

Protection of the European Environment after the Amsterdam Treaty

Said Mahmoudi

1 Introduction

After more than one year of negotiations within the framework of European Union's Intergovernmental Conference, a new major agreement was signed in Amsterdam on 2 October 1997. The new agreement, which is generally referred to as the Amsterdam Treaty, entered into force on 1 May 1999. This is the third time that the 1957 Treaty of Rome, the original constitution of the European Community, is substantively amended in a comprehensive manner. The first major amendment took place through the Single European Act that entered into force on 1 July 1987. The Second amendment was introduced by the Maastricht Treaty that entered into force on 1 November 1993.

The purpose of the Amsterdam Treaty is to amend EC constitution in light of recent experiences, new needs and future ambitions. The amendments that have been introduced are comprehensive and require many extensive commentaries. Parts of these amendments concern the protection of the environment within the European Union. The EC has a long and impressive record of environmental legislation despite the fact that it was first in 1987 that it received, through the Single European Act, explicit competence to adopt environmental measures. The amendments that are introduced by the Amsterdam Treaty reflect partly the developments in international environmental law in the last few years and partly the increasing public pressure within the European Union to do more for the environment. In the following, amendments relating to the environment will be briefly commented on.

2 Basic Environmental Principles

2.1 Sustainable Development

Some of the amendments concern basic environmental principles. The environmental principles, which before the adoption of the Amsterdam Treaty were set out in Article 130r (2) of the EC Treaty, had their origin in the First Action Programme for the Environment from 1973¹ and in the previous amendments through the Single European Act and the Maastricht Treaty. These principles shall govern all activities and decisions within the Community. They include principle of prevention, polluter pays principle, principle of integration of environmental requirements in other Community policies, subsidiary principle, precautionary principle, and principle of high level of environmental protection. The Amsterdam Treaty contains a new addition to this list, that is the principle of sustainable development. This principle received a general recognition through United Nations Conference on Environment and Development in Rio de Janeiro in 1992.²

Sustainable development is the underlying idea in the EC Fifth Action Programme for the Environment.³ The gist of this concept was already contained in Article 2 of the EC Treaty⁴ where one of the main objectives of the Community was formulated as sustainable growth with respect to the environment. During the work of the Intergovernmental Conference several States emphasised the need for direct reference to and further elaboration of “sustainable development” in the EC constitution. Sweden was of the opinion that sustainable development should be the basic objective for the European Union and should be written down in the treaty articles where the objectives of the Union are given.⁵ The Amsterdam Treaty has met this demand, and sustainable development is now explicitly incorporated in the EC constitution through several amendments. The first amendment is in the seventh paragraph of the preamble to the Maastricht Treaty, which is amended to read as follows:

DETERMINED to promote economic and social progress for their peoples, *taking into account the principle of sustainable development* and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring

¹ OJ 1973, C 112/1.

² The principle of sustainable development has permeated all basic documents resulted from the Rio Conference, particularly Agenda 21 and the Rio Declaration.

³ OJ 1993, C 138/1. The main title of this action program is “Towards Sustainability”, and sustainable development has permeated all paragraphs in that program.

⁴ According to Article 12 of the Amsterdam Treaty, most of the articles in the Maastricht Treaty and the EC Treaty will be renumbered. However, Article 2 of the EC Treaty will remain its number.

⁵ See Rapport från EU:s regeringskonferens (The Swedish Report from EU’s Intergovernmental Conference), No. 2, October 1996, p. 2.

that advances in economic integration are accompanied by parallel progress in other fields. (Italic text is new.)

What is interesting in this new wording is that “sustainable development” is referred to as a *principle* and not a *concept*. There are still some controversies in the doctrine about whether sustainable development is an inspiring concept devoid of any specific content or a solid legal principle conveying a set of concrete rights and duties. The choice of “principle” in the amendment may denote that for the authors of the Amsterdam Treaty sustainable development is consolidated to a principle. It is a significant amendment since sustainable development has so far been indiscriminately used in many disciplines more as a slogan than a guiding principle. This has prevented the concept from developing a firm, precise and uniform legal content.

