Environmental Protection, Economic Conflict and the European Commuuity

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The predominant objectives of the European Community are economic, one of these being the creation of a common market and, ultimately, full integration of the economies of Member States. Although the Community has elaborated an environmental policy, the policy has been largely conditioned by the restricted mandate granted to the Council of the Community, which is to issue directives "for the establishment or functioning of the common market". Environmental initiatives have had to be justified on the basis that they remove impediments to the creation of a common market and, consequently, the evolution of an environmental policy has been controlled by the economic agenda of the Community. This, as the author points out, may nevertheless work to the advantage of the environment where the interests of the environment and of economic integration coincide. When the added factor of the economic self-interest of Member States is taken into account, an interesting dynamic develops the outcome of which is often politically contingent. The author examines the interplay between environmental policy, economic integration, and the economic self-interests of Member States and, supported by illustrations, presents the various outcomes which this dynamic has produced.

Les objectifs principaux de la Communauté européenne sont à caractère économique, l'un d'eux visant la création d'un marché commun et, ultimement, la complète intégration économique des États membres. Bien que la Communauté ait élaboré des politiques environnementales, ces politiques ont grandement été conditionnées par le caractère restrictif du mandat dévolu au Conseil de la Communauté, lequel consiste à émettre des directives pour l'établissement ou le fonctionnement du marché commun. Les initiatives en matière d'environnement ont été justifiées par le fait qu'elles pouvaient contrer certains obstacles à la création d'un marché commun et, en conséquence, le développement de politiques environnementales a été soumis au contrôle économique de la Communauté. Ceci, note l'auteur, peut constituer un avantage pour l'environnement lorsque les intérêts propres à l'environnement et à l'intégration économique coïncident. Lorsque le facteur additionnel de l'intérêt individuel États membres est pris en considération, une intéressante dynamique se développe, et les résultats de cette dynamique reposent souvent sur des données purement politiques. L'auteur étudie cette relation entre politiques environnementales, intégration économique et intérêt individuel des États membres et, à l'aide d'illustrations, présente divers résultats produits par cette dynamique.

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Synopsis

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This article examines the dynamics of the inter-relationship between the environmental policy of the European Community, the movement towards economic integration in the Community and the desire of Member States to protect their individual economic interests. It seeks to demonstrate that:

a) there is an affinity between economic integration policy and environmental policy which arises from the origins and legal status of the latter, and the fact that both types of policy face a common obstacle in the form of the economic self-interest of individual Member States;

b) while both types of policy are prone to fall victim to the economic self-interest of Member States, of the two, economic integration is better placed to overcome this obstacle;

c) the fortunes of environmental policy can become dependent on, and subordinated to, those of economic integration policy;

d) despite the affinity which exists between them, the mutual interests of economic integration policy and environmental policy do not always coincide, so that progress in integration policy can, as a result, represent a setback for environmental protection;

e) conversely, where the mutual interests of economic integration and the environment do coincide, the latter may benefit from its association with the former.

Background

The European Community[1] comprises a group of nations with predominantly economic objectives, in particular that of economic integration. However, in 1972, at a meeting of the Heads of State or Government of the Member States in Paris, it was declared that the Community should have an environmental policy.[2] Nearly 16 years later the Community has seen three environmental "action programmes" and a fourth is just beginning.[3] Policy initiatives have been taken across a whole range of environmental issues, including water, air and noise pollution, the management of waste, land use planning, and the protection of wildlife and the countryside.[4] The Community has also developed cross-sectoral policies on matters such as environmental impact assessment,[5] cross-media pollution[6] and the need

[1]It is now customary to refer to the "European Community" although there are, in fact, three Communities: the European Economic Community (EEC), the European Atomic Energy Community (EURATOM) and the European Coal and Steel Community (ECSC). The EEC and EURATOM were established by two different treaties signed in Rome in 1957, while the ECSC was established by a treaty signed in Paris in 1951. For environmental purposes, it is the Economic Community which is of most importance and references in this paper to the *Treaty of Rome* are, therefore, to the treaty establishing this Community.

[2]A definition of the environment, used by the European Commission, is "those elements which in their complex inter-relationships form the framework, setting and living conditions for mankind, by their very existence or by virtue of their impact". See N. Haigh, *EEC Environmental Policy and Britain — An Essay and a Handbook* (London: ENDS, 1984) at 3.

