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REPORT

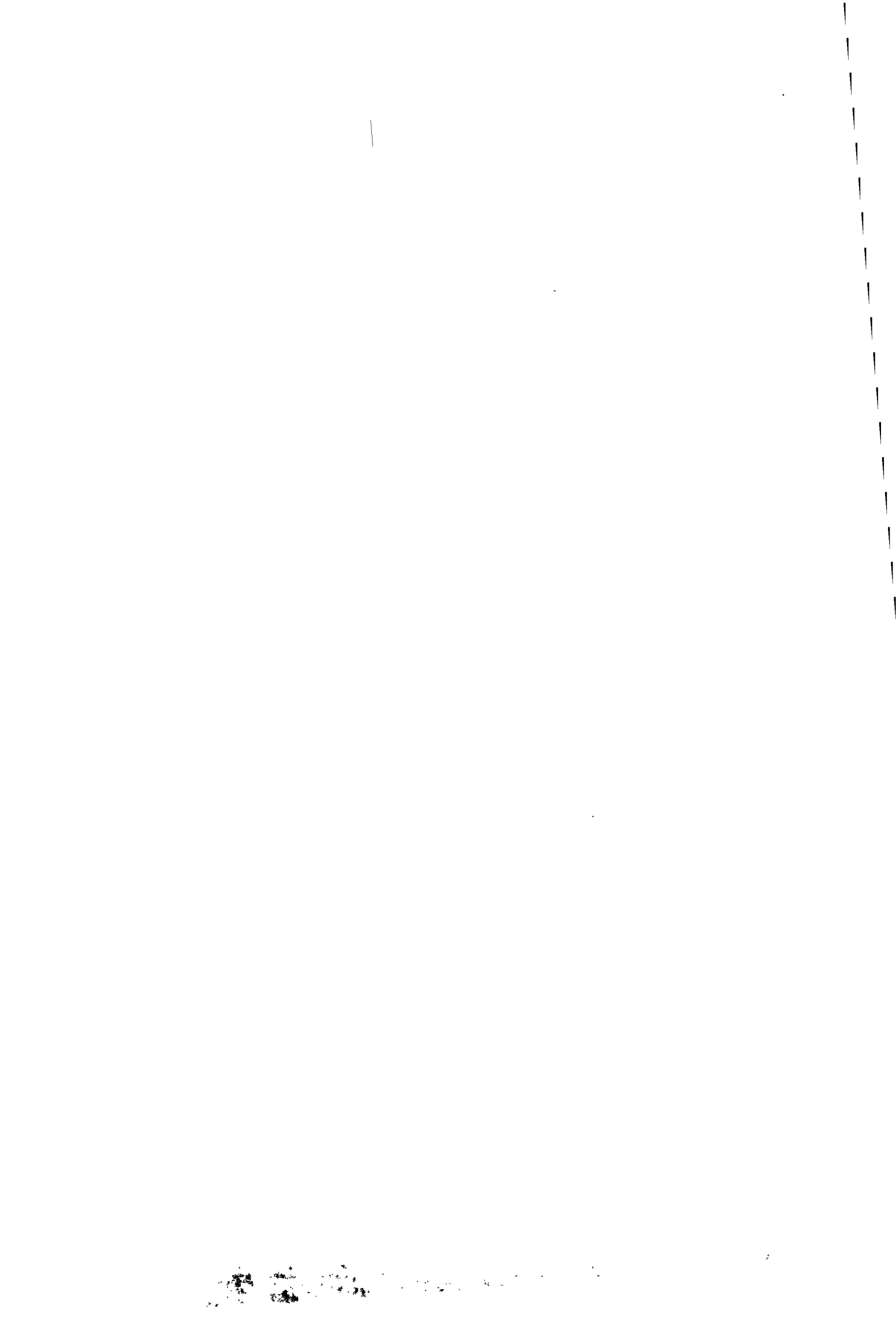
drawn up on behalf of the Committee on the Environment,
Public Health and Consumer Protection

on the embodiment of the principle of environmental
protection in the EEC Treaty

Rapporteur: Mr S. ALBER

WG(VS) 2739E
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PE 100.051/fin.



During its sitting of 11 February 1985, the European Parliament referred the motion for a resolution tabled by Mr Schmid and others (Doc. 2-1273/84) pursuant to Rule 47 of the Rules of Procedure to the Committee on the Environment, Public Health and Consumer Protection as the committee responsible and to the Committee on Legal Affairs and Citizens' Rights and the Political Affairs Committee for their opinions.

At its meeting of 25 April 1985, the committee decided to draw up a report and appointed Mr Alber rapporteur.

At its meetings of 30 October, 21 November and 18 December 1985 the committee considered the draft report. It adopted the motion for a resolution as a whole by 13 votes to 1 with no abstentions.

