do in fact exist.

Germany, The Netherlands and Denmark agreed that the directive was not sufficiently comprehensive with regard to creosote and therefore voted against it at the Council meeting on December 8th, 1994. Germany and The Netherlands demanded more stringent threshold limit values for creosote or, alternatively, a stipulation in the directive to the effect that it is permissible for Member States to use stricter legislation. Denmark called for total prohibition as “the only acceptable solution” in terms of protecting human health and environment or, alternatively, a minimum regulation(41).

However, the three countries did not have the necessary number of votes to constitute a blocking minority. At the Council meeting, they were unable to have the adoption of the directive postponed until the 1st January 1995, after which date they would have been able to create a blocking minority with the support of three new Member States: Austria, Finland and Sweden.

The directive was therefore passed without a total ban on creosote. The Danish government’s introductory remarks referred to the minimum interpretation of the 76 Directive and thereby reserved the right to apply more stringent national legislation. In December 1995, the Danish government notified the Commission that they intended to invoke the Environment clause to uphold existing Danish rules. (42) Denmark is thus following The Netherlands

and Germany, who also refer to Article 100A, Section 4, the Environment clause regarding the creosote issue.

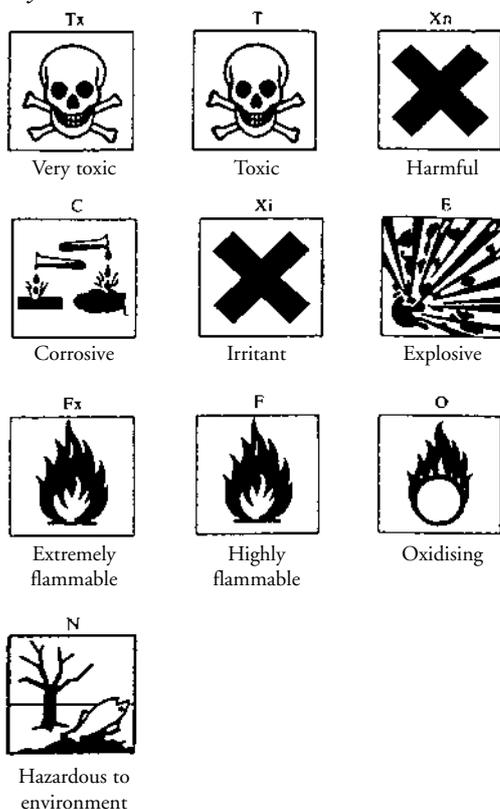
3. Labelling and notification of chemical substances and compounds

In order to evaluate the hazards of a given chemical substance to human health and the environment, the substance is classified and graded according to the hazards involved. The classification of chemical substances and compounds is of crucial importance. It forms the basis of all future assessments, and consequently any later action to be taken against hazardous chemicals. Measures could, for example, be limitations on use, prohibition, or demands to find substitutes.

Classification and labelling is one of the most extensively harmonised sectors within the EU system. In contrast to the above-mentioned regulations on limitations on marketing, the EU has adopted general regulations, requiring the labelling of *all* substances, and not merely those listed, meaning that the sector is completely harmonised.

In the years 1973 and 1977, respectively, directives for the labelling of solvents and paints were passed.⁽⁴³⁾ For several years, Denmark refrained from implementing these directives since they would significantly undermine the Danish labelling regulations in effect at the time. But since the Commission threatened legal action, the EU regulations became effective in Denmark from 1983. Above all, this meant that products containing organic solvents were labelled more leniently, or not at all. For example, if a product contained at least 25% of an organic solvent before it was labelled as a hazard to health, whereas previous Danish regulations had often stipulated 10%. The Italian labelling regulations for organic solvents were undermined in a similar way. Italy attempted to uphold its regulations, but the Commission brought matters to the Court, which in 1979 judged Italy to be in violation of the Treaty (see Annex).

EU hazard symbols :



The hazard symbols are used on labels for hazardous chemical substances and products. In addition, the classification and labelling system consists of standardised “risk sentences” (R-sentences) and “safety sentences” (S-sentences).

In 1979, the EU adopted a basis directive on chemicals, the 6th amendment to Directive 67, henceforward plainly referred to as the 67 Directive.⁽⁴⁴⁾ The three directives from 1973, 1977 and 1979 stipulated that Member States will vote on the classification and labelling of individual chemical substances and products. Denmark has been outvoted on several occasions. Article 100A, Section 4 (the Environment clause) does not apply since these directives are all Article 100 directives passed before the Single Act (see section: Single Act). Furthermore, up to the Amsterdam Treaty, the Environment clause was not applicable for Commission directives. And this is exactly where the specific substance classifi-

cations are laid down. On the other hand, there is a safeguard clause (see section on Agriculture and environment), but this only allows for temporary tightening of national regulations.

Denmark invoked the safeguard clause when, in 1987, the Danish Parliament decided to label thirteen organic solvents used in the working environment with the warning "prolonged exposure can cause serious health damage".(45) Like the other Nordic countries, Denmark held that exposure to organic solvents in the working environment may cause brain damage. In the 1980s, when many workers were still exposed to organic solvents, 2-300 Danish workers were awarded compensation for this chronic ailment each year. On this occasion, the Danish Parliament decided also to label a number of substances as carcinogenic, though they were not acknowledged as carcinogenic by the EU.

Whenever a Member State applies the safeguard clause, the Commission may simply introduce a new proposal for harmonisation and convene the Member States to vote on it. In case the said Member State is in the minority, it must revoke its labelling regulation. Denmark's labelling of the thirteen organic solvents was overruled and only three of the compounds could be labelled according to Danish wishes. These three solvents have a different effect, namely on the peripheral nervous system, i.e. arms and legs.

Still - after ten years of debate - an agreement is yet to be reached regarding white spirit, which is one of the chief solvents. Denmark continues to label white spirit as a substance with long-term damaging effects. The EU Member States have agreed to label mineral turpentine as being suspected of having carcinogenic effects and for its potential to provoke chemical pneumonia(46). Consensus cannot be reached on a labelling for brain damaging (long-term damaging) effects. The criteria for labelling a substance with such effects is based on animal testing; however, effects in mice and rats are quite difficult to verify - at least using the test methods available so far.

Under the present criteria, a large group of substances falls outside classification. Denmark will therefore work to have the criteria changed, since the Danish EPA deems this necessary in order for white spirit to be labelled with a warning of its brain-damaging effects, also in the EU. Prospects of having the criteria changed are

remote, so until then Denmark will continue to use the safeguard clause.(47)

Classification and labelling of chemical substances according to the 67 Directive take place either by inclusion in a list of hazardous substances, or by the so-called “self-classification” of producers and importers. Chemical substances classified as hazardous within the EU system are listed in annex 1 to the 67 Directive – also called “list of hazardous substances”. Annex 1 contains 2,500 classifications and covers at least twice the number of single substances classified as dangerous.(48) This is due to the fact that some entries in the list denote substance groups.

A manufacturer or importer wishing to market a chemical not included in Annex Supplement 1 must, of his own accord, classify and label the substance. The self-classification principle implies that manufacturers themselves must obtain any available information about the chemical they wish to market, and then have the substance labelled in accordance with this information. The self-classification principle may lead to diverse labelling of identical chemical substances found within the Single Market. In principle, manufacturers and importers will supply documentation of their classification to the authorities, but in reality this is optional. Manufacturers may evaluate the available information differently, and the authorities have little possibility of controlling what information is the basis for labelling. For example, DINP, a chemical substance used to soften PVC plastic, is labelled as carcinogenic in the UK, while in Denmark it is sold for laboratory use without labelling.(49)

Notification

Moreover, the 67 Directive contains provisions for the notification of new chemical substances, i.e. substances not on the EU list. In 1981, a census was taken of the chemical substances in the EU and listed in the EINECS list. The list contains approx. 100,000 substances which, as a benchmark, are not subject to notification to the authorities. This means that the chemical industry can largely use such “existing” substances without prior examination.

Each Member State must acknowledge other Member States’ handling of notifications, and are not entitled to any further information about a substance once it enters their territory. This principle

is called mutual recognition. Since 1981, as few as 1,800 new chemicals were notified in the EU, only a few in Denmark.

A report ordered by the Commission in the beginning of 1998 revealed an insufficient control as to whether new substances are in fact notified. The report showed that, at variance with the regulations, 37% of all new substances on the market had not been notified. And this has been going on for years, without any intervention.(50)

Contrary to an EU majority, Denmark has traditionally had a more stringent chemical regulation. In 1981, Denmark wished to exercise more control on substances entering Danish territory, and therefore introduced a mandatory notification of substances if they had not been on the *Danish* market earlier than 1980. This would have led to a far more comprehensive notification, since the Danish market contains far fewer substances than does the whole of the EU market. However, the Danish requirement was overruled by the EU Court in 1987 (see Appendix).

Denmark has a *product registry* (PROBAS) where substances and compounds covered by the extended Danish danger concept are registered. Herein, the concept of the DK Labour Inspectorate includes substances and compounds(51) that are “hazardous to or otherwise detrimental to safety and health”(52), and covers a larger number of substances and compounds than those classified under EU directives - in particular, compounds containing more than 1% organic solvent or more than 0,1% of a carcinogenic substance. 85,000 chemical substances and compounds are registered in the Danish product registry, whilst the EU system only provides for the registration of substances. Denmark has requested and received information on imported products and thus far has not encountered problems. Sweden has a similar registry. In future, this registration could be perceived as distortion of competition, since the registry is not valid and harmonised in the remaining Member States.

3.1. Safety data sheets

In 1988, and not least on a Danish initiative, the EU extended the general classification and labelling regulations to also cover chemical compounds, called the Preparations Directive. Denmark voted against the new directive since it would detract from the Danish labelling of certain chemical compounds. In spite of the fact that

the largest number of chemical substances are marketed as parts of chemical compounds, provisions regarding the classification and labelling of compounds are still not nearly as extensive as those applying to single substances.

Since 1982, Danish regulations have stipulated that a supplier of chemical substances and compounds has to prepare a safety data sheet (directions for use) which enlarged on and supplemented the labelling. These regulations also apply to products not acknowledged as hazardous by an EU majority. If anything, this is relevant for the above-mentioned compounds containing carcinogens and organic solvents. The Preparations Directive⁽⁵³⁾ came into force in June 1991, and in consequence provisions on safety, safety data sheets were also harmonised. In principle, these provisions implied that Denmark could no longer demand safety data sheets for compounds not acknowledged as hazardous by an EU majority. Denmark, however, twice obtained a two-year deferment regarding the part concerning safety data sheets.

In 1995, the Commission was informed that Denmark intended to invoke the directive's safeguard clause which (as previously stated) allows only for a temporary tightening of regulations. The Preparations Directive is presently under amendment. In reply to Denmark's invocation of the Safeguard Clause, on the 26th July 1996 the Commission motioned the Council to extend the number of compounds for which safety data sheets had to be compiled. Hereby, the proposed regulations are more closely in concordance with Danish regulations. With reference to the position of the southern European countries, the proposal stipulates only that safety data sheets are to be handed over "upon request" (while, according to Danish regulations, such safety data sheets must be presented "on delivery" of compounds). This, however, does not affect Denmark where, due to regulation of the working environment, a provision directing the employer to ask for a safety data sheet has been effective since 1983.⁽⁵⁴⁾

The Commission proposal implies that companies may apply for permission to conceal the properties of a given hazardous chemical substance. Denmark tried to limit this principle as far as possible.⁽⁵⁵⁾

3.2. Labelling on environmental impacts

Until 1993, provisions on labelling covered health considerations only. But the 7th amendment to the 67 Directive(56) introduced a labelling of substances that are particularly damaging to e.g. bird life, fish and other aquatic animals and plants. However, criteria for the labelling of qualities such as estrogenic effects and possible hazards to groundwater resources were not taken into consideration. A labelling of these properties thus remains impossible.

However, provisions for the labelling of environmental impacts apply to pure chemical substances only. Provisions for environmental hazard classification of chemical compounds are yet to be introduced. A Nordic proposal has been included in a proposed Council directive concerning hazard labelling of compounds, which the EU Commission submitted to the Council in July 1996. The proposal came up for discussion in the Council in the beginning of 1998. At the earliest, amended regulations on the environmental labelling of preparations (compounds) can be expected to come into force around the change of the millennium (57). Until labelling regulations of preparations are implemented, the promise of environmental impact labelling is of little consequence, since the vast majority of chemicals are marketed as compounds.