[3]The first programme was adopted in November 1973 (OJ C112), the second in May 1977 (OJ C139), and the third in February 1983 (OJ C46). The fourth programme, to run from 1987 to 1991, was adopted by the Commission in October 1986 (COM (86), 485 final), and approved by the Council of Ministers in March 1987. See (1987)146 ENDS Report at 22 (ENDS Reports are published monthly by Environmental Data Services Limited, London). Formal adoption by the Council must, however, wait for the delivery of United Kingdom and European Parliaments' opinions.

[4]For details of the substance of these policies see, *inter alia*: N. Haigh, *EEC Environmental Policy and Britain*, 2d ed. (London: Longman, 1987); S. Johnson, *The Pollution Control Policy of the European Community* (London: Graham & Trotman, 1983); Commission of the European Community, *Ten Years of Community Environment Policy* (Brussels: Commission of the European Community, 1984). For a brief overview see J. Minor, "Environmental Law: the European Dimension" in D. Hughes, *Environmental Law* (London: Butterworths, 1986) c. 4.

[5]A Directive (85/337 OJ L175/40) on "The Assessment of the Effects of Certain Public and Private Projects on the Environment" was adopted in 1985, five years after it had been originally proposed. For a discussion of the Directive see N. Haigh, "Environmental Assessment — The EEC Directive" (1987) J.P.L. 4. The Directive came into force on 3 July 1988.

[6]See the fourth environmental action programme, *supra*, note 3.

for environmental policy to be integrated into the policies of the Community and its Member States in all areas.

Within the Commission of the European Community, the environment now has its own Directorate-General[7] which, together with its predecessor,[8] has been responsible for numerous legislative proposals, well over a hundred of which have now found their way into Community law. Environmental policy is, therefore, rightly seen as an important element in the make-up of the European Community.

Yet, the environmental programme claims a mere 0.06 per cent of the Community's budget.[9] This is because the institutions of the Community have no role in the implementation and administration of the policy. That is the responsibility of Member States. The main function of the Community is to agree on common policies and then legislate, with a view to having these policies put into effect by the Member States.[10] For this reason, there is a tendency for the Community to measure the success of environmental policy in terms of the number of legislative proposals made and passed into law. This conveniently ignores the more difficult question of implementation, where serious obstacles remain.[11]

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[7]The Commission is the administrative arm of the Community. It has considerable powers, including the right to make proposals for new policies and legislation. Directorate-General XI (DG XI) deals with Environment, as well as with Consumer Protection and Nuclear Safety.

[8]The predecessor to Directorate-General XI was the Environment and Consumer Protection Service of the Commission.

[9]See D. Briggs, "Environmental Problems and Policies in the European Community" in C. Park, ed., *Environmental Policies: An International Review* (London: Croom Helm, 1986) 105 at 138.

[10]The Community also has research and experimental functions and may issue advice and perform an educative role in relation to environmental matters.

[11]While Directives (the main legal instrument used for environmental policy) are legally binding on Member States, their implementation is the responsibility of each Member. Where implementation will be costly or otherwise disadvantageous for a Member State, there is a tendency to delay or only partially implement, or otherwise seek to circumvent the Directive. The Community has no effective method of "policing" implementation and it lacks the resources to establish one. As a result, an enforcement deficit has arisen. The Community has now recognized this: see the fourth environmental action programme, *supra*, note 3, which places great importance on more effective enforcement and makes specific proposals. The House of Lords Select Committee on the European Communities has, on a number of occasions, criticized weaknesses in implementation. See, for example, their *Report on the Fourth Environmental Action Programme* (8th Report 1986/87 HL 135) at 21, para. 79, where they comment that, "[i]mplementation of environmental law already made should be given high priority; for law which is not implemented undermines confidence in the Community and the law which it creates. . . . [T]here are signs of a growing gap between standards of implementation by some Member States and the others . . . ." See also Haigh, *supra*, note 2 at 23.

Of the three main legislative means available to the Community,[12] Directives have, almost invariably, been used to enact environmental policy. Directives are legally binding on Member States as to the result to be achieved, but the form and the method of implementation remains within the discretion of each Member.[13] This allows for considerable flexibility in the selection of the machinery of implementation that best accords with the particular national system. Implementation may, for example, be achieved by means of an administrative direction, rather than primary or even subordinate legislation.

I. Environmental Policy and Economic Integration

The environmental policy of the European Community has a close affinity with economic integration policy. Two reasons, in particular, account for this. The first concerns the origins and legal status of environmental policy, while the second relates to the relationship which each bears to the economic self-interest of Member States. Dealing with origins and status first, at the time the European Communities were formed in the 1950s, the environment was not thought of as a subject requiring systematic international cooperation. Consequently, the original treaties contained no reference to matters of the environment. The legal basis for Community environmental policy was, therefore, until very recently, rather tenuous.[14] It relied upon two articles of the *Treaty of Rome*,[15] which established the Economic Community, namely Articles 100 and 235.