The other amendment with respect to sustainable development is in Article B of the Maastricht Treaty, which will be renumbered as Article 2 of that treaty, concerning the objectives of the European Union. As one of these objectives, the amended text provides in the first paragraph of the Article:

to promote economic and social progress *and a high level of employment and to achieve* balanced and sustainable *development*... (Italic text is new.)

“Sustainable development” has found expression even in Article 2 of the EC Treaty⁶ and in a new Article 6 (see below). The amended text of Article 2 reads:

The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 4, to promote throughout the Community a harmonious, balanced *and sustainable* development of economic activities... (Italic text is new.)

In this way, the present amendments place sustainable development both in the preamble and in the operative part of the EC constitution. Characterising it as a principle may contribute to the crystallisation of its legal implications and confirm its role as the basic guiding principle for all work within the Community. The next step will be to elaborate in the constitution itself specific rights and duties which are derived from this principle, more or less in the same way as subsidiarity principle seems to have been elaborated.⁷

⁶ This article retains its number.

⁷ The subsidiarity principle, which may play a decisive role in the division of legislative power between the Community and the Member States, received an authoritative, but not binding, interpretation by the European Council in the Edinburgh meeting in 1992. This interpretation is now formally transformed into a binding protocol attached to Amsterdam Treaty. Krämer believes that even “sustainable growth” in the previous wording of Article 2 referred to sustainable development as was defined by the Commission on Sustainable Development (Brundtland Commission) in 1987. He means sustainable development should be seen as a guideline for Community action which supports and strengthens the requirement of Article 130r (1) [present Article 174 (1)] that there should be a prudent and rational utilisation of natural resources.” Krämer, *E.C. Treaty and Environmental Law*, 2nd edition, 1995, p. 64. In

2.2 Principle of High Level of Environmental Protection

There are some other principles that, in distinction to sustainable development that has found expression in many international environmental conventions, are specific to the EC. One such principle is the principle of high level of environmental protection. It was first introduced in Article 100a (3) [present Article 95 (3)] through the Single European Act. The reason was to ensure the Member States with higher environmental ambitions that the requirement of qualified majority decision in Article 100a would not lead to worse environmental proposals by the Commission. Through the Maastricht Treaty this principle was put down in Article 130r (2)⁸ [present Article 174 (2)]. The Amsterdam Treaty has elevated the status of this principle by inserting it even in Article 2 as one of the introductory principles. This article provides that one of the Community's tasks is to promote a high level of protection and improvement of the quality of the environment. Principle of high level of environmental protection has a close connection with another significant Community principle, namely, integration of environmental requirements into other Community policies.

2.3 Integration of Environmental Requirements into other Community Policies

The need for integration of environmental issues in other Community policies attracted the attention first in the beginning of the 1980s when considerable effects of the Community agriculture, transport and regional policies on the environment were observed. The Single European Act in 1987 provided in Article 130r (2) [present Article 174 (2)], as one of the basic environmental principles, that "Environmental protection requirement shall be a component of the Community's other policies." The Maastricht Treaty reformulated this principle to read "Environmental protection requirements must be integrated into the definition and implementation of other Community policies." This wording, which is kept in the last sentence of the first paragraph of Article 174 (2) [former Article 130r (2)], has been criticised to "give a general mandate to the Community institutions for some future action, without specifying time and form of fulfilment of these requirements and without fixing the consequences in the case of non-fulfilment."⁹ The Amsterdam Treaty has taken a step forward by moving away this requirement from Article 130r (2), and making it an independent general principle in a new Article 6, that reads:

the Third edition of his book, Krämer treats these two concepts under the same heading. See *ibid.*, 3rd. edition, 1998, p. 56.

⁸ For differences between Article 100a (3) [present Article 95 (3)] and Article 130r (2) [present Article 174 (2)] with respect to the requirement of high level of environmental protection, see Krämer, 1995, p. 58.

⁹ *Ibid.*, pp. 58-59.