3.3. Carcinogens

Traditionally, the EU majority has been more reluctant to acknowledge substances as being carcinogenic than Denmark would wish for. Up to the middle of the 1990s, the tendency was for the WHO (the UN health organisation) to have a larger number of substances on their list of carcinogens (the IARC-list) than those classified as carcinogenic by the EU.(58) The 1990s, however, have seen a considerable development, where Denmark and other countries have pressed to have more substances classified as carcinogens within the Union. At the same time, the WHO changed their procedure for entering a substance on the IARC list of carcinogens, so today their methods resemble those used by the EU.(59)

The EU list has been augmented, particularly in 1994 following the 21st adaptation to the directive for classification and labelling: By group classification, approx. 700 carcinogenic coal and oil derivatives were added to the list of hazardous substances.(60) Yet, a number of significant substances remain to be classified by the

EU; though considered carcinogenic in Denmark, we are unable to have them labelled as such.

In 1991, Denmark attempted to have DEHP(61) - a substance widely used as a PVC additive - labelled as carcinogenic. The WHO already had DEHP on its list of carcinogens; nevertheless, Denmark was unsuccessful in obtaining EU labelling. A risk assessment of DEHP has now been initiated, and is expected to be finalised by the end of 1998. The findings will be decisive for whether or not DEHP can be classified as carcinogenic.

In addition, the following widely used substances are not acknowledged as carcinogenic within the EU system: creosote (see relevant section), styrene, and toluene-di-isocyanates (TDI).

3.4. Assessment of chemical substances in the EU

A general problem with new as well as familiar chemical substances is our very limited knowledge of their impacts on health and environment - not only individually, but also as compounds. In order to obtain more knowledge of the characteristics and effects of chemical substances, the EU is conducting a so-called risk assessment of chemicals.

A distinction is made between a hazard evaluation and a risk assessment of chemical substances. A *hazard evaluation* is exclusively concerned with the inherent properties of a given substance, whereas a risk assessment also considers whether a substance might, for example, leach to groundwater resources. It takes into account how people and environment are affected by the chemical. Hazard evaluations, as well as risk assessments are of decisive importance since the possibility of imposing restrictions on the use of a chemical depends on their findings. However, the complex task of conducting a risk evaluation should not cause measures against particularly hazardous substances to be delayed for years on end - a trend strongly in evidence at the present time.

Within the EU framework, the risk assessment work is regulated by a directive from 1993 (62), passed with reference to Article 100A of the Treaty (see section on the Single Act), even though it has no direct bearings on trade. Since this regulation is total harmonisation, it may be interpreted as depriving Member States of their previous right to impose restrictions on the use of particularly hazardous chemical substances and compounds. Thus, Article 8,

Section 5, states that it rests upon the Commission to propose EU measures in this area. So far it is not known whether the directive will, in practice, stop Member States from taking steps to limit the use of certain substances upon assessment. So far, the assessment of the first substances on the priority list is only about to be concluded.

As a beginning, an assessment of 80 substances with a special priority has been initiated. The substances are selected among approx. 2,700 substances that are marketed in amounts of over 1,000 tons per producer, on an annual basis. A risk assessment must result in a joint evaluation in order to determine whether an effort is needed to reduce the risk. A risk assessment is carried out for each individual substance, one reason why Denmark has criticised the programme for being rigid and time consuming. As yet, none of the substances undergoing risk assessment in the EU have come through the whole process(63). Preliminary findings were published in spring 1998.

As in the classification field, it would be obvious to suggest that the risk assessment process should adopt an approach allowing for a bulk assessment of substance groups, rather than substance by substance. A 1996 report issued by the Danish Technology Board on "Non-assessed chemical substances" proposed the use of *group classification*, the idea being that this is a much faster way to cover the many thousands of non-assessed chemical substances. The principle is to define a group of chemically closely related substances; all examined substances of the group will then be classified as the one most stringently classified. A manufacturer requesting a downrating of a given substance would then have to produce sufficient evidence to verify that the substance is less hazardous than rated. The proposal was followed up by the Danish Parliament, and included on their agenda on a chemicals policy adopted on 30th January 1997.

4. Chemical substances in toys

Since toys are a commodity, they are regulated under a total harmonisation directive, meaning that a Member State is not entitled to block the marketing of a toy product as long as it fulfils the provisions of the directive.(64) Toys contain a number of different chemical substances, only a few of which are provided for in the directive. The directive cites limit values for eight different heavy

metals, including lead and mercury, and - with regard to all remaining chemical substances - states that “toys may not contain hazardous substances or preparations as defined in Directives 67/548 (Classification and labelling) and 88/379 (the Preparations Directive) that can potentially damage the health of children using them”. Certainly a very vague wording, the reality being that a large number of hazardous substances are found in toys.

The toys directive is a so-called new-method-directive, meaning that the directive merely states general provisions, while it is up to CEN (the European standardisation organisation) to supply technical requirements and test methods. This in turn means that decisions vital to human health can be made by a private organisation strongly influenced by vested commercial interests.

4.1. Heavy metals in toys

Heavy metals are environmental toxins to which children are particularly sensitive. Since 1982, common European standards on the release of heavy metals from toys have been in existence, and the 1988 toys directive sets limit values to how much heavy metal may be *released*. Hence, there is no upper limit on the total permissible *content* of heavy metal. The limit value is a so-called “*migration limit*”, meaning that the amount of heavy metal released if a child sucks on or swallows a toy is measured. Tests are carried out to establish how much heavy metal can leak into an acid solution. A minor safeguard factor – 30–60% – is built-in before determining whether the released amount of heavy metal exceeds the limit values.(65)

A report from the DK Ministry of Environment confirms that the total content of heavy metals in a toy may be up to 200 times the upper limit for leaking as specified in the EU directive.(66) In practice, a toy could be subjected to treatment different than what is assumed by the testing procedure. For instance, if exposed to mechanical wear, the toy may produce inhalable heavy metallic dusts.

The regulation of heavy metals in toys has been criticised as being outdated. As an example, the total heavy metal content in toys could be anywhere from 10 to 100 times higher than the total content permitted in packaging according to the EU packaging directive, which came into force on the 1st of July 1998. The amount

of mercury allowed in ordinary ceiling paint is 25 times lower than the permissible release of mercury from children's finger paint.(67)

4.2. "Toys may not contain hazardous substances"

A long line of chemical substances are found in toys. The substances are added, for example, in order to make the toy either soft or hard, for colouring, and to ensure that it will not burn easily. The toy directive does not give limit values as to how much of a chemical substance is permitted, only that toys may not contain hazardous substances and compounds liable *to harm the health of the child using it*. Though a substance is considered hazardous if classified under the EU provisions on labelling.(68), any potential health hazards to children playing with their toys must also be documented; so toys may very well contain substances found on the list of hazardous substances. In other words, the admission of hazardous substances in toys is a matter of opinion.

4.3. Softeners in toys

In the course of 1997-98, focus has been on the use of phthalates as softeners in toys. Phthalates are primarily used in PVC plastic to make the material soft and pliable. PVC plastic is a cheap and extensively used material - also in toys (see section on Packaging and PVC). Several of the most used phthalates are known to have estrogenic effects - meaning that chemically the human body may mistake them for natural hormonal excretions. Phthalates are suspected of being co-responsible for the falling semen quality and the world-wide rise in testicular and mammary cancer.(69)

One reason for focusing on phthalates, notably in toys, is the knowledge that they do not stay bound to the material to which they are added, but are released upon contact with water and saliva. This means that when children play with a PVC bathing ring softened with phthalates, the chemical substance will leak into the water.

In the spring of 1997, Danish EPA published the results of a study of eleven teething rings made from soft plastic, showing that three released so much phthalate that the producers were requested to withdraw their products. The three teething rings withdrawn from the market were all made from PVC. Later that year, a study conducted by Greenpeace showed that PVC toys contain 10-40% phthalates.

The most widespread phthalates are DINP and DEHP which are not classified in the EU. However, if purchased by a US or UK manufacturer for laboratory use, DINP is labelled as “carcinogenic”, and DEHP has for the past ten years been on the IARC (WHO) list of carcinogens⁽⁷⁰⁾ - see section on Classification and labelling. In Denmark, the Labour Inspectorate uses the IARC list, which is why 16-18 year-old workers are not permitted to work in places where they could be exposed to DEHP.⁽⁷¹⁾ The differences found between regulations for the working environment, and those applying to sectors such as toy products, are due to the fact that the former are less limited by EU total harmonisation. This also enables the Danish Ministry of Labour to use the IARC list of carcinogens, instead of the EU assessments of the carcinogenic effects of chemical substances.

In the autumn of 1997, the focus on chemical substances in children’s toys led the Danish Minister of the Environment, Svend Auken, to declare that Denmark intended to call for an EU ban on phthalates in toys for children under three years of age. Moreover, the Danish Minister of Environment and the Minister of Industry addressed Martin Bangemann, EU Commissioner for Industry, to request a revision of the toy directive, with a particular view to securing more stringent provisions for chemical substances in toys.⁽⁷²⁾ - At the same time, Austria announced a *national ban* on toys containing phthalates for children under the age of three years.⁽⁷³⁾

The Commission must be notified of such a ban, and then may opt to have it postponed, while the introduction of common rules is being considered. Presumably, the Commission can even stop such a ban - and if necessary take it to the EU Court. The toy directive contains a so-called free trade clause stating that a Member State cannot prohibit or limit the marketing of products provided they abide by the provisions of the directive. It is, in other words, an exhaustive regulation - in the same way as the directives on classification and labelling.

The political pressure brought to bear by Denmark and Austria led the Commission to raise the issue of phthalates in toys as an issue, and a scientific committee under the Commission compiled a report specifying which types of phthalates should be included in a future regulation in the toy sector. On the 9th of February 1998, the scientific committee came to an agreement on proposed limit

values for the release of six phthalates. They also recommended that new types of phthalates for toys should be tested before being used.(74)

However, even if the Commission was to accept the limit values recommended by the committee, the regulation would not be able to satisfy the Danish and Austrian wish for a ban on all softeners in toys for children under the age of three years.(75) Denmark and Austria still wanted a ban on all softeners, but the majority of member states were against. A compromise was adopted in spring 1998. Individual member states were allowed to ban softeners in toys for children under three, without making use of the Environment clause - though not all softeners were banned by the EU as such. The USA threatened sanctions, if the softeners were banned by EU-countries in toys for children under three.

During 1998 Denmark and Austria introduced national bans on phthalates in toys meant for children under 3 years. In the summer of 1998 a Dutch report (76) concluded that there was no significant health hazard for children using toys with softeners, and this was used in a new attack from industry against the two countries and their ban. But the EU Scientific Committee (CSTEE) evaluated the question again, and they still found that concerning two phthalates - DEHP and DINP - the margin of safety was too low - 75 and 19 times respectively - where it should have been at least 100 times (77).

4.4. Standards

Among other considerations, the mechanical, electrical and chemical properties of toys must conform to a series of standards prepared by CEN, the European standardising organisation. As mentioned, the EU entrusts CEN to compile the more detailed stipulations referred to in the toys directive. Member States are far from any agreement on how the standardising work for toys should take place. The work has proceeded very slowly because of disagreements. But from the end of 1998 more progress seems to have been made, and the CEN committee now intends to set limits not only for single substances, but for groups of substances.

The Commission has given a mandate to the CEN to prepare standards for a series of organic chemicals, such as solvents, preservatives, etc. in toys. The work almost stopped during 1997-98, because the parties could not agree who should pay for the devel-

opment of standards for chemical substances in toys. But from the beginning of 1999 it has started again, because the Danish and German environment agencies have agreed to pay for part of the work (75). This also illustrates that it is a bad idea to privatise the legislative work on hazardous chemicals, because industry is not able to handle such controversial issues.

5. Import and export of hazardous chemicals

We have seen many examples of companies from rich countries exporting hazardous chemicals to developing countries, even though the chemicals have been banned in the *exporting* country. For instance in the spring of 1997, an animated debate took place in the Danish media concerning the export of chemicals to developing countries. In May 1997, a TV programme called “Made in Denmark” focused on Cheminova, a Danish chemical plant exporting hazardous chemicals to developing countries, e.g. in Latin America. The chemicals, including methylparathion, an acute toxic pesticide, are produced for export by the Cheminova plant at Limfjorden, Denmark, though methylparathion is not approved for use in Denmark. And this methylparathion was, according to the TV-programme, used in Nicaragua and Guatemala without the least safety precautions.