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[12]These are Regulations (which are directly applicable law in the Member States), Directives and Decisions (which are binding upon those to whom they are addressed).

[13]Directives are *not*, therefore, directly applicable. They require implementation by Member States within a given period. Though Directives are not directly *applicable* under the *Treaty of Rome*, the European Court of Justice has decided that they may be capable of having direct *effect*, thus giving citizens the right to enforce a Directive in their national courts. See Case 26/62, *Van Gend en Loos* v. *Nederlandse Administratie der Belastingen*, [1963] E.C.R. 1; Case 41/74, *Van Duyn* v. *Home Office*, [1974] 2 E.C.R. 1337; and Case 8/81, *Becker* v. *Finanzamt Münster-Innenstadt*, [1982] 1 E.C.R. 53. The need to enforce a Directive in the national courts will only arise where a Member State has failed in its legal duty to implement it, either in whole or part. Thus, where a court enforces a Directive, the ruling also amounts to a finding that the Member State has failed to carry out its legal obligations. It is now clear that Directives are capable only of "vertical" direct effect — *i.e.* a citizen may only enforce a Directive against a Member State. "Horizontal" direct effect, involving the reliance on a Directive by one individual when bringing an action against another, is not possible: see Case 152/84, *Marshall* v. *Southampton Health Authority*, [1986] 2 W.L.R. 780.

[14]The idea of amending the *Treaty* in order to make environmental policy explicit was, at the time, dismissed as unnecessary.

[15]25 March 1957, 298 U.N.T.S. 3.

Article 100 reads, in part:

> The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

Article 235 reads:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

The argument used to justify the implementation of environmental policies under Article 235 was rather weak, and the provision is not relied upon exclusively. The difficulty is that, in order for the article to be used, environmental protection must be "one of the objectives of the Community". This is taken to mean objectives set out or referred to in the *Treaty of Rome.* Yet the Treaty contained no explicit reference to environmental matters whatsoever. In order to overcome this, it was necessary for the Commission to assert that the essentially economic aims of the Community, which are set out in Article 2, in fact comprehended environmental issues. The reasoning used here was that the promotion of "balanced" economic expansion and the raising of living standards referred to in Article 2 contained qualitative, as well as quantitative, elements, the former including protection of the environment.[16]

Article 100 was taken to authorize Directives on the environment on the basis that the policies concerned "directly affected the establishment or functioning of the common market". The underlying argument here was that a uniform environmental policy was necessary in a common market if industry and commerce were to compete on equal terms. Failure to agree on common policies would open the door to divergent national environmental measures, leading to unequal production costs and a consequent distortion of competition. Such measures might also amount to non-tariff barriers to trade, in the form of measures having an equivalent effect to quantitative restrictions.[17]

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[16]Doubts about the correctness of these arguments, and consequently their legality, have been raised by the House of Lords Select Committee on the European Communities (22d Report 1977/78). See also J. Usher, *European Community Law and National Policy — The Irreversible Transfer?* (London: George Allen & Unwin, 1979).

[17]See Articles 30-32 *Treaty of Rome.*

Once accepted, these arguments clearly brought environmental policies which "directly" affected the common market within the article.[18] Most environmental Directives have, therefore, been based on Article 100 together with Article 235.

The fact that the Community's environmental policy was conceived of and justified in these essentially economic terms is of considerable significance. It demonstrates clearly the close affinity which has, perforce, developed between environmental policy and the preponderant goal of economic integration of the European Community.

The inadequate legal foundations of the Community's environmental policy have now been rectified by the *Single European Act*[19] which amends the *Treaty of Rome.* Article 130R of the amended Treaty establishes environmental protection as an explicit policy of the Community, and Article 130S provides power to implement it. The inclusion of these measures, which had long been called for,[20] in the *Single European Act*, has been heralded as the "coming of age" of the Community's environmental policy.[21] There is no doubt that they represent a significant development. In practice, however, Article 100A of the amended Treaty will most likely have the greatest impact on the Community law-making process.[22]

Article 100A provides, in part, that:

> 1. ... The Council shall, acting by a qualified majority on a proposal from the Commission..., adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
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> ...
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> 3. 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. [emphasis added]

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[18]The House of Lords Select Committee, *supra*, note 16 has also criticized the use of Article 100 where the Directives concerned only *indirectly* affect the functioning of the Common Market, thus raising doubts about the legality of a number of Community laws.

[19]The *Single European Act* was signed in February 1986 but, due to a delay in ratification by the Irish Government, did not come into force until 1 July 1987.