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

The new wording is more explicit by referring to Article 3. In this way it, in distinction to the previous text, specifies with more clarity the scope of the duties of the Community institutions with respect to the integration of the environment in other policies. Integration of environmental requirements in all other policies will thus become one of the main principles with general applicability in all Community decisions.¹⁰ The efforts since 1987 to fulfil this requirement properly at the Community level have had little success. The main reason has been that it is not considered as a legally binding rule, but an objective whose attainment depends on the will of the institutions. By placing it among other general principles such as subsidiarity, observance of *acquis communautaire* and non-discrimination, and by specifying the scope of the institutions' duty, one may hope that they will more frequently consider it in their decisions. The attainment of this objective has to be combined with the duty to have due regard to the principle of a high level of environmental protection. In this connection it can also be noted that during the work of the Intergovernmental Conference, the Commission undertook to carry out environmental impact assessments for all its future proposals which are expected to have some impact on the environment.¹¹ If observed faithfully, these principles and undertakings taken together may lead to a higher level of environmental protection in all stages of Community activities and decisions.

3 Amendments in the Legal Bases of Environmental Acts

3.1 Article 175 [former Article 130s]

The Community's non-market related environmental measures were adopted on the basis of Article 130s, which is now renumbered as Article 175. The majority of these measures (about 90 percent) were based on paragraph 1 of Article 130s. The wording of that paragraph required that the decisions would be adopted according to the procedure referred to in Article 198c [present Article 252]. This in itself meant that decisions were taken by a qualified majority of the members of the Council. The Council had to co-operate with the Parliament, that had the right to two readings. If the Parliament and the Council disagreed, the latter would have the final word and could adopt the proposed legal act with unanimous vote. A persistent demand from environmental organisations and certain Member States during the Intergovernmental Conference was that

¹⁰ Sweden had a more modest demand in the Intergovernmental Conference which meant that specifically formulated environmental objectives should be introduced in those articles of the EC Treaty which deal with agriculture, transport and trans-European transport networks. Rapport från EU:s regeringskonferens, No. 2, October 1996, p. 2.

¹¹ This was noted by the Conference in a declaration attached to its Final Act. See document CONF 4001/97 CAB, p. 68. A similar undertaking was made in a declaration annexed to The Maastricht Treaty. See Jans, *European Environmental Law*, 1995, p. 26.

environmental measures adopted on the basis of Article 130s (1) should be subject to the same decision-making procedure as those adopted according to Article 100a [present Article 95]. This demand is now met through the Amsterdam Treaty, and the said paragraph is amended to read:

The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee *and the Committee of the Regions*, shall decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 174.

Article 251 [former Article 189b] refers to co-decision by the Council and the Parliament. Experiences from the application of Article 189b after the Maastricht Treaty had shown that decision-making was complicated and time-consuming. The Amsterdam Treaty has simplified this procedure. From the viewpoint of the environment, the amendment of Article 130s (1) [present Article 175 (1)] and simplification of the procedure in Article 189b [present Article 251] are very welcome. The amendment means that all Community environmental measures, with the exception of those that are covered by Article 130s (2) [present Article 175 (2)], will be adopted by the Parliament and the Council as two equal parts. It is improbable that Member States in a foreseeable future will relinquish their power to the Parliament with respect to measures adopted on the basis of Article 130s (2) [present Article 175 (2)]. Town and country planning, choice of energy sources and adoption of financial measures are and will remain areas of significant national interest.

The Committee of the Regions, which was created through the Maastricht Treaty, is a consultative organ that may give an opinion to the Council. The Council had before the Amsterdam treaty no obligation to consult the Committee of the Regions with respect to environmental measures. The Amsterdam Treaty has introduced amendments in Article 130s (1)-(3) [present Article 175 (1)-(3)] so that in future the Council for measures based on any of these three paragraphs must consult the Committee of the Regions in the same way as it must consult the Economic and Social Committee. Such duty does not exist with respect to measures based on Article 95 [former Article 100a]. The role of the Committee of the Regions that consists of representatives of major regions in the Member States is important with respect to the environmental issues.¹² The amendment is thus very appropriate.