Contrary to products for domestic use, pesticides for export only are not subject to approval according to national regulations. An EU member state cannot plainly impose an export ban on pesticides to countries outside the EU since this would be at variance with the general principles of the WTO agreement, according to which discriminating trade barriers cannot be introduced. Equally, for trade in general, no demands can be made for the importing country to meet certain environmental and health requirements. (See section on EU and WTO).(78)

Since 1988, the EU has rules for Community import and export of certain hazardous chemicals. The area is regulated by a Council directive, covering all chemicals placed under a ban or stringent restrictions within the EU, due to their effects on human health and on the environment. Stringent restrictions are defined for: “... chemicals which for reasons of human health or on environmental grounds have been banned for practically every usage by public regulation, but are still permitted for certain specified purposes”.

The idea was to introduce a notification procedure, so countries importing hazardous chemicals in this category would be informed of any restrictions or bans placed on such chemicals, and on what grounds. The Commission Proposal contained the principle of *Prior Informed Consent* (PIC), which would have enabled the importing country to refuse such chemicals. But to begin with, the Council rejected this procedure in favour of the “softer” notification scheme.

5.1. The PIC scheme

The voluntary principle of “prior informed consent” (the PIC scheme) has existed within the UN framework since 1989. The scheme encourages exporters of (presently) 27 specified substances to supply any relevant data to the authorities of the recipient country - prior to exportation. The receiving country may then decide whether or not they wish to receive the substance. The 27 substances include DDT, dinoseb and PCB; another six substances are about to be added -two of which are Cheminova products, parathion and methylparathion. The future extension will be of importance to Denmark, since for the first time the procedure will include substances and preparations produced in Denmark. The complete voluntary PIC scheme was made binding for the Member States by a Council directive passed on the 23rd July 1992.(79)

At the 18th session of the UNEP in May 1995, it was resolved that a proposal for a convention should be prepared, transforming the PIC scheme into binding rules. The convention was signed by 60 countries in September 1998. It will come into force, when it has been ratified by at least 50 countries. This will mean that the USA, Japan, Russia and China will be under one obligation of the PIC scheme. This, however, depends on the ratification of the convention by the countries, and during the negotiations so far, the USA was only prepared to endorse sections of the convention. If the four countries support the convention, a significant loophole in the procedure for chemical exports will be closed.

However, another likely implication of the convention is that the addition of further substances to the PIC list will become even more difficult: Since regulations are binding and a breach thereof can lead to sanctions, the countries will be more reluctant to enter new substances. But basically, negotiations will presuppose that any country signing the convention will abide by its rulings.

Hence, guidelines for sanctions will be prepared only after the conclusion of negotiations.(80)

After the principle of prior informed consent (PIC) was introduced in the UNEP convention, it was also adopted by the EU (Council Regulation EEC/1734/88); however, the process of extending and updating the list of chemicals has proved extremely slow. The chemicals listed in by the regulation directive list are covered by the PIC procedure, whereas environmental authorities do not register other exported substances, nor their quantities. The EU Parliament has offered proposals for greater extension, but these were opposed - due to the fact that the procedure for inclusion of substances is quite complex: The directive can be augmented only with substances can only be added to the regulation if they are already covered under Directive 76/769, on limitation of marketing and use of certain hazardous substances and preparations (see section on limitation of marketing and use), and the directive on prohibition of certain plant protection agents (EU-directive 79/117).

In December 1994, the regulation directive was extended from 24 to 39 chemical substances. It has twice been amended, as new countries joined the PIC scheme. By the beginning of 1998, 191 countries had joined the scheme.(81)

For the present, the chemicals produced by Cheminova are not listed in the regulation on the directive listing, and the plant is free to export to third-world countries without supplying any relevant information to the recipient. In Denmark, it is not possible to plainly ban an export production of hazardous chemicals even though the chemicals are banned for use on the domestic market. This does not, however, impede Danish attempts to stop the production of chemicals that we consider to be particularly dangerous. Only, we have to prepare ourselves for a clash in the EU.

6. Ozone depleting substances

In the 1980s, it was first acknowledged that the use of several chemicals led to a depletion of the ozone layer. The ozone layer acts as the earth's sunglasses, and a thinner ozone layer means: more UV radiation on earth. The best known ozone depleting agents are CFCs, which were used e.g. in aerosols and refrigerators. They were earlier known as Freon, their trade name. Estimates were that CFCs caused 75% of the ozone layer decomposition.

In 1984, Denmark decided to ban CFCs in aerosols for private use. This met with opposition in the EU, but the Commission did relinquish its efforts to take the case to the EU Court. Prior to the Montreal Protocol, the EU tried to undermine the ban as much as possible. Later, a political change of ground took place, so in 1989, the EU agreed to aim for a total abolition of CFCs before the year 2000, and in December 1990, the time window was brought forward to 1997.(82)

The Montreal Protocol, passed within the UN framework in 1987 and endorsed by 163 nations, has been tightened several times. In the EU, it has been implemented in the form of a Council order on ozone-depleting substances. A revision of the order, passed in December 1994 (83), includes a phase-out of “soft” CFCs, such as HCFC. HCFCs are called “soft”, which is misleading. HCFCs are indeed less hazardous than CFCs, meaning that their ozone layer depleting potential is less than that of CFCs. But HCFCs still do have major impacts on the ozone layer. Yet another substance to be abolished because of its ozone layer depleting effects is methylbromide, a herbicide used in plant nurseries in most countries.

The more stringent measures of the regulation were inconsequential to Danish legislation in the area, since they were already more extensive than those of the EU. Denmark chose to order a phase-out in such a way that definite dates have been set for each of the major applications of CFC, etc.(84). At the same time, Denmark introduced a tax on CFC and on products containing CFC; this should provide a competitive edge for alternative substances/methods. In a Danish statutory order that came into force on January 1st 1996, Denmark set earlier phase-out dates for both HCFC and methylbromide than did the EU.(85)

Germany and The Netherlands have followed a similar strategy as Denmark. The EU regulation on CFC was passed as a *minimum regulation*, based on articles in the Treaty on the Community’s environmental measures, Article 130S, and on the joint trade policy in relation to third-party countries, Article 113. In spite of it being a minimum regulation, the Commission has several times requested an explanation of the more stringent Danish rules. Each time, Denmark responded in writing; and finally the Commission remained passive, which must be construed as an acceptance of the Danish rules.(86)

In principle Presumably, due to their legal authority, Member States should also have the right to apply more stringent national rules, provided they are motivated by environmental concerns. With this in mind, it is remarkable that Article 130S has been applied here, although it is a case of marketing limitations to chemical substances. However, the Commission refers to the fact that although Member States may introduce more stringent national rules, these must be consistent with the Treaty, and the Commission should be notified. In this case, the Commission was able to refer to the verdict in a wild bird protection case against The Netherlands (see Appendix), which established that minimum directives should also be consistent with Articles 30-36 on Community trading.

Under the auspices of the Montreal Protocol, the USA in September 1997 proposed a phase-out of Methylbromide, used for pest control, by the year 2001. Denmark supported the American motion; however, in the EU, the Member States could merely agree on a mandate for the phase-out of methylbromide by 2005. And this ended up as the result. This is about to be implemented in the EU as an amendment of the order mentioned above. The new order was adopted as a common position by the Council in late 1998, but it still needs a second reading by Parliament.

Concerning HCFC the Montreal protocol as well as the EU order still have very long time frames. In the EU the *use* of HCFC must be phased out before 2010, but *production* can go on till 2026. In the Montreal protocol the time frame is 2030. So there is still much to be done in terms of strengthening this international regulation.

Another great challenge in the future lies with the developing countries which are not covered by the same phase-out agreements as the industrial countries. For instance, in developing countries, the withdrawal of methylbromide will not be accomplished until 2015. As for CFC, developing countries have not yet undertaken to reduce or desist in its use. At present, these countries are doubling their consumption of CFC every seven years. Furthermore, Russia and the Ukraine still have a considerable production of ozone layer depleting substances. The World Bank has requested the industrialised countries to fund the phase-out of this production, but only the USA, Denmark, Norway and the UK have responded positively.(87)

7. Pesticides

The term 'pesticide' means "any chemical used for killing insects, weeds, fungi etc." Pesticides fall in two groups according to their use. One main group of substances is termed *plant protection agents*, mainly agents used as herbicides, insecticides and fungicides in agriculture, forestry, plant nurseries and gardening. The other main group is termed *biocides* and includes agents used for wood protection, for pest control in buildings, and against vermin, etc. Pesticides contain at least one substance that is active against the relevant pest.

By far the greatest amount of pesticide is used by agriculture, in the form of plant protection agents. In practice, EU regulation for this area (the Plant protection directive) has had little significance so far, since only one substance has been completely evaluated. The 89 substances given priority in the first round are still awaiting their assessment by the Member States. In total, 700 to 800 active substances exist within the EU.

As yet, the EU has only concerned itself with the approval of single substances and not - though no less important - with the process of reducing the *amount* of pesticides used. In Denmark and a couple of other EU member countries, organic farming is gaining ground, and there is a general debate on the prospects of avoiding the use of pesticides. In 1997, the so-called Bichel Committee(88) was appointed, and it issued its report by March 1999. Their task was to give an estimate of social benefits and drawbacks associated with a total or partial stop to pesticides in agriculture. Viewed in this light, efforts at EU level to contain environmental and health damage caused by the use of pesticides have indeed been very limited. Reversed, this means that nationally, Denmark is free to limit the *amount* of pesticides that may be used, without any intervention by the EU.

The directive on plant protection agenproducts was approved in 1991 and is a total harmonisation directive, allowing Member States very scant opportunity of using more stringent rules. The directive is due for revision in the year 2001. There is a need to bring it up to date so that the individual Member States are allowed to take the lead.

7.1. Approval of pesticides

The EU directive on the marketing of plant protection agents was passed in 1991.⁽⁸⁹⁾ Denmark voted against it because of its implications. For example, the so-called alternative assessment, then part of the Danish legislation, would have to be abandoned. The implications of this alternative assessment were that the approval of a pesticide could be refused simply on the grounds that another substance existed that was less hazardous and served the same purpose.

The directive is in accordance with Article 43 (see section on Agriculture and environment), meaning that it could be approved by a qualified majority, and with fewer inputs of the EU Parliament (i.e. with the consultation procedure and not the “co-operation procedure”). Moreover, it does not contain an “Environment clause” corresponding to Article 100A, Section 4. Hence, it is not possible for a Member State to apply more stringent rules for an indefinite time. However, the directive does contain a so-called safeguard clause (see the section on «Agriculture and environment»). In several previous verdicts, the EU Court has established that directives concerning the production of and trade with agricultural products *must* come under Article 43, even though the goal of the relevant directive is health and environmental protection. (See Appendix).

The directive, which came into force in the summer of 1993, contains procedures for the approval of plant protection agents, both active single substances and formulas (compounds), and rules for mutual acceptance of approvals by individual Member States.⁽⁹⁰⁾ Phase 1 of the approval procedure is that the Member States are delegated a number of active substances, the hazards of which they are to assess. Guidelines for the assessment of formulas (compounds) are given in Annex VI of the directive, passed in 1994. This supplement was brought before the EU Court by the EU Parliament, and in 1996 annulled by the Court because it involved a poorer protection of groundwater resources than the original general directive.⁽⁹¹⁾ In 1997 a new Annex VI was adopted ⁽⁹²⁾.

An evaluation of active substances and formulas also involves considerations regarding the protection of *groundwater resources*. For run-of-the mill approvals, the starting point is the threshold values found in the *Drinking water directive*. Here, threshold values were

originally set at 0,1 mg/m³ for single substances and 0,5 mg/m³ for total concentration of pesticides. These threshold values reflected the precautionary principle and were tantamount to meaning that no pesticides were allowed in drinking water since, at the time, it was not technically feasible to measure values below these levels. Since then, several Member Countries have requested the adoption of a human health criterion, based on known health effects, combined with a safeguard factor. This would be a step backwards since, in that case, heed would be taken only of effects already scientifically proved. By the beginning of 1998, however, a general consensus on a Commission proposal had been achieved, maintaining a limit of 0.1mg/m³ for any active substance and 0.5 mg/m³ for the total concentration of active substances (93).