[20]The call has come from lawyers, environmentalists and politicians alike. See, for example, E. Grabnitz & C. Sasse, *Umweltkompetenz der Europaaischen Gemeinschaften* (Berlin: Erich Schmidt Verlag, 1977) at 77.

[21]See P. Kromarek, "The Single European Act and the Environment" (1986) 1:1 European Env. Rev. 10 at 12.

[22]Where the establishment of environmental protection as an explicit Community policy may be of significance is in the European Court of Justice. Here, it is possible that the interpretation given to specific Community laws by the Court may be influenced by the express recognition given to environmental policy in Articles 130R, S and T.

What makes the provision such a potentially powerful tool for environmental policy is that, unlike under Article 130S, proposals brought under Article 100A may be adopted by a *qualified majority* of the Council.[23] As a result, contentious proposals which cannot be passed unanimously under Article 130S may instead be brought under Article 100A, provided that they are seen by the Commission as contributing to the "establishment and functioning of the internal market". Any doubt that this Article can be used in cases where use of Article 130S would also be possible is removed by the specific reference to environmental protection in paragraph 3. Already, the Commission has indicated that seven draft Directives on environmental issues, which have been obstructed by the unanimity requirement of Article 130S, may be brought before the Council under Article 100A.[24] As we shall see later, this has already happened in one case.[25]

Although the role of environmental policy receives express recognition in Article 100A, the goal of economic integration remains at the heart of this article. Despite Articles 130R and 130S, it is clear that the relationship between economic integration and environmental policy in the European Community is likely to continue in the coming years.

The second factor contributing to the close affinity between environmental policy and economic integration, is that they share a common obstacle to their progress. Measures designed to harmonize and integrate the laws of Member States, and/or to promote economic integration, inevitably require the surrendering of certain competitive advantages by some States. They also bring with them costs and benefits which fall disproportionately on Member States. Both environmental protection policy and economic

[23]Under the qualified majority voting system, the voting power of each Member State is basically determined by its population, with adjustments being made to safeguard the interests of smaller countries. Thus, France, Italy, United Kingdom and West Germany have 10 votes each, Spain has 8 votes, Belgium, Greece, Netherlands, Portugal have 5 votes each, Denmark and Eire have 3 votes each and Luxembourg has 2 votes. A simple majority is not sufficient — at least 54 of the 76 available votes must be obtained. The effect of this is that at least seven Member States must support a proposal before it can be adopted. It also means that a large country, such as the United Kingdom, will need at least two, and possibly four, allies before it can prevent a policy from being adopted.

Merely because qualified majority voting is available does not mean that it will be used. Previous experience has shown that normally the Council only adopts policies which, after lengthy negotiation, command unanimous support. However, the use of qualified majority voting is increasing, and there is reason to believe that its use for Article 100A may become more routine. This is partly because all Member States, as recently as 1986, signed the *Single European Act* which provides for qualified majority voting, and partly because, as explained below (see text accompanying note 85), para. 4 of Article 100A provides alternative courses of action for Member States who are outvoted.

[24]See (1987) 146 ENDS Report at 22-23 and (1987) 149 ENDS Report at 23.

[25]See below, text accompanying notes 84-85.

integration policy have, therefore, to come to terms with the short term economic self-interests of individual Member States, which often operate powerful constraints on their progress.

Despite their close affinity, however, it would be wrong to conclude that environmental policy and economic integration policy command the same influence and status in the Community. Because greater economic integration is perceived by all Member States to be in their mutual long term economic interests, economic integration policy is clearly in a stronger position than environmental policy to overcome opposition from Member States trying to protect their short term economic position.

This factor, taken together with the legal and historical dependency of environmental policy on the contribution it can make to economic integration, has important implications for environmental protection. On one level, it may result in the interests of environmental policy being lost in a purely economic argument between the demands of economic integration policy and those of the economic self-interest of Member States. Where this occurs, environmental policy becomes subordinate, and gains and losses for the environment become secondary and incidental. At another level, the effect may be to lock the environment into a policy framework which has been designed to promote economic integration, rather than environmental protection. This may have a decisive impact on the form and content of important environmental policy initiatives. For, as is demonstrated below, the demands of economic integration and environmental protection are not always coterminous and may even be contradictory. Policy initiatives combining both environmental protection and economic integration objectives can, therefore, progress in ways which satisfy the needs of economic integration but which, for the environment, constitute a set-back. One particular example of this is that, while environmental policy demands stringent emission standards, all that is needed to satisfy the requirements of economic integration is that standards be uniform (or, at least subject to a uniform *maximum* requirement, so that industry knows what it has to do to be granted free access to the whole of the European market).