3.2 Article 95 [former Article 100a]

Amendments concerning environmental principles and decision-making according to Article 175 [former Article 130s] are first and foremost important for the Community's environmental measures whereas a greater part of the amendments in Article 100a [present Article 95] has significance for environmental protection within the Member States. Article 100a was introduced

¹² A fresh assessment of the role of this committee is given in Jones, "The Committee of the Regions, Subsidiarity and a Warning", 22 *European Environmental Law Review*, 1997, pp. 312-326.

by the Single European Act in order to make it possible for the EC legislative organ, *i.e.*, the Council, to adopt measures by qualified majority for approximation of national laws. Changing the unanimous vote (in Article 100 [present Article 94]) to the qualified majority vote (in Article 100a) was deemed a necessity for the realisation of internal market. The underlying idea was that an effective internal market could not be created if the Council had to wait for the conceding vote of every single Member State with respect to issues directly effecting such market. Article 100a before the adoption of the Amsterdam treaty had five paragraphs. The market-related environmental measures were also among the issues, which had to be decided by the Council on the basis of Article 100a. The Maastricht Treaty gave an important role to the Parliament by providing for shared decision-making power according to Article 100a for the Parliament and the Council.

The Amsterdam Treaty has increased the number of paragraphs in Article 95 (former Article 100a) from five to ten. The first amendment is in paragraph 3, which reads:

The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, *taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.* (Italic text is new.)

The fact is that proposals by the Commission are normally based on well-documented scientific data. Addition of this requirement to paragraph 3 puts an obligation on the Commission to expressly clarify whether in its proposal the latest available scientific data are taken into account. The same requirement is also extended to the Parliament and the Council, albeit with a weaker language. For the latter organs it is not an obligation but rather an objective that they should endeavour to achieve. The amendment in paragraph 3 may, in addition to emphasis on the significance of basing future environmental rules on new scientific facts, indicate the strengthening of the trend in recent years to put clear limits on how far the Commission can expand its own competence to the disadvantage of Member States.¹³

From the viewpoint of the possibilities for the Member States to adopt more stringent environmental measures, the most important amendment introduced by the Amsterdam Treaty is undoubtedly the amendment of paragraph 4.

¹³ This trend started in the middle of the 1980s by demands from certain Member States with the United Kingdom as the driving force to curtail the possibilities of the Commission to make extensive interpretation of its own power. Introduction of the subsidiarity principle was a response to that demand.

3.3 Possibility of Adopting more Stringent National Environmental Measures [Article 100a (4)]

The ultimate objective of Article 100a [present Article 95], when it was introduced in 1987, was the harmonisation of national laws for the purpose of the completion of internal market. It was taken for granted that Member States should as a general rule not be allowed to go their own way once a harmonising rule was decided. When Article 100a with the requirement of qualified majority vote was discussed in 1986, some Member States expressed the concern that such voting system would lead to the adoption of minimum standard environmental measures agreed by some States without any possibility for dissenting States to adopt more stringent measures at the national level. On the initiative and insistence of Denmark an exception to the general rule was introduced in Article 100a (4).¹⁴ This exception, which in Scandinavian literature is baptised as environmental guarantee,¹⁵ gave the Member States the possibility to apply, under certain conditions, their own environmental rules despite the existence of EC harmonising measures on the same subject. Being an exception, this possibility was from the outset subject to extensive interpretation of those States that wanted to invoke it and the restrictive interpretation by the Commission that had the power to authorise or reject the use of national law under Article 100a (4). Some Member States including Sweden and Denmark wanted to change the character of this paragraph from an exception to a rule.¹⁶ During the Intergovernmental Conference numerous proposals were submitted for amendments in paragraph 4. These proposals concerned those issues that deemed to be controversial, meaning different things to different people. Denmark was the driving force behind these proposals even this time. The amendments were adopted, exactly like in the case of the Single European Act, on the very last day of the Intergovernmental Conference.

The amended paragraph 4 is divided into four paragraphs, namely paragraphs 4-7. The new paragraph 4 reads:

If, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30 [former Article 36], or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.

¹⁴ Johnson & Corcelle, *The Environmental Policy of the European Communities*, 2nd edition, 1995, p. 490. It is noteworthy that Denmark was the driving force in the Intergovernmental Conference for the amendments in Article 100a (4). These amendments were adopted in the last days of the Conference in May 1997.