The following took part in the vote: Mrs WEBER, chairman; Mrs SCHLEICHER and Mrs BLOCH von BLOTTNITZ, vice-chairmen; Mr ALBER, rapporteur; Mr BOMBARD, Mr DALSAASS (deputizing for Mr Parodi), Mr ELLIOTT (deputizing for Mr Collins), Mrs LENTZ-CORNETTE, Mr MERTENS, Mr MUNTINGH, Mr SCHMID, Mrs SQUARCIALUPI, Ms TONGUE and Mr Van der LEK.

The opinion of the Committee on Legal Affairs and Citizens' Rights is attached. The Political Affairs Committee will deliver its opinion orally.

The report was tabled on 21 January 1986.

The deadline for tabling amendments to this report will be indicated in the draft agenda for the part-session at which it will be debated.

C O N T E N T S

	<u>Page</u>
A. MOTION FOR A RESOLUTION	5
B. EXPLANATORY STATEMENT	9
I. Introduction	9
II. Need to amend the Treaty	10
1. Legal bases in the EEC Treaty and their limits	10
a. Articles 2 and 3	10
b. Article 100	10
c. Article 235	11
d. Formal and constitutional limits	11
2. The present aid system and its limits in the environmental sector	12
3. Present obligation on Member States to notify the Commission	13
III. Proposals	13
1. General	13
2. Specific amendments and their justifications	14
a. New Article 2	14
b. New Article 3(f)	14
c. New Title IVa (Articles 84a - 84e)	15
d. New Article 92(3) (c)	17
ANNEX: Motion for a resolution, Doc. 2-1273/84	19
Opinion of the Committee on Legal Affairs and Citizens' Rights	21

The Committee on the Environment, Public Health and Consumer Protection hereby submits to the European Parliament the following motion for a resolution:

A

MOTION FOR A RESOLUTION

on the embodiment of the principle of environmental protection in the EEC Treaty

The European Parliament,

- having regard to the motion for a resolution tabled by Mr SCHMID and others on the embodiment of the principle of environmental protection in the EEC Treaty (Doc. 2-1273/84),
 - having regard to the Spinelli report of 14 September 1983 and particularly paragraphs 64-67 and 125 ff of that report¹,
 - whereas, in its draft Treaty establishing the European Union², it allocated an important role to environmental protection,
 - having regard to the report of the Committee on the Environment, Public Health and Consumer Protection and to the opinions of the Committee on Legal Affairs and Citizens' Rights and the Political Affairs Committee (Doc. A 2-203/85),
- A. whereas as early as 1972 the ARMENGAUD report (Doc. 15/72) called for the inclusion of a separate chapter on the environment in the EEC Treaty,
- B. having regard to the declaration, issued by the Heads of State or Government at the Stuttgart European Council meeting of 17-19 June 1983, on the stepping-up of cooperation at Community level in order to combat pollution,
- C. having regard to the conclusions adopted by the Heads of State or Government at the European Council of 2 and 3 December in Luxembourg, especially as regards the inclusion of environmental protection in the EEC Treaty,
- D. whereas citing Articles 100 and 235 of the EEC Treaty as a basis for the implementation of a common environmental policy is only a makeshift solution,
- E. whereas the unanimity requirement in respect of action pursuant to Articles 100 and 235 of the EEC Treaty will prevent a speedy and effective response - or permit, at most, an inadequate one - to the challenges presented by worsening pollution,

1 OJ No. C 277, 17.10.1983

2 OJ No. C 77, 13.3.1984

F. whereas the Community is endeavouring to extend the scope of the intergovernmental conference on amendments to the EEC Treaty convened by the Heads of State or Government pursuant to Article 236 of the EEC Treaty to include environmental protection¹,

1. Believes that a legal basis for the implementation of a common environmental policy must be incorporated into the EEC Treaty;

2. Demands that the EEC Treaty be amended as follows:

a. 'Article 2

The Community shall have as its task,

(a) by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it,

(b) to ensure the creation of a habitable environment for the citizens of the Community, the protection of which is inseparably linked with economic and social development and the creation or maintenance of harmonious living conditions for those citizens'.

b. (Article 3, Activities of the Community)

A new subparagraph (f) to be inserted after Article 3(e):

'(f) the adoption of a common policy in the sphere of environmental protection;'

Subparagraph (f) becomes (g), etc.

c. (Part Two - Foundations of the Community)

A new Title IVa to be inserted after Title IV:

Title IVa

Environmental Policy

¹ See letter from the Commission to the European Parliament published in EP Bulletins No. 39, 26 September 1985 - PE 100.805 and No. 39/Add.3 of 25 October 1985 - PE 100.805/Add.3

Article 84a

1. The common environmental policy shall serve primarily
 - (a) to preserve, foster and restore the natural environment and to improve its quality,
 - (b) to protect human health, and
 - (c) to ensure the optimum utilization and re-utilization of natural resources.
2. The common environmental policy shall include, in particular, measures:
 - to reduce pollution of the air, water and soil, especially where it crosses national borders,
 - to protect human health,
 - for testing chemicals,
 - to preserve and restore the natural environment including fauna and flora,
 - to develop a policy on waste with particular emphasis on the recycling of waste,
 - to promote the development of environmentally acceptable sources of energy and technologies.