More positively, where the interests of economic integration policy and environmental policy are in harmony, the potential exists for the latter to benefit from its association with the former. In particular, the economic integration aspects of the policy may enable it to gain sufficient support to prevail over the economic self-interests of Member States in circumstances where the environmental benefits alone would have been insufficient to achieve this.

II. Illustratious of the Iuter-relationship

Numerous examples exist which could be used to illustrate the complex dynamics of the inter-relationship between environmental policy, economic integration policy and the economic self-interests of Member States. For reasons of topicality, both in Europe and in the North American context, the examples of water pollution and air pollution, specifically the problem of "acid rain", have been selected for consideration. No attempt will be made to assess the effectiveness of the policies examined, although some conclusions may be drawn from what will be said.

A. Water Pollution — the Dangerous Substances in Water Framework Directive

Community action to control water pollution has taken several forms.[26] One approach has been to try to improve the quality of different categories of water, such as drinking water, water used for bathing and fresh water supporting fish. Another has been to attack different sources of pollution directly through, for example, Directives on detergents and on waste from the titanium dioxide industry. A third method, which contains elements of each of the first two, is revealed in the *Dangerous Substances in Water Framework Directive*[27] of 1976. This Directive, which applies to all inland, coastal and territorial waters,[28] reflects a compromise between the United Kingdom and the then eight other Community members, achieved following more than a year of sometimes acrimonious disagreement and debate. The Directive sets a framework for the elimination or reduction of pollution of water by highly dangerous substances. The substances concerned are set out in two lists in an Annex to the Directive which have become known as the "black list" and "grey list", reflecting their relative dangerousness. The black list includes particularly toxic, persistent and bio-accumulatable substances, such as mercury, cadmium and carcinogenic compounds. The objective here is the complete elimination of water pollution by these substances. The grey list contains substances which are considered to be slightly less hazardous to the environment, such as lead, zinc, cyanide and ammonia.

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[26]For details, see Haigh, *supra*, note 2, c. 5 & 7 and note 4, c. 4.

[27]76/464 OJ L129. For a detailed discussion, see J. Farquhar, "The Policies of the European Community Towards the Environment: The Dangerous Substances Directive" (1983) J.P.L. 145.

[28]Groundwater is covered in a complementary Directive: 80/68 OJ L20.

The contentious element in the proposal for this Directive concerned the regime of control to be adopted in relation to black list substances. The Commission proposed that "limit values" should be set, in daughter Directives,[29] for each substance on the list. A "limit value" specifies the maximum allowable emission of a substance into the water by industry.[30] Though limit values must not be exceeded, a Member State may impose emission standards which are more stringent than those specified by the limit values.

The United Kingdom objected to this method. It proposed instead that "water quality objectives" be applied for the discharge of individual substances. A "water quality objective"[31] prescribes the level of water pollution which must not be exceeded, without specifying any maximum level of discharge *into* the water by industry. Member States would set emission standards in relation to each discharge which were necessary to meet the prescribed quality objective in the receiving water.

The compromise eventually agreed upon was that the Community would use both methods of control, but with limit values being regarded as the preferred regime (see Table 1). The result was that the United Kingdom alone adopted the quality objective approach.[32]

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[29]This is a term used to describe later Directives which seek to apply the principles agreed in the framework in specific circumstances or in relation to specific pollutants or sources of pollution.

[30]A "limit value" laid down in a Community Directive expresses the maximum permissible emission level for a given pollutant from any fixed installation anywhere in the Community. This limit value is binding on each Member State, but not on the operators of individual installations. Each Member State must, therefore, implement the Directive containing the limit values by creating "emission standards" in their domestic laws. These emission standards may either be equal to or more (but not less) stringent than the limit value. Further, provided, in each case, the standard set is not less stringent than the limit values, these emission standards may also vary from plant to plant, according to local circumstances or additional criteria laid down in domestic law.

In light of this, Community-wide limit values can never be described as imposing "fixed" or "uniform" emission standards on installations. The most that can be said is that the Community has a fixed or uniform *maximum* permissible emission level (or a fixed or uniform *minimum* standard).

[31]The term employed is water quality *objectives*, although it is more correct to refer to *standards*. This is because in an annex to the First Action Programme, the Community defined *standards* as prescribing, with legally binding force, the levels of pollution not to be exceeded, and *objectives* as being more in the nature of goals. It is clear that what is intended in the Directive are, therefore, *standards*.

[32]This approach also requires a Member State to satisfy the Commission regularly that the objectives (standards) set are being met.