¹⁵ Miljögarantin.

¹⁶ This is clear from various demands that Sweden had with respect to amendments in Article 100a (4). For a list of these demands, see Rapport från EU:s regeringskonferens, No. 2, October 1996, p. 2.

Several important changes can be seen in the amended text compared with the previous wording of this paragraph. First, there is no longer any mention of qualified majority. One ambiguity in previous paragraph 4 was that it was not clear whether a Member State had to vote against a measure to be able to later invoke the possibility in paragraph 4 or even despite voting for a measure, the Member State had the right to use national law.¹⁷ Another related vagueness was whether paragraph 4 could be invoked only in case of decisions adopted by qualified majority or even for decision adopted by unanimous vote. The deletion of reference to qualified majority did away with all these ambiguities. The amended text makes it clear that regardless of how a Member State votes, it can invoke paragraph 4.¹⁸

Another important difference is that the possibility of applying national law under paragraph 4 will not any longer be limited to decisions by the Council, but can be applied even in case of acts adopted by the Commission. The acts of the Commission are in principle for the implementation of rules decided by the Council. Thus, the Commission should not normally adopt stronger or weaker environmental measures than what the Council has decided. However, the Commission may sometimes find itself in a situation where it should adopt detailed measures that probably do not correspond to the spirit of the Council's higher ambitions. In such cases, the need for invocation of paragraph 4 may arise.

One of the issues which gave rise to many academic debates after 1987 was whether "to apply national provisions" in paragraph 4 should be interpreted as a right for the Member States to *continue applying* existing national environmental rules or even to *introduce* stronger rules after the adoption of harmonising legislation by the Community.¹⁹ The amended paragraph 4 and a new paragraph 5 have put an end to the differences of opinions by using both "to apply" and "to introduce". Paragraph 4 uses "to apply national provisions", which refers to existing laws.²⁰ It is also explicitly provided in the new paragraph 4 that the Member State which invokes this paragraph shall not only notify the Commission of the national provisions but also the grounds for maintaining them. In those few cases since 1987 that Member States (Germany, Denmark, the Netherlands and Sweden) have invoked paragraph 4, notification has always been accompanied by detailed explanation of the grounds for application. The addition at the end of the amended paragraph 4 seems to be an effort to put down in this article what has already been practised.

The possibility of *introducing* national provisions after the adoption of Community harmonising measures is now provided in a new paragraph 5, which reads:

¹⁷ For discussion, see Mahmoudi, *EU:s miljörätt*, 1995, p. 187.

¹⁸ In a commentary on the present wording of Article 100a (4), Krämer argues that in case of unanimous decisions, Paragraph 4 cannot be applicable. Krämer, 1995, p. 108.

¹⁹ *Ibid.*, p. 186.

²⁰ The possibility of applying existing provisions or introducing new ones in case of environmental measures adopted on the basis of Article 130s already existed in Article 130t.

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

It is obvious that unlike the case of “maintaining” existing national provisions in paragraph 4, introduction of new national measures will be subject to the fulfilment of a range of several difficult conditions. An important requirement is that the specific environmental problem should be new and not known at the time of the adoption of harmonising measure. Another difficult requirement is that “scientific *evidence*” should support the application of national provision. Various drafts for this provision referred to “scientific fact” and “scientific proof”. It was only in the final text that “scientific evidence” was adopted. The changes are obviously not of editorial significance. The fact that there should be *new* scientific evidence underlines the significance of presenting scientific facts which were not available during negotiations for the adoption of the Community measure. The change from “fact” or “proof” to “evidence” shows that it is not the question of indisputable scientific proof. Such requirement would have been in contradiction to the precautionary principle as laid down in Article 174 (2) [former Article 130r (2)].

Precautionary principle means that preventive measures shall be taken even if there is not sufficient convincing evidence with respect to the link between activity and damage. “Scientific evidence” makes sense if it is consistent with precautionary principle. There should be sufficiently comprehensive scientific data to be able to invoke a new environmental problem, but it is not necessary to have consensus among scientists. “Scientific evidence” does not put the same high requirement as “scientific proof” as regards the conclusiveness of the facts, but the requirement is still high enough to make the invocation of paragraph 5 rather difficult.