Article 84b

1. The common environmental policy shall be based on the following principles in particular:
 - prevention of environmental damage through a preventive environmental policy ('prevention' principle),
 - action against hazards to the environment at source ('source' principle),
 - the 'polluter pays' principle,
 - use of environmental impact assessment in the technical planning procedures and decision-making processes,
 - inclusion of environmental protection in other policies,
 - increased consideration of environmental aspects in structural planning and regional planning.
2. Particular value shall be attached to the improvement and development of education in environmental matters and awareness of the environment.

Article 84c

1. In order to ensure coordination of environmental policies, the Member States shall notify the Commission of any projected provisions to be laid down by law, regulation or administrative action and of any international measures planned.

2. Provisions laid down by law, regulation or administrative action may only enter into force in the Member States if, within five months of receiving notification of preparation of draft instruments, the Commission fails to communicate to the Council its intention to submit proposals for Community measures in the field of environmental policy. Such provisions may enter into force in the Member States if, within five months of notification, the Commission has not submitted a proposal or if, within six months of submission of the proposal by the Commission, a decision has not been taken.

3. In order to take effective action against any regional and national environmental problems, individual Member States shall be free to apply stricter provisions than those adopted at Community level. The second sentence of Article 36 of the EEC Treaty shall apply *mutatis mutandis*.

Article 84d

1. The Community may establish special machinery in order to promote the realization of the objectives under Article 84a(1).

Article 84e

The European Community shall conclude, with one or more States or with international organizations, any agreements necessary to realize its objectives in the field of environmental protection.

d. (Article 92, Aids)

A new subparagraph (c) to be inserted after Article 92(3)(b):

'(c) aid to offset unacceptable burdens, which may result from environmental policy measures dictated by local conditions, or aid to offset burdens which may result from national environmental regulations, insofar as such regulations exceed Community requirements'

Subparagraph (c) to become subparagraph (d) etc;

3. Instructs its President to forward this resolution to the Council and Commission.

EXPLANATORY STATEMENTI. Introduction

Ever since the European Community began to consider environmental protection the question has always arisen in one form or other as to the legal basis for Community action in this field¹.

As is generally known, the Treaty of Rome contains no explicit provisions declaring environmental protection to be one of the Community policies. The Commission did not therefore find it easy to cite a legal basis for such activity in its first communication on the policy of the Community in the field of environmental protection²: 'it would appear that the powers of the Community are not sufficient to coordinate the legislative activities of the Member States with the urgency required for the protection of human health and the environment in order to implement fully its aims the Community should have the power to enact provisions³ which would be directly applicable in the individual Member States and which once adopted would replace existing national provisions.....' and finally: 'insofar as measures would be taken which go beyond the framework provided by Article 235⁴, the Commission should have recourse to Article 236⁵'.

The Council subsequently also found it difficult to refer to a Community environmental policy; instead it spoke of environmental policy in the Community⁵. Several Member States, particularly France, wished to make it clear by this formulation that the Community does not have general powers in the field of environmental protection⁶.

1 One of the first thorough discussions of the legal bases can be found in the report by the Legal Affairs Committee of the European Parliament on the scope provided under the Community Treaties for environmental protection and amendments which might be proposed (Doc. 15/72, drawn up by Mr ARMENGAUD in 1972

2 SEC (71)2616 final, 22.7.1971

3 This means regulations

4 Any article numbers given without further explanation relate to the EEC Treaty

5 OJ No. C 112/1 1973

6 Toulemon, R., La problématique d'une politique européenne de l'environnement, in Revue du Marché Commun 1974, p.232

II. Need to amend the Treaty

1. Legal bases in the EEC Treaty and their Limits⁷

a. Articles 2 and 3

Although Article 2 of the EEC ('harmonious development of economic activities', 'raising of the standard of living') and Articles 3(f) and 3(i) ('protection of competition', 'improved employment opportunities for workers and enhanced standard of living') allow at least sectoral Community powers to be inferred⁸, they cannot be interpreted as granting independent powers as they only serve to define common aims.

b. Article 100

Article 100 of the EEC Treaty, which allows those provisions laid down by law, regulation or administrative action as directly affect the establishment or functioning of the Common Market to be approximated, has been particularly important for previous Community activities in the field of environmental policy. Essentially, however, directives based on Article 100 can only consist of a reaction to existing imbalances, and not form the sole basis for a comprehensive environmental policy. Moreover there is widely-held view⁹ that strict limits are set to the applicability of Article 100 of the EEC Treaty by the fact that the national provisions to be harmonized must directly affect the establishment or functioning of the Common Market. In particular the main problem, the elimination of obstacles to competition created by different legal and administrative requirements concerning the environment which affect costs, cannot be tackled via Article 100 of the EEC Treaty as such costs only directly affect the trade in end-products and as a result only affect the functioning of the Common Market indirectly. There are also reservations concerning the application of Article 100 on the grounds of integration policy. Many directives, for example, only set out minimum requirements and allow the individual Member States to enact stricter provisions. This can lead to a drifting apart of the legal requirements in the various Member States and as a result once again lead to distortions of competition and fragmentation of the market, effects which the approximation of legislation was in fact meant to eliminate.