In relation to grey list substances, all Member States agreed to establish their own water quality objectives,[33] to be achieved by the setting of emission standards for each substance.

TABLE 1
The *Dangerous Substances in Water Framowork Diroctivo* 1976

Black List Substances	Grey List Substances
Aim: Elimination of Pollution	*Aim:* Reduction of Pollution
Preferred control method: Prescribed "limit values" for emissions. Emission standards to be imposed on all discharges, the same as or more stringent than the "limit values" contained in daughter Directives.	*Control method:* Self-set "water quality objectives" from which limits on emissions must be derived. Emission standard to be set in relation to each discharge which is necessary to meet, in the receiving water, the "water quality objectives" determined by individual Member States.
Alternative control method: Prescribed "water quality objectives" from which limits on emissions must be derived. Emission standard to be set in relation to each discharge which is necessary to meet, in the receiving water, the "water quality objectives" laid down in daughter Directives.	

So far, the Directive has given rise to three daughter Directives — two on mercury and one on cadmium.[34] Progress has been, by anyone's standards, disappointingly slow.[35]

[33]But these water quality objectives were set in accordance with existing Community Directives — the implication being that the Community may decide, at some future date, to lay down its own objectives. In fact, the Commission has now proposed just such a Directive to contain quality objectives for chromium in water.

[34]These are: 82/176 OJ L81/29 and 84/156 OJ L74/49 on mercury, and 83/513 OJ L291/1 on cadmium.

[35]Note, however, that black list substances not yet covered by daughter Directives are subject to the controls of the grey list regime.

The two different approaches to pollution control contained in this Directive reflect differing philosophies concerning environmental protection. Advocates of the limit value method argue that all pollution[36] is undesirable or cannot be assumed to be harmless, and that reductions should be made whenever and wherever possible. In contrast, the quality objective approach is more pragmatic, confining itself to pollution which caues identifiable harm.

Genuine differences of opinion also exist concerning the environmental benefits that might be expected to flow from the adoption of either approach.[37] The proponents of limit values point to their easy application and verification and to the fact that such measures are directed at the very source of the pollution. Those favouring quality objectives argue, conversely, that they deal with the problem of water pollution itself, rather than with activities which may not be damaging at all to the environment. Using this approach, finite resources can be concentrated where they are most needed and where the most effective contribution can be made to environmental protection. Indeed, its proponents argue that in heavily polluted areas determining emission standards for each discharge by reference to water quality objectives can lead to stricter controls than would apply if a limit value approach had been used.[38] As well, unlike limit values, the use of quality objectives encourages industry to locate where least environmental damage will be caused, thereby reducing costs.

Whatever the relative merits of the two approaches in environmental terms, it is clear that at the heart of the dispute lay economic considerations. The insistence of the United Kingdom on the inclusion of quality objectives in the Directive was clearly motivated by reasons of economic cost and economic self-interest. The quality objective approach allows for considerable flexibility in the emission standards to be imposed on industry in individual cases. In particular, largely for geographical reasons, in many locations in the United Kingdom, quality objectives can be met by very generous emission limits involving little or no abatement costs for the industries concerned.[39] In this way, industrial costs can be minimized, with consequent benefits for the national economy. For the other Member States who do not enjoy the same geographical advantage, the quality objectives approach did not have the same economic attractions.

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[36]Use of the word "pollution" here, however, can be said to beg the question, and raise difficulties of definition. In the case of water, unless all discharges are to be regardcd as "pollution", then evidence of some danger to the environment must exist before it can become appropriate to use the word.

[37]See Haigh, *supra*, note 2, c. 4 & 5, particularly at 33-36.

[38]It is important to remember, however, that the limit value approach does not prevent Member States from imposing more stringent emission standards, if they wish.

[39]This is discussed in more detail below, in text preceding note 90.

Economic self-interest is, of course, the chief enemy of economic integration. The United Kingdom's success in having quality objectives included in the Directive thus dealt a severe blow to any contribution which it could be expected to make in this regard. For, whereas limit values tend to equalize competition, quality objectives encourage distortions, favouring some producers over others. This is particularly unfortunate, bearing in mind that the chief legal justification for the Directive under Article 100 was its contribution to establishing the common market by equalizing competition. It is worth noting, however, that although the United Kingdom was alone in opposing limit values for black list substances, ironically and inconsistently, all Member States agreed that the quality objective approach should be adopted for grey list substances and, further, that each should be free to determine the objectives to be set. The contribution that this made to economic integration is not readily apparent, and the use of Article 100 as the means to implement this part of the Directive must surely have been open to challenge as *ultra vires* and void. The implications for the environment of the compromise solution contained in the Directive are less easy to assess, depending as they do on judgments about the relative merits of the two approaches to pollution control. For the purpose of the present analysis, however, this does not matter. What the history of the disputed draft Directive shows, is that environmental considerations were largely secondary and incidental and that economic considerations were allowed to predominate.