The requirements of a *new* environmental problem and new environmental evidence exclude the possibility for a Member State to invoke the new Article 95 [former Article Article 100a] for introducing a new national environmental act after failing to get response for its environmental requirement during the Community enacting procedure. The whole idea with all these requirements seems to be that paragraph 5 will be used only in very rare and exceptional cases, if at all. Such interpretation is in consonance with the main objective of the new Article 95, which is the completion and well functioning of the internal market. Reference to “without prejudice to paragraph 4” apparently denotes that even if a Member State has already invoked paragraph 4 to continue applying national provisions with respect to a certain product, there is no hinder to adopt a new more stringent law to meet a new environmental problem related to the same product.

As before, it is the Commission that will have the last word with respect to approval or rejection of national provisions invoked according to paragraphs 4

and 5. The new paragraph 6 describes in more details the role of the Commission in this respect. It reads:

The Commission shall, *within six months of the notifications as referred to in paragraphs 4 and 5, approve or reject the national provisions* involved after having verified whether or not they are a means of arbitrary discrimination or a disguised restriction on trade between Member States *and whether or not they shall constitute an obstacle to the functioning of the internal market.*

In the absence of a decision by the Commission within this period the national provisions referred to in paragraphs 4 and 5 shall be deemed to have been approved.

When justified by the complexity of the matter and in the absence of danger for human health, the Commission may notify the Member State concerned that the period referred to in this paragraph may be extended for a further period of up to six months. (Italic text is new.)

A comparison between the previous text and the new text shows several important differences with respect to the role of the Commission. One such difference is that the second paragraph of Article 100a (4) was formulated as “The Commission shall *confirm* the provisions involved....” [Italic is added] The legally insufficient term “confirm” is now changed in Article 95 (6) into “approve or reject”. This makes it adequately clear that the role of the Commission is not to *register* the notification of Member States as in the case of more stringent national measures based on Article 176 (former Article 130t), but to make a decision to *authorise* or *forbid* the application of national provision.²¹

Another difference is imposition of a time limit on the Commission to make its decision for approval or rejection of national provision. The time limit of six months, which in certain cases can be prolonged to maximum one year, is a reasonable requirement. The amendment has been necessary and should be considered welcome. The Swedish notification for application of national law concerning creosote has been under the consideration of the Commission since 1995. No decision as to the approval or rejection of Swedish provision has been taken yet (October 1999).²²

The approval or rejection of national provisions should be preceded, as previously, by verification that they are not means of arbitrary discrimination or a disguised restriction on trade between Member States. A new addition is that

²¹ This point is elaborated by Advocate General Antonio Saggio in his Opinion in Case C-319/97, *Prosecutor v. Antoine Kortas*, point 26 (not yet reported).

²² The issue of the time limit that the Commission may need in order to make its decision according to Article 100a (4) [present Article 95] was a core problem in the Kortas Case (see note 21). The Swedish, Danish, French, Netherlands and Austrian Governments expressed the view that the principles of legal certainty and protection of legitimate expectations require that when a long time (in that particular case almost four years) has elapsed since a Member State has notified the Commission, confirmation of national measures by the Commission should be deemed to have been acquired. See judgement of the Court delivered on 1 June 1999, point 30. However, the Court refused this argument and said “Although failure on the part of the Commission to act with due diligence following a notification effected by a Member States under Article 100a (4) may therefore constitute a failure to fulfil its obligations, it cannot affect full application of the directive concerned.” *Ibid.*, point 36.

the Commission shall also ensure that national provisions do not constitute an obstacle to the functioning of the internal market. What is indeed meant by this addition is not so clear. The wording is vague and can easily be invoked by the Commission to reject national measures according to points 4 and 5. The Commission can particularly invoke this addition when the possibility of stopping a national measure on other grounds is not deemed to be great. A guarantee against the Commission's undue application of this addition is that Member States can directly lodge their complaint to the Court. This guarantee, which formerly existed in the last part of paragraph 4, was through the Amsterdam Treaty introduced in an independent paragraph 9.