⁷ The legal bases are discussed in detail in the Armengaud report (see footnote 1) p.12 et seq. In practice and in discussions, however, only Articles 2, 3, 100 and 235 of the EEC Treaty play any significant role. The following therefore deals only with these.

⁸ See too the 'First communication from the Commission on Community policy in the field of environmental protection' (footnote 2).

⁹ Hoppe: *Die wirtschaftliche Vertretbarkeit im Umweltschutzrecht*, Cologne-Berlin-Bonn, Munich 1984, p.238; Grabitz/Sasse: *Umweltkompetenz der Europäischen Gemeinschaften*, Berlin 1977, p.93.

c. Article 235

In addition to Article 100, Article 235 is often used as the legal basis in those cases where the Treaty of Rome does not offer a specific legal basis. It is quoted for marginal areas such as regional policy, research, monetary policy and environmental protection, the latter of which latter concerns us here. Despite the perceived necessity of conducting such policies at Community level and basing them on Article 235 as the only alternative, the use of this article, for example for Community environmental policy, is increasingly coming under criticism in legal and political circles.

For example as long ago as 1972 a report by the European Parliament's Legal Affairs Committee¹⁰ described Article 235 as a makeshift article which above all was meant to fill the unintentional gaps in the powers accorded by the Treaty. In such an extensive field as environmental protection this article could not provide adequate legal security in the long term; Article 235 should as a matter of principle only be used as a temporary expedient. Moreover on constitutional grounds, Article 235 should be interpreted narrowly so as not to grant the Community all-embracing powers by the back door¹¹. Only the aims cited in the preamble and in Articles 2 and 3 can justify the extended powers under Article 235¹². There has therefore been no shortage of attempts to relate the aims set out in the preamble and in Articles 2 and 3 to environmental protection, for example the reference in the preamble to a constant improvement of the living and working conditions of the peoples as an essential goal.

d. Formal and constitutional limits

The abovementioned rules relating to powers are, however, also subject to certain restrictions on formal and constitutional grounds.

Article 100 and Article 235 both require unanimity. In the past this has delayed decision-making and in some cases blocked any decision at all¹³. The aim therefore should be to secure a solid legal basis for Community environmental policy with decisions being taken

10 see footnote reference 1, p.20

11 Zuleeg: EG-Richtlinien auf dem Gebiet des Wasserrechts und ihre innerstaatlichen Auswirkungen, in Zeitschrift für Wasserrecht p.133 et seq. (137)

12 Decisions by the Court of Justice of 21.12.1973, Case 6/72 - [1973] E.C.R., 215 et seq. (245); of 4.4.1974, Case 167/73 - [1974] E.C.R., 359 et seq. (369f)

13 For example the meeting of the Council of Environmental Ministers of 27/28 June 1985 where the decision on air pollution from road vehicle exhaust fumes was adopted by nine governments but not by Denmark.

according to the majority principle which generally applies in the Treaty. From the constitutional point of view the use of Articles 100 and 235 as general legal bases for a Community environmental policy engender misgivings because originally they lack democratic legitimation. The Treaties establishing the European Communities and their amendments have passed through the legislative process in the national parliaments. Thus the Community policies set out in the EEC Treaties have been granted legitimation under the democratic process.

Policies on the other hand which are based on Articles 100 and 235 cannot claim this 'level' of legitimation and have to this extent therefore not been democratically legitimized. The explicit inclusion of environmental policy in the Treaties is necessary to make up this shortfall in democracy unless the approval of the European Parliament were made necessary for any expansion of policies based on Article 235 in order to ensure their democratic legitimation¹⁴. But this too would require an amendment to the Treaty.

2. The present aid system and its limits in the environmental sector

A brief reference has already been made above to the distortions of competition and obstacles to trade which may result from different laws in the environmental sector. Aid was included in Article 92 et seq. of the EEC Treaty as a general means of removing distortions in the field of competition.

Again this article makes no reference to environmental policy; there is no provision for example for aid to encourage non-polluting technology. In 1974 the Commission declared state environmental aid on a degressive basis to be permissible¹⁵, albeit initially only until 1980 and then following pressure from the Member States until 1986 in order to allow subsidies in the environmental sector. There is however a certain amount of controversy¹⁶ concerning the granting of aid in the environmental sector when these are not explicitly mentioned in Articles 82 et. seq. Attention should therefore be given in this proposal to making aid in the environmental sector feasible on the basis of Articles 92 et seq.