Only three active substances - imazalil, azoxystrobin and kresoximmethyl - have been completely assessed until now. Once an active substance has been assessed, the findings are passed on to the Plant Health Committee under the EU Commission's Directorate for agriculture, a committee manned by civil servants. This is a closed procedure where it is not possible for environmental organisations and researchers to gain insight; nor is it controlled by the Council or the Parliament. When a substance is approved by the Committee, it is placed on a *positive list*.

The decision as to which Member States will examine the various pesticides rests with a committee under DG 6 (General Directorate for Agriculture). Denmark was for instance delegated two substances; these have been through the Danish re-assessment and are now on the Danish prohibition list.(94)

The last phase is the approval of preparations (mixed compounds). This takes place in the individual Member States, and approval can be granted only to compounds for which each active substance is already included in the EU positive list. However, individual countries are free to decide on the mixtures in which the active substances may be sold, spraying times, etc. Each country can demand that the effects of an active substance be tested on their own agricultural, environmental and climatic conditions, and the relevant Member State can refuse approval of the agent, in case major deviations are found.(95)

If a Member State is unable to approve the formula, and if the active substance is on the positive list, the country may, temporar-

ily, limit or ban the use and/or sale of the relevant product on its own territory, even though it is approved by other countries.(96) In that case, the Member State will notify the Commission and the other Member States of its invocation of the *safeguard clause*, and within three months, a decision must be made whether or not the ban can be upheld. A permanent ban must be justified by considerable differences in agricultural, environmental or climatic conditions between Member States. Any ban of an individual Member State is considered in the Plant Health Committee, and if approved by the Committee, it is adopted. If the Committee overrules the ban, a decision by a qualified majority can be made in the Council. Thus, theoretically speaking, a Member State's invocation of the safeguard clause could lead to a permanent ban on the use of a given pesticide. Whether this is likely to happen, only the future use of the clause will show.

7.2. Danish regulations and EU regulations

For a number of years, Denmark has been in the process of re-assessing previously nationally approved pesticides, based upon more stringent environmental criteria than were applied for their first-time approval. This re-assessment has been continued on a national level regardless of the EU directive. But the moment an active substance is placed on the EU positive list, Denmark will have to re-assess compounds containing the agent even while opposing it. The principle is called *mutual acknowledgement*.

The principle of mutual acknowledgement also implies that if one Member State approves a formula consisting of *approved* active substances, the other countries may have to also accept that formula on their market - even in the event that its concentration of active substances is higher than those previously approved by the relevant country. The principle of mutual acknowledgement is, however, only applicable if the conditions of agriculture, environment and climate are comparable.

Since 1994, Denmark has banned approximately 170 compounds, containing 30 different active substances, and from 1998 – a few only from September 1999 - these compounds have been prohibited for import and sale. And an even bigger number of compounds and substances have left the market, because the producer or importer has omitted to apply for a new approval. In total 135

active substances have been withdrawn during the re-assessment process.

However, Denmark may not be able to uphold these bans. Substances now prohibited in Denmark could be included in the future EU positive list. One such instance is diquat, a substance approved in the remaining fourteen EU countries. If diquat is placed on the EU positive list, a qualified majority can literally force Denmark to rescind its ban. As a last resource, Denmark could choose to maintain the ban anyway - well aware that the Commission would probably bring the case before the EU Court.

Zeneca, the chemical corporation selling diquat in Denmark, has stated that they will fight hard to have the substance listed on the positive list. (97) Danish legislation will, however, be in force for some years to come, since some 800 (pesticide) active substances are found within the EU, and quite some time will elapse before all these substances have been handled by the approval procedure.

If the recommendations of the Bichel Committee, see above, should lead to Denmark reducing its use of pesticides, and make it refuse approval of agents whose active substances appear on an EU prohibition list - then this could be at variance with EU rulings. The Commission may then choose to take Denmark before the Court where, according to the provisions of the directive on plant protection agents, we must be able to motivate our non-approval with specific national conditions. The directive is due for revision in the year 2001. Denmark will then work for changes to the approval procedures in order that more consideration is given to the Danish demands. The approval procedures to be passed in the biocide directive (see below) could have considerable impacts on the revision of the directive on plant protection agents. It is more than likely that the EU Parliament and the Commission will let the guidelines passed in the biocide directive set a precedent for the entire pesticide sector.(98) Besides it is important that the revised directive must be based on article 100A of the treaty and not on article 43 (see section on "Agriculture and environment") as the present directive. Such a change would lead to the environment clause (see section on this) being valid for approval of pesticides .

7.3. Biocides

Biocides comprise of pesticides for non-agricultural application, such as wood protection agents, anti-fouling agents for ships, or rat

poison. Estimates are that seven to eight hundred active substances exist EU-wide, used in some 15,000 different biocide compounds. The directive is the counterpart of the directive on plant protection agents, and encompasses all pesticides not included in that directive. According to the principle of mutual acceptance, Member States must allow the marketing of a biocidal product, if already approved by another Member State - unless special conditions are applicable. During the adoption process between the Council, the Commission and the EU Parliament two of the amendments proposed by the Parliament were not adopted by the Commission. Therefore the biocide directive ended up in a co-decision procedure between the Council, the Parliament and the Commission (see the section «The co-decision procedure») (99). The biocide directive was finally passed in January 1998 (100).

The most important feature of the biocide approval scheme is that the principle of *alternative assessment* has been incorporated. This principle implies that it is possible to refuse the approval of a biocide if another substance with considerably lower health or environmental impacts is available. During the negotiations on the Directive on the approval of plant protection agents, this principle was not included, though demanded by Denmark. (See section on Plant protection agents) (101). After the inclusion in the biocide directive there are new good arguments to have it included in a revision of the plant protection agent directive too.

Biocides to be delegated for evaluation by the individual Member States will be entered in the annex of the Biocides directive; however, no biocides have been given priority until now, so the annex is void. Since, according to tradition, the preparation of technical annexes circumvents the EU Parliament, it was not planned for the Euro-MPs to have any say as to which biocides should be taken out for assessment. During the co-decision procedure, however, it was decided that the annexes would be given the “full procedure”, i.e. the co-decision procedure, with maximum involvement of the Parliament. This is considered quite a victory for the EU Parliament, since it will provide a lot more influence on the biocides directive, and hence possibly more opportunities to influence the 2001 revision of the Directive on plant protection agents.(102)

8. The greenhouse effect (CO₂)

Like the depletion of the ozone layer, the greenhouse effect is a global issue and also one of the most debated environmental problems of the 1990s. Amongst researchers, there has been some difference of opinion as for the scientific evidence supporting a connection between changes in climate and the so-called greenhouse gases, of which the most important is carbon dioxide (CO₂), followed by CFC (see section on ozone layer depleting substances), methane and several other agents. The absence of political action has reflected the scientific disagreement. In December 1997, however, it was possible to convene the UN member nations for a climate conference in Kyoto, Japan, with the greenhouse effect on the agenda. The goal of this conference was to finally have many years of talking and report-writing followed up with political action, and to stipulate binding goals for the reduction of a number of known greenhouse gases.

Since its formation in 1989, the Intergovernmental Panel on Climate Change (IPCC), an international panel of researchers, has tried to examine if and how the climate will change because of human activity. The panel worked out a climate convention for the 1992 Rio Conference, with the objectives of stabilising CO₂ emissions by the year 2000 and a 60% reduction by 2040. Adoption of the convention dragged out - in particular because the USA (until the presidential change in 1993) maintained that sufficient scientific proof of the greenhouse effect was not in evidence. Also after 1993, the USA has been extremely reluctant to participate in an actual reduction of emitted greenhouse gases. In this context, the EU proved to be more progressive, since a plan for stabilising CO₂ emissions up to the year 2000 was adopted by the EU at an earlier date. The global climate convention came into force in March 1994.(103)

Up to the Kyoto Conference, the EU took the lead with a proposal for a 15% reduction of CO₂ emissions by the year 2010 at the latest, and an intermediate goal of a 7.5% reduction by 2005. The environmental organisations supported the proposal since, after all, it was the most extensive one with a chance to be carried through in the negotiations. The conclusions of the Kyoto protocol was that EU countries will jointly have reduced their emissions by 8% by the year 2010. As for all UN nations, the legally binding climate agreement implies a total reduction of the emission of six green-

house gases(104) by 5.2% up to the years 2008-2012. However, some countries were permitted to increase their emission of greenhouse gases, for example Iceland (by 10%), Australia (by 8%), and Norway (by 1%). Russia and the Ukraine must stabilise their emissions; as emissions have fallen dramatically since 1990 due to the economical recession in both nations, they were in fact permitted an increase in future years. This could be quite an asset if, in a few years time, international trade of CO₂ quotas becomes an option.

The Kyoto protocol is undergoing a hearing procedure by the individual parliaments. Once ratified by at least 65 countries, representing 55% of the member nations, the protocol will take effect. The next session of the climate protocol was in Buenos Aires, Argentina on the 2-13 November 1998, where no substantial decisions were taken. A number of important issues, deferred during the Kyoto Conference, will not be resolved until the first meeting of the parties under the protocol, which will take place no sooner than the year 2000.(105)

8.1. CO₂/energy tax

At present, the EU decision to reduce CO₂ emissions embodies a goal without any indications of means to ensure that it is achieved. The most important means should be a CO₂/energy tax. There are no indications that any such tax can be legislated at the EU level in the next few years. Admittedly, the Maastricht Treaty opens up to a majority vote system on parts of the environmental sector (see section on the Maastricht Treaty); yet, as for passing a CO₂/energy tax, unanimity will still be required since decisions on taxation are exempted from the majority vote system.

In the beginning of 1997, the Commission issued a statement on general guidelines for environmental taxation in the Single Market - including guidelines for the introduction of CO₂/energy taxes by individual Member States.(106) The Commission worked out these guidelines, realising that for the time being, EU-wide consensus cannot be reached on the issue of taxes. The statement has no legal power, but is rather an indicator of how far individual Member States can go without getting into conflict with any future EU provisions.(107)

The Danish Parliament passed a CO₂ tax in December 1991 which, after a postponement, was accepted by the Commission as being in compliance with EU law. In 1993, the CO₂ tax came into

effect, meaning that industries would start paying a levy based on their energy consumption - though a very modest one, compared to that of private households. The Commission approval was based on the fact that the tax is of a preventive nature, and also that no EU legislation has as yet been adopted in the area; hence, the Danish arrangement cannot be said to be at variance with EU law.(108) Hereby, the Commission has made provision for the event that the EU could in future adopt legislation which is not in harmony with Danish law. Also Sweden, Finland and the Netherlands have a CO₂ or energy tax, and several countries are preparing one. Especially the UK-government has submitted a concrete proposal.

9. Genetic engineering

Genetic engineering was developed in the early seventies, when researchers discovered a method to transfer genes from one organism to another and make them active in the foreign organism. The method was soon developed into a production technology, by the pharmaceutical industry and others. In recent years, the field of bio-engineering has been one of the most fervidly debated environmental issues.

9.1. EU regulations and genetically modified organisms

In 1990, the EU adopted two directives (109) on genetically modified organisms (GMO). The directive on confined use of genetically modified organisms is a minimum regulation without particular relevance to the Single Market; hence, it is not discussed here. The most intense discussion concerned the directive on the deliberate release of such organisms. Denmark voted against it, already having more stringent legislation in this field. For example, it was a requirement that any applications for the release of GMOs were subject to individual approval by the Danish Parliament.

The EU directive on the release of GMOs is a total harmonisation directive, and Denmark unsuccessfully attempted to have the directive referred to Article 130S (see section: From the Single Act to Amsterdam). The Danish Parliament passed a new law implementing the two directives(110) in June 1991. Herein, the Environment clause (art. 100A,4) is included, reserving the right to prohibit the marketing of a given GMO should this be in conflict

with essential considerations in terms of environment, nature, or human health (111).

The Danish government has never resorted to the Environment clause - in spite of Denmark having made objections to a number of approvals, partly because of insufficient knowledge of long-term effects and partly because of inadequate labelling. The Environment clause might, for example, have been relevant in a case involving the approval of the so-called "Basta-rape", genetically modified rape resistant to the pesticide Round-up. The rape is produced by a Belgian firm. Danish scientists have shown that the Round-up resistance can be transferred to related wild flowers. Denmark notified the Commission in August 1994 that Denmark would not approve the rape, but was overruled, whereafter the rape was approved in the beginning of 1996.