B. Air Pollution and Acid Rain

The control of air pollution has become a matter of international concern. The European Community, and the United Kingdom itself, are both parties to the 1979 *Geneva Convention on Long Range Transboundary Air Pollution.*[40] This Convention, which was conceived within the framework of the United Nations Economic Commission for Europe (ECE), entered into force in 1983. Since then, priority has been given under the Convention to tackling the serious problem of acid rain,[41] which has now reached critical proportions on the European continent. The processes leading to the creation of acid rain are highly complex and still not fully understood.[42] How-

[40]*Convention on Long-Range Transboundary Air Pollution*, 13 November 1979, 18 I.L.M. 1442.

[41]This is more correctly called acid deposition, rain being only one form.

[42]See the discussion in R. Cox & S. Penkett, "Formation of Atmospheric Acidity" in H. Ott & H. Stangl, eds, *Acid Deposition: A Challenge for Europe. Symposium proceedings, Karlsruhe September 1983* (Brussels: Commission of the European Communities, 1983).

ever, it is now well known that they involve the oxidation of compounds of sulphur and nitrogen that are mainly produced by industrial plants (particularly power stations) and vehicle exhaust emissions. Action taken under the Convention has, therefore, focussed upon abating the emission of sulphur compounds — mainly sulphur dioxide (SO_2) and nitrogen oxides (NOx). In July 1985, a Protocol[43] on the reduction of sulphur dioxide was issued, in which signatories undertook to reduce their emissions of SO_2 by at least 30 per cent by 1993, with 1980 as the base line. Neither the United Kingdom nor the European Community signed the Protocol.[44] A draft Protocol on NOx emissions is also under discussion, but no agreement has been reached.

Within the European Community, efforts have been made to develop policies that, while consistent with the ECE Convention, are designed to impose tighter and more specific controls on emissions of SO_2 and NOx. A general approach has been to set air quality standards that prescribe the maximum permissible ground level concentrations of the pollutants, based on what is necessary to protect human health and the environment.[45] However, neither of these Directives have so far proved very effective in reducing pollution. The target date for compliance with the SO_2 Directive was 1 April 1983, yet by 1986 there had been no general change in air quality in the Community, and all Member States continue to have zones in which the limit values are exceeded.[46] Both Directives permit derogation and non-compliance, subject to steps being taken to improve the situation, and the mandatory compliance dates are not until 1993 and 1994 for SO_2 and NOx, respectively.

The Commission has also presented proposals for reducing emissions of SO_2 and NOx from two specific sources: industrial plants and motor vehicles. These proposals will be examined in some detail, for differing reasons. The proposal on industrial plants highlights the difficulties posed for both environmental policy and economic integration by economic self-interest. In contrast, the proposals on motor vehicle emissions demonstrate that the demands of economic integration can sometimes be satisfied while environmental needs remain at the mercy of the economic self-interest of Member States. These latter proposals also provide an example of how the

[43]See UN Economic Commission for Europe, *Transboundary Air Pollution — Effects and Control* (New York: United Nations, 1986) at ix.

[44]In November 1986 the United Kingdom indicated that it might be willing to sign, but it has now confirmed that it will not be doing so.

[45]See Directives 80/779 OJ L229 on SO_2, and 85/203 OJ L87 on NOx.

[46]See Annual Summary Report on the application of the Directive referred to in Economic and Social Consultative Assembly, *European Environment Policy — Air, Water, Waste Management* (Brussels: Economic & Social Committee of the European Community, 1987) at 40-41.

economic integration framework within which some environmental policy initiatives are placed tends to dictate their form and content.

1. Industrial Plants

The only Directive concerning industrial plant emissions actually in force was passed in 1984.[47] This requires certain new plant in key industries to secure authorization prior to commencing operations and imposes a duty on Member States to ensure that the plant operations do not "result in a significant level of air pollution". The Directive also requires Member States to adopt policies for the "gradual adaption" of existing plant to "best available technology" for the avoidance of air pollution, but imposes no time limits.