14 Zuleeg op. cit. p.138

15 Communication of 7.11.1974 published in the Commission report on competition for 1974, sections 180-185

16 In his Written Question No. 185/82 (OJ C 279/1, 17.10.1983), Mr Muntingh expresses misgivings concerning the granting of aid in the environmental sector pursuant to Article 92 of the EEC Treaty.

3. Present obligation on Member States to notify the Commission

The Representatives of the Governments of the Member States meeting in Council agreed in 1973 that the Commission should be informed as soon as possible on every draft item of legislation, administrative provision or any international initiative relating to environmental protection or improvement of the environment¹⁷. This agreement is, however, not binding; a footnote points out that it is a 'gentlemen's agreement'. The agreement provides for certain deadlines before any action may be taken.

It is dubious whether this agreement has succeeded. Whereas between 1973 and 1981 the Commission received 227 notifications from the Member States concerning legislative projects, the number of such notifications has declined over recent years although the legislative activity of the Member States in the field of environmental protection has scarcely diminished compared with earlier years¹⁸. The Commission has commented sceptically on this development and announced that it will be taking stock¹⁹.

III. Proposals

1. General

Recourse to Articles 100 and 235 as the legal basis for a Community environmental policy which is continually developing and becoming ever more important is reaching its limits, as the previous chapter has shown. Moreover, these articles generally only permit a reaction to undesirable situations which have already arisen in the field of environmental protection.

Secondly, environmental policy should not be the sole responsibility of the Community. There are regional environmental problems where specific solutions will have to be found. Nor should a Member State be prevented from establishing stricter environmental standards than others. The Community must be able to combine the economic aims of integration with the requirements of environmental management. An extension of the goals set out at the beginning of the EEC Treaty to include the field of environmental policy is needed and not only on these grounds.

Community environmental policy must be accompanied by the possibility of granting aid to remove the risk of distortions of competition, for example as a result of local disadvantages.

A Community environmental policy must be combined with an obligation on Member States to provide notification of legislation in their national sector and this should be given the force of law.

17 Agreement of 5.3.1973, OJ C 9, 15.3.1973

18 Quoted from Kramer in Groeben, Boeckh, Thiesing, Ehlermann: Kommentar zum EWG-Vertrag (Commentary on the EEC Treaty) 3rd edition 1983: Environmental policy section 36

19 In the 15th general report on the activities of the European Communities in 1981, section 363.

2. Specific proposals to amend the EEC Treaty

In the following proposals for amendments, which take account of the above criticisms, your rapporteur has sought in particular to put forward as few amendments as possible to enable the amendment of the EEC Treaty to pass the national parliaments without delay²⁰.

a. 'Article 2

The Community shall have as its task,

- (a) by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it,
- (b) to ensure the creation of a habitable environment for the citizens of the Community, the protection of which is inseparably linked with economic and social development and the creation or maintenance of harmonious living conditions for those citizens'.

Justification²¹

The objectives listed in Article 2 relate primarily to the economic aspects of unification; environmental protection cannot however be accounted one of the objectives of Article 2.^{21a}

b. (Article 3, Activities of the Community)

Following Article 3(e) a new paragraph (f) is to be inserted:

'(f) the introduction of a common policy in the field of environmental protection'

Section (f) becomes (g) and so on.

-
- 20 The proposals made here rely heavily on the suggestions made by Grabitz/Sasse 'Umweltkompetenz der Europäischen Gemeinschaften; Vorschlag zur Ergänzung des EWG-Vertrags': (Environmental powers of the European Communities: Proposals for amendments to the EEC Treaty), Berlin 1977
 - 21 These are only brief justifications for the amendments proposed. Fuller explanations can be found above.
 - 21a See Zuleeg in Groeben, Boeckh, Thiesing, Ehlermann: Kommentar zum EWG-Vertrag (Commentary on the EEC Treaty), third edition 1983, Article 2, margin reference 5
 - 22 See Schwartz in Groeben, Boeckh, Thiesing, Ehlermann: Kommentar zum EWG-Vertrag (Commentary on the EEC Treaty), third edition 1983, Article 235, margin reference 70

Justification:

A Community environmental policy must be included in the goals in Article 3 of the EEC Treaty and thus become one of the policy areas of Community legislation. As proposed here, Article 3 now cites environmental protection policy as an area of activity for achieving the goals set out in Article 2 and this complies with the inherent system of the EEC Treaty²².

c. (Part Two: Foundations of the Community)

A new Title IVa is to be inserted after Title IV:

Title IVa Environment Policy

Article 84a

1. The common environmental policy shall serve primarily
 - (a) to preserve, foster and restore the natural environment and to improve its quality,
 - (b) to protect human health, and
 - (c) to ensure the optimum utilization and re-utilization of natural resources.
2. The common environmental policy shall include, in particular, measures:
 - to reduce pollution of the air, water and soil, especially where it crosses national borders,
 - to protect human health,
 - for testing chemicals,
 - to preserve and restore the natural environment including fauna and flora,
 - to develop a policy on waste with particular emphasis on the recycling of waste,
 - to promote the development of environmentally acceptable sources of energy and technologies.