Paragraph 7 in Article 95, which is a new paragraph, may further elaborate what type of national provision can be adopted. It reads:

When, pursuant to paragraph 6, a Member State is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure.

One controversy in the doctrine has been whether a Member State is allowed to adopt only *more stringent* measures or it can even adopt provisions *derogating* from Community harmonising measures. The stronger view before 1994 was that Article 100a (4) itself spoke only of "to apply national provisions" whereas Article 130t concerning non market-related environmental measures expressly spoke of "maintaining or introducing more stringent protective measures". Thus, by analogy, national provisions under Article 100a (4) had to be stronger but not derogating measures. The EC Court in a case concerning Article 100a (4) in 1994 indicated that a Member State could *derogate* from common environmental measure adopted on the basis of Article 100a (4).²³ The new paragraph 7 thus repeats what is already declared by the Court. If "derogating" here is taken to refer to provisions which differ in both content and form from that of the Community's, the new paragraph 7 is clearly in contravention with the high goals of the Community in establishing an internal market with uniform rules. Combined with the possibility of introducing new national environmental provisions in paragraph 5, this can jeopardise the full functioning of the internal market. It is therefore more logical here to equate "derogating measures" with "more stringent measures". In that case, the content of paragraph 7 is consistent with the Commission's practice before the adoption of the Amsterdam treaty.

Despite comprehensive amendments in Article 100a (4), there are still some questions that are not directly addressed in the revised text. One such issue is whether a Member State that has notified the Commission of its intention to apply a more stringent national provision must wait for the decision of the Commission or it may apply its law in waiting for an answer from that organ.

²³ Case C-41/93 *France v. Commission* [1994] ECR I-1829. Paragraph 24 of the judgement of the Court in this case reads: "As this possibility constitutes a derogation from a common measure aimed at attaining one of the obstacles to the free movement of goods between Member States, Article 100a (4) makes it subject to review by the Commission."

This issue was addressed by the EC Court in Case C-41/93.²⁴ The Court stated that a Member State might apply national provisions that are notified only after the Commission has given its confirmation.²⁵ This position has recently been repeated in Kortas case. The Court reiterated in this case that Member States could not apply national provisions that diverge from the harmonising rules before the Commission has confirmed them.²⁶ Thus the Court practice leaves no doubt about the duty of the Member States to abstain from applying their stricter environmental provisions as long as the Commission has not made its decision to approve or reject it. This is true with respect to both measures notified before the entry into force of Amsterdam treaty and those notified after it. It would have nevertheless been clarifying if a provision to that effect had been inserted into Article 95.

4 Conclusion

When it comes to the environment, the amendments in law are not interesting only from the perspective of techniques used and consequences of the changes for related organisations and individuals. The main question is always whether the changes are for the better or for the worse with respect to the protection of the environment. The Amsterdam Treaty undoubtedly introduces the most comprehensive amendments since 1987 to the environmental provisions of the EC constitution. As regards the protection of the environment as such, these amendments generally reflect the outstanding place that environmental protection has received within EU. This in itself is a political response to the public pressure to do more for the environment. It is completely understandable that principle of sustainable development and requirements of high level of environmental protection and integration of environmental requirements into other EC policies shall rightly be placed among the basic introductory principles governing all activities of the European Union. It is likewise natural that the Parliament, which is probably the greenest of all Community organs, shall have equal power with the Council to decide on the majority of the Community environmental measures that are based on Article 175 (1) [former Article 130s (1)]. All these amendments are very positive for the betterment of the environment in Europe.

Principle of sustainable development has finally entered into the Community constitution. The next step is to give a concrete content to the principle through a document (resolution, declaration, decision) adopted by the European Council or Council of the Ministers. Such document shall, in addition to all main rules derived from that principle such as relations between trade and the environment, between EU and third states and particularly developing countries, between resources and wastes, spell out the role of the Community and the Member States for the realisation of a sustainable development.

²⁴ *Ibid.*

²⁵ *Supra*, note 21, points 29 and 30.

²⁶ *Ibid.*, point 27.