The EU regulates the approval of genetically modified crops as well as the labelling of any foodstuffs containing such ingredients. Directive 90/220 regarding the release of GMOs contains provisions for approval, and an order passed in January 1997, the Novel Food Order (112), regulates the labelling of foodstuffs. Also an order on Novel *feedstuffs* is now under way.

9.2. Approval of genetically modified organisms

The EU regulations imply that any manufacturer wishing to grow and market a genetically modified crop must apply for approval in the country in which release is intended. The authorities in that country will then handle the application within three months, after which the Commission will receive a recommendation to either approve or reject the relevant genetically modified organism. The other Member States are involved in that the recommendation for approval/rejection is circulated, and if no objections are received within a period of two months, the crop is considered approved.

If one or more Member States object, the approval is brought to a vote in the Commission. Here, it calls for a qualified majority to approve a crop. Should there be a blocking minority against approval, the issue proceeds to a vote in the Council; in that case, the provisions of committee procedure III-A, Article 21 of Directive 90/220 apply. This means that the Council can dismiss the approval of a genetically modified crop by a unanimous vote only. The procedure proved decisive in the case of the approval of *genetically modified maize* from the Novartis company.

In March 1995, France, on behalf of Novartis, applied for permission to release the maize, but several countries objected, either because of doubt concerning environment or safety problems related to this maize, or because of unsatisfactory labelling of the GMO-product. It was not possible to reach a qualified majority in the Committee in favour of the petition.

The application then came before the Council, where thirteen countries voted against an approval of release of the maize, Spain abstained, and France, as the only country, voted for approval. Since consensus is required for the Council to reject an application, the maize was approved by the Commission. Before its final approval on the 18th December 1996, the maize had been considered by three scientific committees, all in favour of release. In the winter of 1996, Austria, Luxembourg and Italy temporarily prohibited marketing of the maize, with reference to the *safeguard clause* of the directive (Article 16). The safeguard clause can be used if a country has a justified reason to believe that an approved product presents a hazard to human health and the environment. This was the first time that the safeguard clause was used.

Italy withdrew its ban in the autumn of 1997, whereas Luxembourg continues to refuse to approve the maize. Austria has directly prohibited it after 1.2 million Austrians signed a protest against an approval(113). On November 5th 1997, the Commission abandoned attempts to force Austria to relinquish its ban, since it became apparent that the Commission would be up against a blocking minority. Even some member states like Denmark, who had not been in agreement with Austria that the maize could be harmful to humans and the environment, abstained from voting for the Commission proposal. The decision is now deferred and the Commission awaits a pending revision of Directive 90/220, see below. Provided that the proposed amendment is carried, it may mean a revision of committee procedure III-A, in order to preclude the situation where a single country together with the Commission are able to approve a genetically modified organism(114).

At present the directive on the release of GMOs (90/220) is being revised, following a Commission proposal aiming to ensure more democratic procedures regarding the approval of GMOs and a more satisfactory labelling of products containing GMOs. The proposal for new regulations is on the agenda in the autumn of

1998 and spring 1999. (115). As the only EU country, Austria has prohibited the marketing of a genetically modified crop.

So far, only genetically modified maize and soya bean have been approved for release in the EU. Twenty-two petitions for release approval are pending an answer from Member States and the Commission. At the present time, the Danish authorities have three new applications up for hearing, one for the marketing of a genetically modified tomato and two for genetically modified cotton. To date, applications have concerned crops modified for resistance to pesticides or insects. Tomatoes are the first product where improvement of quality is sought, since they will keep fresh longer; they will chiefly be used in tomato purée, ketchup, etc. The Member States submitted their comments to the Commission in February 1998 and the Danish Minister of Environment has approved the three products.(116)

Only once has Denmark been the first country to apply for approval of a GMO: a genetically modified turnip developed by Danisco, a Danish company. In September 1997 the Danish Minister of Environment, gave his approval, and the application has been sent to the EU Commission. The turnip is genetically modified to tolerate the active substance glyphosate (Round-up), meaning that farmers can spray with agents containing glyphosate and so destroy weeds without damage to the turnips.

In November 1997 a leading expert, Professor Courvalin(117), at a conference in Denmark expressed his concern of, amongst other things, the much debated genetically modified maize (see above). This crop has had a so-called marker-gene built in which is resistant to antibiotics but is in fact superfluous(118). It merely has a function in the earlier stages of production and could be removed before release - if the producer was prepared to pay the cost. What experts fear is that the antibiotic-resistant gene can be transferred to humans via bacteria in the intestinal flora, and that with this in mind, the genetically modified maize should never have been approved in the first place.(119)

The EFTA countries Norway, Liechtenstein and Iceland are also covered by the GMO directive through their free trade agreement with the EU, called the EEA agreement. This basically implies that once a product is approved in the EU, the approval will also have effect in the EFTA countries. In Norway, evaluations prior to the

release and marketing of a genetically modified crop must include (in addition to considerations for human health and the environment) its potential social 'utility value', and whether it will promote sustainable development. In pursuance of the safeguard clause and their national legislation, Norway has stated that they have banned six products otherwise approved by the EU. It has not yet been clarified whether Norway can uphold these bans.(120)

9.3. Labelling regulations

Genetically modified foods and ingredients are covered by the so-called *Novel Food Order* (121) which came into force on 15th May 1997. The order was drawn up under a great deal of discussion and disagreement between industry and consumer organisations, and contains the first European legislation ever for the labelling of genetically modified foodstuffs. The Novel Food Order requires, amongst other things, an approval of new foods and ingredients before they can be marketed. Starting May 15th 1997, the provisions of the Novel Food Order are in effect in Denmark, so any future labelling of food produced using GMO will be based on these. Prior to this, Danish regulations implied a labelling of *all* products manufactured on the basis of GMO (122). The provisions of the Novel Food Order require labelling only when it can be scientifically proved that the product is different from its non-genetically modified equivalent. To what degree the product must differ is not yet clarified, since the labelling provisions of the order have not been set out in a more concrete way.(123)

Prior to the Novel Food Order coming into effect, two types of genetically modified products, soya bean and maize, had been approved for marketing and hence were not covered by EU labelling provisions. In Denmark, however, foods containing these ingredients were subject to labelling in accordance with Danish regulations. To ensure identical labelling of such foodstuffs, the EU Foodstuffs Committee, consisting of representatives from all 15 countries, presented a labelling proposal. Several Member States found it too comprehensive and it has yet to be adopted. The proposal is of major significance, since it will make a precedent for the interpretation of the Novel Food Order, and hence also for future decisions on the labelling of GMOs.

It is expected that future EU regulations will lead to the labelling of fewer products than under the present Danish regulations. For

instance, it is hardly possible to prove that oil produced using genetically modified soybeans is any different from the ordinary product, and consequently it will not be labelled as such;(124) presumably, since total harmonisation applies to this sector, member states will not be in a position to label oil produced from genetically modified soya beans.

The Danish regulations do not cover genetically modified additives; nor does the Novel Food Order. Thus, the order has been criticised for leaving a large grey zone in which consumers are not guaranteed adequate labelling. Nor shall products from animals (milk, meat, eggs) raised on genetically modified feed be labelled. Yet, several countries find that the common rules in the area are too excessive.

10. Packaging

Packaging contributes with very large amounts of waste in modern society. Therefore there has been an intense discussion in some countries on reduction of waste from packaging, e.g. by using returnable packagings. But as the packaging is also a part of the product, which can be traded across borders, conflicts can arise between environment and free trade. One of the most prolonged conflicts has been the Danish bottle case, see the section « Trade barriers and the bottle verdict». For many years – almost 100 - Denmark has demanded that beer and soft drinks may be sold only in returnable bottles with a deposit. In 1986, the Commission brought an action against Denmark at the EU Court, since the regulation was considered to be a technical trade barrier. In 1988 the Court ruled in favour of Denmark, permitting them to continue to require returnable bottles with a deposit and also to enforce a ban on canned beverages. On the other hand, Denmark was sentenced to withdraw an approval requirement for the type of bottle used for beer and soft drinks. This opened the market for a greater number of bottle types, making the deposit and return system more burdensome.

However, since the packaging directive was passed in December 1994 the bottle verdict is no longer valid.(125) The stated objective of the *Packaging Directive* is to harmonise the prevention and reduction of packaging waste and to promote recycling to protect the environment. The legal basis is Article 100A, since “Beyond

tightening of environmental protection, the directive also targets the realisation of the Single Market.”

The directive has been a much debated issue in the EU, in particular in Denmark, since it could entail the sale of canned beverages on the Danish market and threaten the returnable bottle system. Consumer and environmental organisations agreed that with its vaguely formulated objectives and a very unambitious goal for recycling, the directive was not extensive enough. Additionally, they criticised the lack of opportunities for Member States to maintain more stringent national regulations, e.g. those of Denmark and Germany. As a concrete alternative, the “Green Group” of the EU Parliament advanced a more extensive directive proposal. Denmark voted against the directive and, together with the Netherlands and Germany, made a joint council declaration to establish the right of Member States to uphold more stringent national rules.(126)

The directive demands that 65% of all packaging material should be recycled. This might seem to be a high percentage. However, the 65% recycling includes waste to be incinerated. And this goal also expresses a *maximum rate of recycling*. Since as much as 90% of packaging waste in Denmark is either recycled or incinerated, the directive could have led to far more packaging waste ending up at waste deposits. Denmark succeeded in having an exemption clause entered into the directive (127), enabling a Member State to maintain more extensive collecting systems if they can prove they have capacity to process the increased amount of material to be recycled.

10.1. The Danish can case

The Danish government thought that the exemption clause would save the Danish returnable bottle system. In the summer of 1996, Denmark notified the Commission that the returnable bottle system would be preserved, listing a number of its environmental benefits, particularly for Denmark. But the Commission would not accept the Danish justification – because the directive includes a free trade clause, see below - and instituted proceedings of violation of the Treaty in June 1997.(128) Denmark responded to the Commission’s opening note, referring to the previous arguments. The Danish arguments were not accepted by the Commission.(129) Consequently, the Commission in April 99 decided to bring Denmark before the EU Court.

The Packaging Directive is formulated as a so-called “New-Method Directive”, meaning that the directive does not set precise standards to be followed. Standards are prepared consecutively, meaning that many political decisions are left with the European Standardisation Organisation (CEN) - e.g. specific requirements for packaging, and plants and equipment needed for the collection and recycling of packaging waste. The CEN is a forum dominated by vested commercial interests, and a closed circuit beyond direct democratic control.⁽¹³¹⁾ Hence, new-method-directives will provide ample opportunities for the industries to influence the standardisation work in the direction they desire. But the Commission has a weak safeguard. As it is the Commission which has ordered the standards the Commission can avoid publishing them in the Official Journal, and then the standards will not become valid in terms of the directive. But it will only be the last opportunity, because it will leave the Commission with empty hands.

The directive is a Single Market directive, meaning that Member States cannot ban a particular type of packaging as long as it meets the directive’s basic requirements.⁽¹³²⁾ The directive also contains a so-called free trade clause stating: “The Member States may not prevent the marketing on their territory of packaging fulfilling the provisions given in this directive.” But as long as the standards have not been complemented, Denmark may choose to interpret the directive as an option to uphold national requirements on packaging.

The possibility of maintaining national legislation and agreements in the packaging sector is relevant in relation to threshold values for heavy metals. The EU threshold value for cadmium is higher than the Danish one (see section on cadmium). The values are not directly comparable since the directive applies an aggregate threshold for cadmium, lead, mercury and hexavalent chromium, and with milestones on gradual reductions of threshold values. The third and last EU threshold value is 100 ppm. Even after the third and last implementation milestone, five years after the adoption of the directive, EU legislation will - in principle - still permit higher cadmium values than the 75 ppm accepted according to the Danish law - provided, of course, that the remaining metals are not present in any substantial amounts.

11. PVC

The packaging directive may also impede Danish attempts to phase out the use of PVC (polyvinyl chloride) in packaging – this is also relevant for Austria and Sweden who are also phasing out PVC packaging. PVC packaging constitutes a particular problem since it is softened with chemical substances that migrate from the plastic to the contents, e.g. meat. Moreover, like other PVC materials, PVC packaging is the major source of pollution by environmentally noxious chlorine compounds. Waste incineration plants contribute to acidification by releasing hydrochloric acid and also contribute to dioxin pollution. In both instances, PVC is presumably the main culprit since it contributes approximately 70% of the chlorine found in waste materials.