Article 84b

1. The common environmental policy shall be based on the following principles in particular:
 - prevention of environmental damage through a preventive environmental policy ('prevention' principle),
 - action against hazards to the environment at source ('source' principle),

- the 'polluter pays' principle,
- use of environmental impact assessment in the technical planning procedures and decision-making processes,
- inclusion of environmental protection in other policies,
- increased consideration of environmental aspects in structural planning and regional planning.

2. Particular value shall be attached to the improvement and development of education in environmental matters and awareness of the environment.

Article 84c

1. In order to ensure coordination of environmental policies, the Member States shall notify the Commission of any projected provisions to be laid down by law, regulation or administrative action and of any international measures planned.

2. Provisions laid down by law, regulation or administrative action may only enter into force in the Member States if, within five months of receiving notification of preparation of draft instruments, the Commission fails to communicate to the Council its intention to submit proposals for Community measures in the field of environmental policy. Such provisions may enter into force in the Member States if, within five months of notification, the Commission has not submitted a proposal or if, within six months of submission of the proposal by the Commission, a decision has not been taken.

3. In order to take effective action against any regional and national environmental problems, individual Member States shall be free to apply stricter provisions than those adopted at Community level. The second sentence of Article 36 of the EEC Treaty shall apply mutatis mutandis.

Article 84d

1. The Community may establish special machinery in order to promote the realization of the objectives under Article 84a(1).

Article 84e

The European Community shall conclude, with one or more States or with international organizations, any agreements necessary, to realize its objectives in the field of environmental protection.

Justifications

Article 84(a) has deliberately been formulated free of any economic references; the goals listed in (1) and the measures mentioned in (2) are not exhaustive but intended to serve as examples.

Article 84(b) mentions by way of example a number of principles for a common environmental policy. The total ban called for in the motion for a resolution has not been included in order to allow a more flexible response.

Article 84(c)

refers back to the 'Agreement of the Representatives of the Governments of the Member States meeting in Council'.²³

This agreement which the government representatives themselves described as a gentlemen's agreement has gradually become less important in the course of time, at least as far as notification is concerned. Article 84(c) now represents an obligation on Member States to provide information and notification without which no effective environmental policy can be conducted at Community level.

Article 84(d)

The creation of special funds such as the EAGGF, the European Social Fund and others have proved helpful for implementing policies.

In the field of environmental policy too, institutions could help to solve specific problems relating to environmental policy. For example the Community has created the European Foundation for the improvement of living and working conditions²⁴. Article 84(d) provides a unequivocal legal basis for institutions of this kind.

Article 84(e)

An effective environmental policy cannot take account of geographical or political borders. International agreements are increasingly being concluded to combat environmental pollution in which the Community has to appear as a single entity.

d. (Article 92, Aids)

A new subparagraph (c) to be inserted after Article 92(3)(b):

'(c) aid to offset unacceptable burdens, which may result from environmental policy measures dictated by local conditions, or aid to offset burdens which may result from national environmental regulations, insofar as such regulations exceed Community requirements'

Subparagraph (c) to become subparagraph (d) etc.

23 See footnote 17 above

24 Council Regulation 1365/75, 26.5.1975, OJ L 139/75

Justification:

General:

State aid granted to business in relation to environmental measures requires a legal basis in the EEC Treaty. This provides an effective way of combating economic imbalances which may be created by national or Community measures to implement environmental policy.

First part

Certain industrial locations require greater investments to reduce environmental pollution than others because of their specific geographical situation.

Second part

Stricter requirements imposed by one or other Member State when translating Community directives into national law should, for reasons of competition, not affect undertakings.

MOTION FOR A RESOLUTION (Doc. 2-1273/84)

tabled by Mr SCHMID, Mr ARNDT, Mr COLLINS, Ms TONGUE, Mr HUGHES,
Mr VITTINGHOFF, Mrs WEBER, Mr MUNTINGH and Mr SCHINZEL

pursuant to Rule 47 of the Rules of Procedure

on the embodiment of the principle of environmental protection
in the EEC Treaty

The European Parliament,

- A. gravely concerned at the alarming and growing extent of damage to human health and to the environment,
 - B. whereas the European Council has also acknowledged the need for action at European level in order to protect the environment and preserve natural conditions of life (see decision of the Heads of State or Government, meeting in Paris in 1972, to draw up an action programme on environmental protection¹ and decisions taken by the Stuttgart European Council in 1983 on immediate action to combat air pollution²),
 - C. whereas the draft Treaty establishing the European Union³, adopted by the European Parliament in February 1984, contains the guidelines for the future organization of the European Community, inter alia with regard to environmental protection,
1. Takes the view that a more effective legal basis for environmental protection legislation must be established as a matter of urgency;
 2. Calls on the Commission to submit to the Council, pursuant to Article 236 of the EEC Treaty, a draft proposal amending the EEC Treaty in the manner set out below:

- The following text to be inserted in Article 2 of the EEC Treaty:

'... an increase in stability, greater protection of the natural environment, enhancement of the quality of life, in particular an accelerated raising of the standard of living and closer relations ...'