Principle of integration of environmental requirements in other Community policies, which was introduced in the Community constitution in 1987, has despite many efforts by the Commission remained empty words. The Intergovernmental Conference has only “noted” in a declaration appended to its Final Act that the Commission has undertaken to carry out environmental impact assessment (EIA) for those Community measures which can be expected to have significant impact on the environment. The next step shall be to *require* the Commission to carry out EIA. Given that such assessment entails substantial costs, it can be limited in a preliminary period to those measures that are expected to have significant impact on the environment. In the long run, it should be extended to all Community measures. In this case, the principle of integration will make sense. In short, one can conclude that amendments in environmental principles and in Article 130s [present Article 175] are positive and progressive.

One can perhaps be less enthusiastic about the amendments in Article 100a [present Article 95]. At face, the amended text can set an environmental activist’s mind at rest that it will be possible for any Member State to go as far as it wishes. In reality it is not so, and it shouldn’t be so either. The amendments have certainly thrown light on several legal ambiguities such as when, by who and how the possibility of continuous application of an existing more stringent national environmental provision or introduction of a new stricter national law can be used. But by trying to transform Article 100a (4) from an exception to a rule, the authors of the Amsterdam Treaty have not only produced a badly drafted text, but also undermined the whole idea of a well functioning internal market, which is by definition the basic objective of the European Union prior to all other objectives. It is more than obvious that the possibility of keeping national law or introducing a new national law has an inherent contradiction with having a unified market with similar laws for all.

Paragraph 4, both when it was introduced for the first time in 1986 and when it was amended at the Intergovernmental Conference in 1997, was adopted as a last minute compromise. It shows that there is not much support for this provision among Member States. It also shows that paragraph 4 in the eyes of the majority of the Member States and particularly the Commission and the Court can at best be tolerated as an exception. It is clear that the possibility of applying existing national laws or introducing new ones is in itself inconsistent with a unified market with the same rules for all. It is therefore reasonable that paragraph 4 keeps its character as an exception.

Since paragraph 4 was an exception, the Commission took as a rule a high level of protection in its proposals based on Article 100a. It hoped that after the adjustment of the Council, what was left of the proposal would be anyhow high enough not to necessitate the invocation of paragraph 4. Moreover, the Council in the majority of the cases adopted the measures based on Article 100a by unanimous vote. This meant that even less environmentally ambitious Member States accepted a rather high level of protection in a spirit of solidarity and in order to work out a consensus. One possible effect of the amendments in Article 100a can be that not all Member States will be prepared to work for consensus and unanimous vote in the future. They may argue that those who are not

satisfied with the level of protection can easier than before invoke paragraph 4 even if the reality may be completely different. This can lead to the adoption of less stringent environmental measures for a greater part of the Community.

The possibility of invocation of paragraph 4 by those who insisted on these amendments (including Sweden and particularly Denmark) has not increased. It is possible that in future paragraph 4 will be used more frequently than paragraph 5. It is therefore important that a Member State that is not satisfied with the Commission's proposal, adopts necessary legislative measures before the Commission's proposal become Community act. It is not any longer the question of showing that national measure is not means of arbitrary discrimination or disguised restriction on trade. The Commission shall be convinced that a national provision will not constitute an obstacle to the functioning of the internal market, something that certainly invites further elaboration by the EC Court.

The question is then whether the amendments in Article 100a will indeed contribute to a better protection of the environment in the whole Europe or even in some Member States. One possibility is that the Intergovernmental Conference has responded to the immense public pressure for increased concrete environmental undertakings and has taken a step backward with respect to the attainment of the main objective, *i.e.*, the internal market.

Another possibility is that the amendments have been considered, at least by the more influential States, as cosmetics which will not change anything since the Commission may anyhow stop most of the efforts to apply more stringent national provisions. In this case, the changes would probably lead to the adoption of Community measures with lower level of protection. The reason is the false impression that the Member States can easier than before go their own way. The environmentally less ambitious Member States can argue that there is no longer any reason to work for consensus. At any rate, the amendments in Article 100a, at the same time that they clarify some ambiguities will disturb the established routines of the Community institutions and Member States with respect to market-related environmental measures.