The packaging directive was passed in 1994; Denmark voted against because it does not include any restrictions on the use of PVC. Again, since it is a total harmonisation directive, it will in principle not be possible for Denmark to implement a ban on PVC in packaging - or otherwise limit the import of PVC packaging from other EU countries.

Denmark has for several years called for a stern limitation to the use of PVC, but this meets with intense opposition from manufacturers. Originally, Denmark wanted to limit all PVC that was destined to be destroyed in waste incinerators. The government has attempted to avoid legislation in this case, which is one of the most controversial environmental issues in Denmark. Instead, an agreement with suppliers and consumers was made in 1991, thereby also avoiding obstruction of legislation by the EU. The most important points of the agreement are:

- a reduction of PVC consumption for packaging by 50% before 1992 and by 85% by the year 2000;
- a limited reduction (1000 tonnes) in the amount of PVC used for other relatively short-lived products, e.g., office supplies, rainwear, toys;
- efforts to increase PVC recycling from construction waste.

The use of PVC packaging has been substantially reduced, and the goals here might be reached – mostly because of progressive retailers and pressure from consumers, and not so much because of the packaging industry. The second and third point of the agreement is only proceeding very slowly, but the Ministry of Environment is

now trying to tighten up. The agreement covers products manufactured in Denmark only. Hence, the agreement is not directly challenged by the packaging directive. In a more indirect way, however, it may be threatened in the event that imports of e.g. PVC packaging begin to increase.

Sweden, Austria, The Netherlands and Switzerland also wish to limit PVC, with particular reference to packaging materials. In Austria all "short-lived" PVC products are in focus (see above), meaning that Austria is more or less in line with the Danish standpoint. Austria and Denmark have banned soft PVC plastics in toys for children under the age of three years (see section on toys). The ban can be regarded as a de facto prohibition on soft PVC and is the first of its kind ever.(133)

PVC is a product with recognised hazardous environmental effects for which it has to date been impossible to obtain an EU-wide regulation. In this case, concerns of the PVC industry weigh more heavily. The limitation of softeners in PVC toys and the limits regarding the use of cadmium as a PVC additive (see section on cadmium) might have an indirect effect on PVC. But alone, these measures against certain additives will hardly lead to any major reduction in the use of PVC within the EU.

12. Airborne pollution from automobiles (The Auto-Oil programme)

During the 70s and 80s, several initiatives were taken to curtail airborne pollutants from automobiles in both the USA and Japan. Demands were made, making it necessary to have cars fitted with catalysts. During this period, Europe was lagging behind. It was not until 1989 - after Austria, Switzerland, Sweden and Norway had decided to follow USA's lead - that the EC followed suit, under pressure from the Parliament and Denmark. The Single Act (see section on this) had come into effect in 1987, which meant that proposals by the Parliament could be dismissed only by a unanimous Council. Since Denmark backed the Parliament, the Council had to waive a directive proposal implying more lenient rules than those of the USA. Instead, provisions were adopted that were roughly equivalent to those of the USA, to become effective in 1993. Denmark followed the American provisions, effective already from 1990.

However, the improvements following the introduction of catalysts were to some extent cancelled out by the ever-increasing traffic, hence the need for even more stringent demands on exhaust emission. In addition, the introduction of reductions in exhaust fumes from *diesel*-driven vehicles proved an even slower process. Furthermore, for petrol-driven vehicles, several pollutants had not been taken into account, including benzene, a carcinogenic substance. All in all, there was a great need for tightening up EU legislation on fuel and on automobiles as well.

The Commission launched the so-called auto-oil programme at the end of 1992 in order to obtain a technical basis for the limitation of airborne pollution from motor vehicles. The programme was carried as a joint effort by the Commission, the European car industry (ACEA) and the oil industry (EUROPIA), and finalised in April 1995. The project was criticised by most Member States because they were not involved in the work, but merely informed through a monitoring group. The calculations produced by the auto-oil programme were also criticised as being insufficient. Equally, the EU Parliament has been strongly critical of the procedure used for the auto-oil programme, which let the industry have a disproportionate say.(134)

In order to evaluate the need to reduce airborne pollution, the Commission chose seven representative cities in the EU, and air quality in these towns was mapped for the year 1990. The breakdowns were limited to the following substances: *carbon monoxide (CO)*, *nitrogen oxides (NO_x)* and *benzene*. The auto-oil calculations show that among the three substances examined, NO_x is the most critical substance group. For this group to adhere to the air quality standard by the year 2010, as set by the Commission, a reduction in airborne pollution from car exhausts is necessary. The extent of necessary limitations varies from one city to another. Athens, Madrid and Milan are the most critical locations and will require a reduction by 50-55 per cent. In London and Lyon, pollution has to be reduced by 40%.

As for benzene, the auto-oil calculations do not give an unequivocal result, since apparently it has not been possible to agree on a future air quality standard. Concerning carbon monoxide, the auto-oil calculations show no grounds to reduce emissions - so the result of the large-scale programme is that future political actions will be evaluated only by their capacity to reduce NO_x emis-

sions.(135) This basis, however, is too narrow. For instance, no stand has been taken on ozone, another substance often exceeding the threshold value. This issue is more complex, though, involving an indirect pollution, since ozone is formed by nitrogen oxides and hydrocarbons, both originating in particular from car exhausts.

Basically, the Danish EPA has been sceptical of the validity of the calculations. Calculated concentrations of airborne pollutants can only be regarded as background city concentration, suggesting a far heavier pollution in the trafficked streets.

12.1. Political intervention

The political interventions to follow from the auto-oil programme fall in five parts:

- (1) Fuel quality.
- (2) Emissions from private cars.
- (3) Emissions from light transport vehicles.
- (4) Emissions from heavy trucks.
- (5) Improved periodical MOT tests.

The Commission submitted proposals on the two first points of the programme to the Council in August 1996. Both are based on Article 100A and will hence lead to total harmonisation. The proposals were heard using the co-decision procedure which can give the Parliament the right of veto and the option of having the case decided in a conciliation committee. (See section on the Maastricht Treaty and the environment). The proposal on emissions from private cars is an amendment to two EU directives on reduction of airborne pollution by private cars.(136)

The proposal on fuel quality comprises environmental requirements regarding petrol and diesel. It is an extension of an existing directive on sulphur content in certain fluid fuels.(137)

The requirements for petrol and diesel proposed by the Commission were considerably more lenient than those enforced by many individual countries for several years, e.g. Sweden and Finland. Requirements for diesel were also less exacting those for ultra-light diesel applied by Denmark since 1992, e.g. for buses.(138)

The proposal involved a 2% threshold value for the carcinogenic benzene, but six countries - Denmark, Germany, Finland, Italy, Austria and Sweden - were not satisfied, and in February 1997

expressed their wish for a 1% threshold value as the maximum. Shell oil company had launched a major lobbying effort to avoid a reduction to 1% by the year 2000; however, in the summer of 1997, they did concede that a reduction of benzene content is not only technically, but also economically feasible.(139) In 1998 the Council finally decided, that petrol may contain 1% benzene max. This will come into force from the year 2000.

Benzene is one of the best-documented carcinogenic substances in existence. For comparison it is worth noting that for all products other than petrol, a threshold value of 0,1% applies. In Denmark, products exceeding this limit are not for sale to private citizens without a written permission issued by the police - a so-called poison permit.

The first two sections of the auto-oil programme have given rise to disagreement between the Commission and the Parliament. The Parliament approved both proposals in April 1997, with 141 amendments. Practically all proposed amendments were motioned with the purpose of strengthening the Commission's proposals.(140) For instance, the Parliament suggested that for both fuel quality and emissions by private cars, additional reduced norms should be stipulated for the year 2005; the Commission proposal only stipulated norms for the year 2000. The Commission declared it could only accept twenty-two of the proposed amendments, all involving minor alterations. The rest (119 in all) were dismissed by the Commission.(141)

In October 1997 the Council reached an agreement on the first two points, fuel quality and emissions by private cars. Then, the Parliament had a second reading which took place in February 1998. On that occasion the EU Parliament supported approximately 100 proposed amendments, later to be heard in a conciliatory procedure between the Parliament and the Council. Directives covering the first three issues (fuel, private cars and light transport vehicles) were adopted on 29 June 1998 (directives 98/69 and 98/70). The remaining directives (heavy vehicles and periodic MOT test) are expected to be adopted before summer 1999 (143).

Throughout the auto-oil programme, the oil and car industries constituted an intrinsic barrier against more environmentally focused political intervention and, during the preparation of the auto-oil programme, they formed a united front in order to avoid

too drastic consequences for both industries. However, they are no longer in agreement, both trying to shift the costs to the other.(142) The fact that both industries can be played off against one another could give the EU Parliament an advantage, thereby increasing chances of having their more environmentally progressive proposals carried.

In general terms, the future requirements on emissions from vehicles will fully match those stipulated in the USA. On most points, they are even more stringent than those in the USA on the federal level - comparable to the requirements of the State of California where, on several counts, sterner provisions have already been enforced for a longer period of time.(143)

But concerning *diesel* engines the time frame in the EU is still very long. Today a type of filter – the most common is called the CRT-filter - is available, which can reduce the emission of small particles from diesel exhaust by 90-95%. The EU has now adopted a directive, which can only be fulfilled by installation of such filters – or by change of fuel. But the demands will not be valid until 2005. And they will only apply to *new* vehicles. This means that it will take many years, until we achieve such a reduction. This is very serious because these small particles – called PM₁₀ and PM_{2,5} – are today the worst threat to human health from air pollution in the industrialised world. It has been estimated that the small particles are responsible for around 400 deaths per year per 1 million inhabitants in cities (144).

The member states cannot introduce the demands by legislation before 2005, because the directive constitutes total harmonisation. But they are allowed to use economic instruments to introduce the limits before. The member states can for instance introduce tax differentiation between vehicles with a filter and vehicles without a filter.

Concerning *fuel efficiency* and CO₂-emissions there is no regulation in the EU. But in the autumn of 1998 the Commission made a voluntary agreement with the oil and the car industry, that new cars by 2008 as an average should run 16,6 km/l. This is a very modest goal, which will not even compensate for the expected growth in car traffic. And very modest having in mind that cars have already been developed today – but not marketed – which can go up to 30 km/l.

CONCLUSION

The present book considers aspects of EU environmental policy dealing with requirements on goods - the many products we are using in households and industry. This has become a major issue in environmental policy, since this is where a preventive environmental policy can be introduced - by making demands regarding the production and composition of goods. Even so, we would not assert that this book is a characterisation of EU environment policy as such - rather the part dealing with goods.

Requirements on goods are the issue where we see the conflicting interests between concerns, for free trade and for environmental protection. Here the EU applies total harmonisation, implying that Member States cannot directly introduce a more stringent environmental policy than is prescribed by the EU. This practice could curb environmental advances. In spite of the statements of the Treaty - that precisely these directives should target a high protection level - numerous directives are based on a protection level significantly lower than the one desired by the most environmentally progressive countries. This applies, for example, to the directives on limitation on marketing of pentachlorophenol, cadmium and creosote, and also to the packaging directive. It could be feared that the same will apply for the directive on marketing of pesticides - the concrete content (the list of substances) of this directive has yet to be completed.

At the same time, though, an upward trend is in evidence in the environmental level of EU directives during the latest 10 years. This is clearly seen in the directives on car exhausts where, in the 80s, the EU placed itself at the back of the line of OECD countries, when environmental requirements on car exhausts were stipulated. Today, however, the EU takes the lead. The need for improvement is still large, but it is no longer possible to refer to other countries as being far ahead of the EU. On the other hand, the regulation of chemical substances is still advancing at an extremely slow pace.

Economy and trade are becoming still more international. Hence, there is a need for extended international co-operation in the field of environmental regulation and the working environment. The problem is EU application of maximum directives, which in major ways prevents individual countries from taking the lead, thereby

stimulating other countries. In this way, a good deal of the dynamics that otherwise propel development is lost. Things invariably move at a slower pace when a majority in the EU countries is required before any action can be taken.

Some have said that Northern Europeans must accept a more moderate pace in exchange for raising the standards of legislation in Southern European countries. However, it is arguable whether standards are really improving in Southern Europe since companies can in many cases simply ignore the new regulations without suffering the consequences. Conversely, EU regulations can be extremely effective in halting improvements on a national level; employers/ enterprises can simply refuse to abide by national regulations, and refer to the fact that EU regulations take precedence over these. The European Parliament suggested that the European Environmental Agency should have the authority to enforce environmental directives which, however, the Council did not support. The Commission has very limited capacity to handle such enforcement.