¹ See Bulletin of the European Communities No. 10/72, pp. 15-24 (p. 21 in particular)

² See Bulletin of the European Communities No. 6/83, pp. 20-26 (p. 23 in particular)

³ See OJ No. C 77, 19.3.1984, p.33 ff

- A new Article 3(d₁) to be inserted after Article 3(d) of the EEC Treaty:

'(d₁) the adoption of a common policy in the sphere of environmental protection;'

- A new Title III a - 'Environmental protection' - containing the following articles, to be inserted after Article 73 of the EEC Treaty:

Article 73 a

The European Communities and the Member States shall protect human health and preserve a habitable environment.

Article 73 b

For the purpose of implementing Article 73 a, the Council, acting by a majority on a proposal from the Commission, and after consulting the Assembly and the Economic and Social Committee, shall adopt the necessary rules governing the areas set out in the following articles (73 c - 73 f).

Article 73 c

In order to prevent damage to the environment, all technical planning and decision-taking processes shall incorporate an environmental impact assessment. The Council shall adopt the requisite Regulations, in accordance with the procedure laid down in Article 73 b, no later than two years after the entry into force of this amendment to the Treaty.

Article 73 d

Damage to the environment that has already occurred shall be rectified in accordance with the 'polluter pays' principle. The Council shall adopt the requisite Regulations, in accordance with the procedure laid down in Article 73 b, no later than three years after the entry into force of this amendment to the Treaty.

Article 73 e

In order to contribute towards the attainment of the objectives of environmental protection, the Council shall adopt, pursuant to Article 73 b and no later than two years after the entry into force of this amendment to the Treaty, the requisite Regulations for the establishment and organization of a European Environment Fund.

The Council shall regularly modify the area of application and operating rules of the European Environment Fund in line with the requirements of environmental policy.

Article 73 f

In pursuit of the objectives of environmental protection and health protection, the European Community shall conclude the requisite agreements, with one or more States or international organizations, pursuant to Article 228 of this Treaty and after consultation of the Assembly.'

OPINION

(Rule 101 of the Rules of Procedure)

of the Committee on Legal Affairs and Citizens' Rights

Draftsman: Mr W. ROTHLEY

On 11 February 1985 the Committee on Legal Affairs and Citizens' Rights was asked for its opinion.

On 27 June 1985 it appointed Mr ROTHLEY draftsman.

On 18 December 1985 it considered the draft opinion and adopted the conclusion unanimously.

The following took part in the vote: Mrs VAYSSADE, chairman and deputy draftsman; Mr EVRIGENIS, vice-chairman; Mr ALBER, Mrs FONTAINE, Mr HOON, Mrs MARINARO, Mr TOPMANN, Mr TURNER, Mr WIJSENBEEK and Mr ZAGARI.

I. Introduction

1. The Committee on the Environment, Public Health and Consumer Protection as the committee responsible, and the committees asked for their opinions¹ have been asked to act on a basis of the motion for a resolution tabled by Mr SCHMID and others pursuant to Rule 47 of the Rules of Procedure (Doc. 2-1273/84).

2. In the words of the author of the resolution, Mr SCHMID, at the meeting of the Committee on the Environment, Public Health and Consumer Protection of 30 October 1985, his aim was to obtain a reliable legal basis for environmental protection at Community level, even if the overall approach set out in the Draft Treaty on the European Union² were to fail. He had therefore matched his proposal, set out in individual articles, completely to the institutional machinery already contained in the EEC Treaty, simply adding the required environmental considerations.

II. Matters falling within the terms of reference of the Committee on Legal Affairs and Citizens Rights

3. The environmental aspects are the exclusive concern of the committee responsible. The Committee on Legal Affairs and Citizens' Rights for its part is responsible inter alia for 'legal aspects of the creation, interpretation and application of Community law'³.