In the early 90s, the trend was for more and more EU regulation to be adopted as total harmonisation - also in areas not connected to free trade. This happened after pressure from the Parliament, which had the greatest influence on the directives of the Single Market. In the Maastricht Treaty, which came into force in 1993, the procedures for passing minimum directives concerning environmental issues (Article 130S) were changed, so the EU Parliament was given the same influence on most of these directives as it has on Single Market directives. Simultaneously, majority ruling was introduced for these directives. In addition, for areas *not yet* under total harmonisation, the Court has introduced a practice so environmental concerns *may* go before considerations regarding the free movement of goods. This is evident in its 1988 verdict concerning the Danish demand for returnable bottles for beer and soft drinks.

As for areas, for which a Single Market directive *has* been passed, the Treaty contains the so-called Environment clause (art. 100 A,4), enabling individual countries to pursue a more progressive environmental line. All Member States have been extremely reserved in using this option. Germany used it in the pentachlorophenol case, which was accepted in 1994 after being tried before the EU Court. But even after this verdict, doubt exists as to

when the Environment clause in the Maastricht Treaty is applicable - e.g. can a Member State use it to introduce *new*, more stringent legislation.

This has been clarified in the Amsterdam Treaty, which the countries adopted in the course of 1998. The Treaty states that new, more stringent national legislation *can* be introduced with reference to the Environment clause, though under a number of vaguely formulated provisions. The Amsterdam Treaty includes several other improvements in the environmental sector, but also other more hazy formulations, some of which *could* be interpreted as retrogressive. But first and foremost, several problems are left *unsolved*. For instance, the Environment clause will still not be made applicable to the agricultural sector, for instance pesticides.

If a more dynamic development in the environmental sector is desired, future EU legislation should be by minimum directives only, and their adoption by majority voting should be made possible. Alternatively if total harmonisation is used, it should be made more difficult for the Commission and the Court to overrule an individual member state's use of the Environment clause. This could be achieved by moving the burden of proof; today, it lies with the Member State to establish that its use of the Environment clause serves an environmental purpose important enough to justify a hindrance to free trade. Truly, it should be the responsibility of the Commission and the Court to prove that the Member State's legislation does *not* serve an environmental purpose, but was merely a hidden barrier to trade.

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ANNEX:

KEY VERDICTS

Pentachlorophenol	[DK bog 112]
Waste frame directive	[DK bog 114]
Protection of avian life	[DK bog 116]
Notification of chemical substances	[DK bog 117]
Packaging (beer cans, deposits)	[DK bog 118]
Solvents	[DK bog 120]
Non-biodegradable plastic bags	[DK bog 122]
Titanium dioxide industry	[DK bog 124]
Pesticide residue	[DK bog 126]
Export of waste oil	[DK bog 128]

Case number: C-41/93

Verdict pronounced: May 17, 1994

Parties to the case: France vs. EU Commission.

Legal nature of the case: Annulment action against the Commission's approval.

Brief statement of claim: Germany's use of Article 100A, Section 4, for upholding national regulations (ban) on PCP was affirmed by the Commission. France considered Germany's ban a hidden trade barrier and thus in violation of Union legislation. France brought the case before the Commission to claim annulment of this approval.

Legal issues: France referred to several matters of principle: first, that the Commission in their approval had disregarded the so-called justification requirement as outlined by Article 190 in the Treaty. Second, France held that Germany's ban of PCP was not "in reasonable proportion to the possible limitations to commerce". Third, that Article 100A, Section 4, can only "be justified with reference to circumstances with particularly relevance to the " the Member State using the regulation.

Verdict: France's contentions were upheld, and the approval was annulled.

Premises: Only the first count was addressed, since this was enough for the EU Court to justify an annulment. The Court determined that the justification requirement should be main-

tained, and therefore an approval by the Commission should include a well-argued exposition of the legal grounds for granting an approval based on the use of Article 100A, Section 4, in a specific case.

The verdict's implications for EU environmental policy: For Germany's part, the annulment does not mean they cannot uphold their ban on PCP. The verdict only becomes relevant in the event that the Court refuses to recognise the Commission's upcoming approvals, unless they meet the new interpretation of the justification requirement. At present, the verdict's possible consequences for the Danish PCP ban are not clear - mainly because Denmark introduced the ban (i.e. the national regulations on PCP) under the assumption that the area is subject to minimum harmonisation, an issue not addressed by the verdict.

Opinions differ as to the interpretation of Article 100A, Section 4, and thus its future status. Since the verdict was based solely upon the first point of the charge, it remains unclear how Article 100A, Section 4, will be interpreted, or if its use in similar cases is legal and justified. Some aspects have been clarified. It was established that the following conditions shall be met if a Member State wishes to uphold regulations stricter than those of the Union. (1) The Member State must notify the Commission with a substantial argumentation for its use. It is the responsibility of the Member State to prove that the regulation is not a hidden trade barrier. (2) The Member State *cannot* use Article 100A, Section 4, until the Commission has decided to confirm the use of national regulations (see section on the Environment clause and the Danish interpretation hereof). 3) The Commission's motivation must be detailed, such that it can be legally tested whether the conditions are met.

However, the verdict has not established whether Article 100A, Section 4, is applicable only in cases involving the upholding of existing national regulations, or whether it can be applied to new national regulations.

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Case number: C-155/91

Verdict pronounced: March 17, 1993

Parties to the case: The Commission supported by the Parliament vs. the Council supported by Spain.

Legal nature of the case: Annulment action against the Council's Directive 91/156/EEC on March 18, 1991 concerning changes to Directive 75/442/EEC concerning waste treatment.

Brief statement of claim: The Commission proposed a Council frame directive on waste treatment based upon experiences with Directive 75/442/EEC. The Commission submitted their proposal for the new frame directive in accordance with Article 100A. The Council rejected the proposition, and issued Directive 91/156/EEC in accordance with the Treaty's Article 130S, despite objections by the Parliament, which declared its agreement with the Commission.

Legal issues: The Commission, supported by the Parliament, based their legal argumentation on the notion that the disputed directive affects environmental protection as well as the Single Market, and would consequently fall under the provisions of the Single Market's Article 100A. In relation to this, the parties referred to the so-called titanium dioxide verdict where the same line of argumentation had been valid. The Council countered with the argument that the *primary* purpose and content of the directive concerned the protection of human health and the environment, and thus under the provisions of Article 130S.

Verdict: The Court ruled that the directive rightfully fell under the provisions of Article 130S, and the Council's contentions were upheld.

Premises: The Court maintained that the primary objective of the directive was to protect the environment and provide for effective treatment of waste, regardless of origin within the Union, "...and this harmonisation is only of accessory importance to competition and trade conditions". In the present context, 'accessory' means 'of secondary importance'.

The verdict's implications for EU environmental policy: The verdict established that the mere fact that an act has bearings on the Single Market does not necessarily mean it will fall under the provisions of Article 100A. Up until this point, the Commission had the opposite opinion; so the verdict established that as for the legal basis of directives, environment considerations may in future be given priority over the Single Market.

Moreover, the verdict specified that waste is a commodity- recyclable or not - and therefore falls under the fundamental principle

of free mobility of goods within the EU. However, a Member State may establish a ban against waste transport, if conflicting with the country's plans and goals for the sector; i.e. the verdict allows for individual countries to adopt general prohibitions against waste import, if they are able to give a specific reason. In this respect, concern for the local environment is given priority above the free movement of goods.

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Case number: C-169/89

Verdict pronounced: May 23, 1990

Parties to the case: The Dutch government vs. x.

Legal nature of the case: National criminal case, prejudicial question.

Brief statement of claim: The Netherlands had established national regulations for protection of avian wildlife in Europe, which also prohibited the introduction and possession of grouse. Subsequently, a Dutch citizen was charged for being in possession of a dead grouse imported from the UK, where it was purportedly captured and killed in accordance with English regulations as well as EU Directive 79/409 covering protection of wild birds.

Legal issues: The Court had to determine whether the Dutch ban was justified on the basis of the protection of animal health and life as referred to in Article 36.

Verdict: The reply of the Court was negative.

Premises: The Court emphasised that even though Directive 79/409 is a minimum directive (in accordance with Article 235) in that it gives countries the right to establish stricter regulations, it does not give these same countries permission to establish stricter regulations for bird species which neither inhabit that country, nor are migratory, nor are an endangered species according to the directive's interpretation.

The verdict's implications for EU environmental policy: This case demonstrated that the Union's legislation on trade restrictions (Article 30-36) must be observed together with a regulation allowing countries to introduce stricter regulations. This case involved regulations concerning protection of avian life not inhabiting the country in question, and because such wildlife was not considered

endangered according to the directive's interpretation, Article 36 (which takes special notice of animal life) could not be referenced.

Where national provisions affect trade within the Union, and where the EU does not regard the animal in question as an endangered species, a Member State can thus be forced to modify its animal protection regulations.

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Case number: 278/85

Verdict pronounced: October 14, 1987

Parties to the case: EU Commission vs. Denmark.

Legal nature of the case: Breach of Treaty.

Brief statement of claim: With the 6th amendment of Directive 67/548 on the classification, packaging and labelling of hazardous substances (79/831), regulations were introduced on the notification of new chemical substances and preparations, and on cataloguing of familiar hazardous substances. Denmark implemented the directive by tightening regulations on notification. E.g. the deadline used to determine what substances were subject to notification as 'new' substances was backdated, and 'old' substances were required to follow the same approval procedure as the 'new' ones, if any major changes occurred regarding their use, deadlines, or the amount sold or imported.

Verdict: The Court ruled in favour of the Commission and found Denmark in violation of the Treaty due to incorrect implementation of the directive.

Premises: The Court emphasised that the directive simultaneously takes both environmental protection and the harmonisation of legislation into account. Like other harmonisation directives, it can be regarded as exhaustive for the area under provision unless exceptions for national regulation are explicitly stated. Such legal grounds are not contained in the directive. Danish arguments were that the special Danish regulations fully concordant with the directive's intention to protect human life and the environment, which would be illusory if requirements could not be placed on new re-notification of old substances with new applications. Yet, the Court maintained that harmonisation involving the environment is invariably maximum harmonisation.

The verdict's implications for EU environmental policy:

Harmonisation for the environmental sector is by maximum directive, not allowing for national regulation to tighten requirements on environmental protection. In this particular case, Denmark was forced to lower its standards for the protection of human life and the environment against hazardous substances and preparations.

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Case number: 302/86

Verdict pronounced: September 29, 1988

Parties to the case: The Commission vs. Denmark.

Legal nature of the case: Breach of Treaty.

Brief statement of claim: Denmark has special regulations stating that beer and soft drinks may only be sold in returnable bottles, and that the containers are subject to approval by the Danish EPA. The requirement on returnable bottles applied without exception, whereas the approval of containers does not apply to a manufacturer producing less than 3,000 hl per year. Metal containers, however, can never be used without an approval. The Danish provisions constituted barriers to trade, and the issue was whether they could be upheld despite the prohibition on technical trade barriers specified in Article 30.

Legal issues: The question was if Denmark was in violation of Article 30, and if so: whether this could be justified by referring to the exception in Article 36, or Denmark's actions constituted Breach of Treaty.

Verdict: The requirement on returnable bottles was not in violation of Article 30 (or 36), whereas the approval requirement for foreign manufacturers was in violation of Article 30.

Premises: The Court acknowledged that the returnable bottle system is of great importance for the environment, and ascertained that according to set practice environmental concern is one of the compelling considerations mentioned in Article 36 which can limit the application of Article 30. Finally, the Court ascertained that the environmental benefits could not be obtained without the returnable bottle system, meaning that it represented an "absolutely unavoidable restriction, based upon the inherent common interest of environmental protection". So the Court did acknowledge that

the implicit restrictions of the returnable bottle system did not transgress their aim, and that the proportionality principle of Article 36 had thus been observed.

Regarding the requirement on approved containers, Denmark argued that this restriction was crucial to the returnable bottle system. Too many types of returnable containers would make it unfeasible for retailers (the backbone of such a system) to accept them, implying increases in handling expenses and the need for larger storage space. The Court considered the argument weighty. It did, however, emphasise that although a return system based on approved container types undoubtedly favours the environment best, a system using non-approved containers would also favour the environment.

In light of the fact that Denmark could maintain the requirement on approved containers for Danish bottles (meaning that most bottles on the Danish market would be approved containers), the Court determined that the ends and means of this policy were disproportionate (even though firms producing up to 3,000 hl were not subject to approval). The Court emphasised that the approval requirement imposed on a turnover of over 3,000 hl greatly hindered the sale in Denmark of beverages produced abroad.

The verdict's implications for EU environmental policy: In one respect, the verdict is positive, since it confirms Union legislation allows for maintenance of a returnable bottle system with the aim of environmental protection, even though it clearly restricts trade. However, it is also evident that there is a definite limit as to how far a country may go to implement its goals, i.e. aims and means must be proportional. Thus, even though the Court acknowledged that the bottle approval system is clearly linked up with environmental interests, it could not permit the incumbent technical trade barriers, and Denmark was forced to lower its standard of environmental protection.

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Case number: 148/78

Verdict pronounced: April 5, 1979

Parties to the case: Italy vs. Ratti (criminal case).

Legal nature of the case: Prejudicial issue from the Italian Court.

Brief statement of claim: The Italian government failed to implement the solvent directive (73/173), and thus the original Italian regulations were still in effect. In some aspects, these were stricter than those of the directive, e.g. contrary to the EU directive, the Italian legislation unconditionally required that the content of benzene, toluene, and xylene should be given on packaging/labels.

Legal issues: The relevant legal issues were (1) whether the directive should be interpreted as a maximum directive, thus prohibiting Member States from introducing stricter provisions on substances regulated by EU directive, and (2), whether Article 36 could be invoked to justify the trade barrier, based upon regard for human health.

Verdict: The verdict established that the directive was to be interpreted as a maximum directive, and ruled against Italy for Breach of Treaty (violation of Article 30).

Premises: Based on Articles 3 and 8 the Court interpreted the directive as a maximum directive, emphasising that according to these articles a Member State could not maintain domestic regulations diverging from the provisions of the directive. If so, this would constitute a technical trade barrier in violation of Article 30, unless the national regulation could be justified with reference to Article 36. As to that issue, however, the verdict did state in its premises, that whenever harmonisation according to Article 100 concerns measures to ensure human and animal health, and also prescribes a common procedure for the control hereof, then Article 36 can no longer be invoked, since the protection of such interests must concur directly with the wording of the directive.

The verdict's implications for EU environmental policy: This is a key verdict with regards to harmonisation within the EU. It may, on the basis of this verdict, be concluded that (1) the harmonisation (according to Article 100/100A) of regulations for a given area implies that more stringent or deviating national regulations may no longer be imposed on the relevant area unless so permitted by the directive (a principle already established in other verdicts). So what we have here is a so-called maximum harmonisation. (2) The verdict shows that if a harmonisation directive directly concerns environmental protection interests, then Member States may not tighten regulations at the national level by invoking Article 36, claiming that restrictions are found necessary due to environmen-

tal considerations. The directive sets a level of environmental protection, the adoption of which the Member State has already participated in.

The latter merits more attention here, in light of Article 100A that was incorporated by the Single Act. According to this article, a Member State may invoke the so-called Environment clause, even if environmental interests are already provided for in the directive, provided the relevant Member State voted against the adoption of the directive, but was outvoted by statutory majority. However, the scope of the Environment clause is questionable, which could render Article 36 relevant also with respect to harmonisation based on Article 100 A. In fact, it is a bone of contention whether Member States may invoke the guarantee in the case of national regulations to be adopted after the approval of the harmonisation directive. According to the Commission's legal service they cannot, and should the Court prove to be of the same opinion, then the principle of the Court principle - that Article 36 may not be invoked for directives regulating human health considerations - may prove significant.

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Case number: 380/87

Verdict pronounced: July 13, 1989

Parties to the case: Private plaintiff vs. the Italian Government.

Legal nature of the case: Prejudicial question put forward by Italian Court of Justice.

Brief statement of claim: Italy had adopted a ban against the marketing of shopping bags manufactured from non-biodegradable materials (certain types of plastic bags). Six plastic bag manufacturers brought a case against the government with the assertion that the ban was in violation of the EU legislation on free trade.

Legal issues: The plaintiffs interpreted the waste directive (75/442) such that it gives the right for all EU citizens to sell plastic bags since the directive provides for problems associated with plastic bags, without resorting to a complete ban.

Verdict: The Italian Government was acquitted.

Premises: The Court stated that the waste directive did not give the right to buy and sell plastic bags, but contrarily contained an obligation for the Member States to limit and prevent waste. A basic aspect of the directive was that each Member State was free to decide whether it wished to resort to a ban. In that case, a ban would be subject to regulation under the provisions of EECT Article 30-36. The Court would then pay due notice to considerations similar to those involved in the Danish ‘bottle case’.

The verdict’s implications: The verdict demonstrated how the directive should (not) be interpreted, and it is no surprise that the Court disagreed with the plastic manufacturers’ claim. Unfortunately, the Italian Court neglected to ask the EU Court whether the ban was in accordance with EECT Article 30-36. If they had, then the EU Court would have had to determine whether environmental concern could support a ban of this type, or whether it would be considered disproportionate to the problem at hand. The Attorney General mentioned this dilemma, with reference to the bottle case, but stated that the Court could not address the issue. It had not been put forward, and thus had not been given due attention during the process. He offered the following comment: “Specifically based on this verdict (the bottle verdict), this directive - even though it could constitute a restriction in violence of Article 30 - could be motivated in environmental protection. The plaintiffs (the plastic bag manufacturers) claimed in court that this case is different (than the bottle case); concern for environmental protection is more unclear, and the disputed directive . . . is (so the plaintiffs) a means disproportionate to its intended goal.” He did not, however, address the issue, and neither did the Court.

Implications for EU environmental policy: The waste directive does not prevent any Member State from the banning of certain products. If anything, it states the opposite: it authorises Member States to prevent waste problems, although within the limits of EECT (especially Article 30-36). Unfortunately, where precisely this limit is was not addressed by the verdict, since the question was not asked.

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Case number: C-300/89

Verdict pronounced: June 11, 1991

Parties to the case: The Commission and the Parliament vs. the Council.

Legal nature of the case: Annulment.

Brief statement of claim: With reference to 130S, the Council approved a directive (89/428) on the mutual approximation of programmes for reducing the pollution generated by waste from the titanium dioxide industry with a view to total cessation. Article 130S was invoked despite the fact that the Commission in its presentation of the directive proposal had invoked Articles 100 and 235 (prior to the Single Act). The Commission subsequently raised charges against the Council, claiming erroneous invocation, and the Parliament supported the Commission by intervening in the issue.

Legal issue: The case questioned the interpretation of Article 130S in relation to 100A, when a directive has both environmental protection aims and harmonisation aims.

Verdict: The Court upheld the contention of the Commission/Parliament, the directive was annulled, and the Court chose to invoke 100A.

Premises: First, the Court interpreted the directive in order to establish its aim. It concluded that both competitive interests and environmental protection interests were involved, and moreover that both considerations were inseparable components of the directive. In such a situation, an EU institution should ordinarily adopt corresponding acts on the basis of both articles. However, in the present case, the Court rejected the procedure, emphasising the following: The Cupertino procedure referred to in Article 100A is only given its proper weight if the Council proceeds solely according to this procedure, not invoking the Article 130S procedure, in which case the final decision is to be reached by consensus.

Adherence to the co-operation procedure thus implies a choice between either 100A or 130S. In choosing, the Court subsequently stressed that Article 130R, Section 2, specifically states that environmental interests also form an important part of Union policies for other sectors. Based on this argument, the Court deemed that environmental protection falls not only under the provisions of Article 130S, but that such interests may also be served by articles such as 100A. Furthermore, the Court referred to a previous verdict in which it established that unless harmonisation is effectuat-

ed, regulations requiring that environmental considerations be taken into account may adversely affect the relevant companies and imply considerable competitive distortion. As we know, harmonisation is effectuated under the provisions of Article 100A. Finally, the Court stressed that for the harmonisation of legislation, Article 100A, Section 3, assumes a high level of environmental protection, meaning that every consideration mentioned in Article 130R may equally be respected by invoking Article 100A. So presumably, an invocation of 100A would not imply any “loss to environment”.

Implications for EU environmental policies: The verdict expands Article 100A's scope of implementation and correspondingly narrows that of 130S. The disputed directive comprises bans on certain types of waste and also limit values for the content of hazardous substances in other waste types. Such bans and the setting of environmental limit values obviously involve competition, and thus harmonisation aspects. However, since their pivotal point of interest is environmental considerations, they have to date been regulated according to Article 130S. The most significant effect of having more and more environmental regulation included under 100A is the following: In this way, more opportunities are created for legislating bans/limit values by maximum directive, meaning that Member States are no longer free to adopt more stringent national regulation for relevant areas. By contrast, Article 130S involves minimum directives, meaning that Member States may continued to introduce stricter regulation at the national level.

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Case number: 211-88

Verdict pronounced: November 16, 1989

Parties to the case: The Commission vs. the Council.

Legal nature of the case: Annulment.

Brief statement of claim: The Council had adopted an amendment (87/519) of a previous directive (74/63) on maximum limits on the content of pesticide residues in animal fodder, invoking both Article 43 and Article 100. The Commission was not of the opinion that Article 100 could be invoked along with Article 43 and instituted proceedings.

Legal issues: Interpretation of invocation when a directive contains both agricultural policy resolutions and actual harmonisation of the legislation of Member States.

Verdict: The Court ruled that it was proper to invoke Article 43 and improper to simultaneously invoke Article 100.

Premises: Firstly, the Court referred to a previous verdict (“the hormone case”, 68/86), in which two conditions were established for invoking Article 43: (1) The case in question must relate to the issue of the production of and trade in agricultural products as defined in Annex II of the Treaty. (2) It must concern the realisation of one or several common aims of EC agricultural policy as embodied in Article 39. If both conditions are met, only Article 43 may be invoked, regardless of whether the document also concerns harmonisation. Article 43 is a special provision, while Article 100 is a general one, and the general provision may only be used if no other article is applicable.

However, these conditions are not met in the case in question. Firstly, the directive comprises individual products not listed in the Treaty’s Annex I, and secondly, its objective does not pertain to agricultural policy in that it primarily aims to protect human health. As for the former, the Court stated that this is irrelevant, since condition (1) must be taken to mean that the *majority* of products comprised by the directive must be listed in the Annex. With respect to condition (2), the Court stressed that this involves an addition to a directive (74/63) primarily concerned with agricultural policy. When the two directives are juxtaposed, agricultural policy considerations are seen to be predominant. The Court established that fact does not preclude the use of Article 43, and that there are also considerations to be taken into account which, seen independently, would require the invocation of Article 100.

The verdict shows: Article 43 has a very broad scope of implementation, thus enabling a comprehensive harmonisation of regulations concerning the environment and human health. The verdict relates to Article 100, but a similar verdict would have been passed down, had the conflict been between the new Article 100A and Article 43, since 100A is no different in this respect.

This greatly affects developments in environmental policy, since the implementation of Article 43 rather than Article 100A means that (1) Article 100A, Section 4, cannot be invoked, and that more

stringent environmental demands can be introduced at the national level only with reference to an invoked safeguard clause. Such a clause, however, allows only temporary deviation from the directive. (2) A harmonisation of environmental regulations along these lines also implies maximum regulation, since Member States may not invoke Article 36 in order to justify special national regulations. This is exemplified by the “Ratti case” (148/78), described elsewhere in this appendix. Finally, exclusive invocation of Article 43 invalidates the co-operation procedure between the Council and the Parliament, which is hardly to the benefit of the environment.

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Case number: 17/82

Parties to the case: The French government vs. NN (criminal case).

Legal nature of the case: Prejudicial case.

Brief statement of claim: The French government had a regulation on disposal and recycling of waste oil, which was to implement Directive 75/439. According to the French law, the French suppliers of waste oil were not allowed to export to treatment facilities abroad. Some waste oil exporters claimed this to be against EU law.

Legal issues: The question was whether the French restrictions were a breach of Directive 75/439 and Article 34, stating that no member state may restrict possibilities of exporting commodities to other Member States.

Verdict: The Court stated that this was a breach of EU law.

Premises: Waste oil has a certain value as fuel (and thus can be regarded as a commodity). So for waste oil, the directive observes the principle of free trade with, as defined by the Treaty. In the present case, the free market principle could not be overruled reasons of the environment, since environmental considerations are already part of the directive.

The verdict shows: The verdict demonstrates that waste oil is to be regarded as a commodity, and thus protected by the Treaty’s Article 30 and 34.

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