4. This apparently clear demarcation leads the Committee on Legal Affairs and Citizens' Rights to concentrate on the following questions:

- Can environmental protection be incorporated in a text of a constitutional the nature?(A)
- Are the passages proposed for insertion correctly formulated?(B)
- What institutional provisions may be related to the substantive aims?(C)

A. Environmental provisions in constitutional texts?

5. Environmental protection is increasingly being incorporated into national constitutions (e.g. recently in the constitutions of some of the German Lander). The question of whether they are simply objectives set by the State or genuine guarantees which consequently create subjective rights can be ignored in the case of the EEC Treaty: that treaty is hybrid in nature,

¹Committee on Legal Affairs and Citizens' Rights, and the Political Affairs Committee

²OJ No. C 77, 13.3.1984, p. 33 et seq.

³Annex V, Rules of Procedure of the European Parliament

embodying both constitutional provisions and detailed individual policies (e.g. in respect of agriculture and transport). Provisions governing a Community environmental policy committing both legislature and executive may therefore certainly be incorporated in the Treaty.

Furthermore, environmental measures have already been adopted on the basis of the EEC Treaty, mainly of Articles 235 and 100.

The insertion of provisions expressly relating to environmental protection would offer the considerable advantage over the present situation of greater clarity and constitutionally desirable tidiness. The grey area covered by Article 235 of the EEC Treaty would thus be substantially reduced.

B. Where can environmental provisions be inserted in the EEC Treaty?

6. Both Mr Schmid's motion for a resolution and the draft report tabled by Mr Alber (PE 100.051/A/rev.) insert the basic reference to environmental protection in Article 2 of the EEC Treaty, albeit in differing forms. This would seem right. To insert it only in Article 3 would be to ignore the relationship between those two articles: Article 2 portrays the tasks of the Community in general terms. Article 3 covers the Community's activities 'For the purposes set out in Article 2, ...'. The insertion of environmental protection in Article 3 alone would therefore lack the support of any reference in Article 2 and thus fuel the argument that environmental protection was not one of the Community's tasks.

7. Mr Alber's draft report provides for the incorporation of the common environmental protection policy as a new paragraph (l) while Mr Schmid's motion for a resolution incorporates it as a new (d 1).

Although the sequence and location of the reference in Article 3 might appear haphazard, the logic of the EEC Treaty and the consequent placing of specific provisions makes them important: both texts are designed to put environmental protection next to transport, the draft report placing it after transport as Title IV a (Article 84 a - e) and the motion for a resolution before it, as Title III a (Article 73 a - f).

Article 3 of the EEC Treaty lists the activities of the Community in the order in which they subsequently appear as policies. Mr Schmid's motion for a resolution follows this system. By contrast, placing a new paragraph (l) at the end of the article does not. Logically it should be inserted after (e), with the following paragraphs being i.e. lettered accordingly.

8. The proximity to transport policy chosen by both versions would appear to be correct. This is the last individual policy given legal form in the EEC Treaty, although, since the decision of the Court of Justice of the European Communities of 23 May 1983 in Case 13/83, still largely awaiting implementation¹.

¹EP Resolution of 12.9.1985, OJ No. C 262, 14.10.1985, p. 99 (on the basis of the report by Mr Anastassopoulos, Doc. A 2-84/85)

C. What institutional provisions can be related to the substantive aims?

9. Mr Schmid's motion for a resolution takes the institutional machinery now available under the EEC Treaty fully into account, but in order to exert a degree of pressure towards implementation, it sets forth the individual policy objectives in as specific a way as possible, and sets time limits for the Council to act. In doing so it mimics the technique which was successful in creating the common agricultural policy - that is not to claim that the agricultural policy itself is a success - and which in respect of transport policy led up to the aforementioned judgment against the Council for failure to act.

10. Mr Alber's motion for a resolution deliberately refrains from describing the institutional machinery. As at the time his motion for a resolution and this draft opinion were written the governmental conference on the reform of the EEC Treaty has not yet produced results, this is the only possible course.

In its Draft Treaty establishing the European Union of 14 February 1984² the European Parliament did moreover define its conception of an efficient and democratic decision-making procedure, which it would be unlikely to relinquish in a report on the incorporation of environmental protection in the Treaty.

11. The detailed definition of environmental protection in the draft report does however hint that the rapporteur is not counting on the introduction of an efficient decision-making procedure. If one did exist, a Community environmental policy could be established with much less fuss by way of a general clause.

The present, and possibly future, decision-making process, noted principally for its blocking procedures, requires the greatest possible wealth of detail in order to provide the necessary pressure and impetus for the legislation to be put into effect.

12. At present the draft report therefore necessarily falls short of the goal set in Mr Schmid's motion for a resolution of drafting complete articles for the Treaty. It is worth considering whether the committees involved should resume their work after the intergovernmental conference, if necessary in order to draft provisions taking into account the institutional machinery. On these grounds it would be desirable to produce only an interim report at present.

D. Conclusion

13. The Committee on Legal Affairs and Citizens' Rights

proposes to the committee responsible that a new paragraph relating to a common environmental protection policy be inserted after Article 3(e) of the EEC Treaty;

²OJ No. C 77, 13.3.1984, p. 33 et seq.