Although a step in the right direction, the 1984 Directive contains no limit values or air quality standards for any pollutants. Even before it was adopted, it was seen as inadequate, in the light of growing evidence of serious damage to forests, lakes, crops and buildings caused by acid rain, particularly in West Germany. Prompted by the West Germans, the Commission, therefore, made proposals for major and specific reductions in the emission of SO_2 and NOx[48] from large industrial plants over a nine year period.[49] The motives of the West Germans and the Commission were not, however, purely environmental. Domestic political pressures had already prompted the West German Government to introduce measures on a national level involving a substantial reduction in emissions. These measures promised to place considerable economic burdens on West German industry, thus affecting adversely its competitive position. This is recognized in the preamble to the draft Directive which stated that disparities between Member States in "the obligations imposed in respect of large combustion plants ... [were] ... liable to create unequal conditions of competition and this would have a direct effect on the Common Market".[50] The second purpose of the Directive was, therefore, to promote equal environmental protection standards and thus economic integration, or to protect equal standards from erosion, where already in existence. This aspect of the proposals also provided their chief legal justification (they were brought under Articles 100 and 235).

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[47]84/360 OJ L188/20.

[48]Proposals for reductions in dust emissions were also included.

[49]COM 83/704 OJ C49.

[50]See Preamble to the Commission's draft Directive which was appended to COM 83/704, *supra*, note 49 at 2.

The draft Directive, which was amended in 1985,[51] has still not been adopted over five years after it was originally produced. It continues to be the subject of fierce disagreement between Member States. Some of the reasons for this disagreement are worth investigating.

The Commission's proposal was that the total emissions from plant with over 50 megawatts (MW) thermal output (*i.e.* mainly power stations) should be reduced by 60 per cent in the case of SO_2 and 40 per cent for NOx by 1995, with 1980 as the base line.[52] The methods to be used to achieve this reduction were to be left to the discretion of individual Member States. However, in relation to new plant, the proposal laid down mandatory uniform limit values with more stringent limits for plants producing more than 300 MW (large power stations).

Technologically, the proposals created few difficulties.[53] The know-how exists to achieve the emission reductions required and West Germany is currently retro-fitting all of its power stations with the equipment necessary to achieve the reductions in its emissions referred to above. Few now dispute the need for action to be taken to reduce the emissions of sulphur and nitrogen compounds if the damage caused by acid rain is to be arrested. The argument, largely advanced by the United Kingdom, that the link between these emissions and acid rain has not been established and that more research is required has lost all credibility within the Community.

The main obstacle to adoption is, therefore, economic. Member States are concerned that the financial costs of achieving the required emission reductions will have a detrimental effect on their national economy and competitive position. This has resulted in a remarkable and unedifying series of negotiations in which the dimensions of the problem posed by acid rain, and the measures required to effectively combat it, appear to have been largely forgotten.

In early 1986, both of the key targets for reductions in emissions by 1995 were abandoned.[54] Since then, attention has been focussed primarily on reaching an agreement on reductions in SO_2, leaving NOx emissions and

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[51]COM 84/47 OJ C76.

[52]The cut proposed for dust was also 40 per cent.

[53]There is, however, some dispute between the United Kingdom and West Germany with regard to catalytic flue gas treatment systems for the abatement of NOx emissions. West Germany advocates their use, while the United Kingdom questions their effectiveness, and regards them as being excessively costly.

[54]Meeting of the Council of Ministers, March 1986.

limit values for new plant for subsequent determination.[55] Numerous proposals have been tabled in an attempt to overcome the objections of individual Member States. These have included the use of phased emissions reductions, with the scale of cuts in the later phases being left open,[56] and differential cuts for individual Member States,[57] determined by reference to various suggested criteria such as economic prosperity[58] or emissions per head of population.[59] One recent proposal, by the Belgians,[60] was made to appease those whose emissions had fallen before the 1980 base line (mainly the United Kingdom), and those whose emissions have risen since then due to the commissioning of new plant (Spain and Eire). Under this proposal, a system of emission "credits" would be granted to qualifying Member States reducing the required emission cuts.

None of these proposals has been formulated by reference to what is required to combat the environmental effects of acid rain. The Belgian proposal, for example (which itself is a substantial improvement on some of the earlier suggested compromises),[61] envisages cuts of only 35 per cent by 1993 and 57 per cent by 1998,[62] *without taking into consideration* the negative impact of substantial emission credits granted to the United Kingdom[63] and Spain.

The Council's discussions on these proposals resumed in December 1987 on the fourth anniversary of the Commission's original proposal, with demands being made by Member States for individual extensions to the

[55]Discussions have, though, continued about the size and timetable for cuts in emissions of NOx, on the limit values to be imposed in respect of new plant, and upon the size of plant to be covered by any proposals. Unfortunately, disagreements remain on all of these matters, as they do in relation to reducing emissions of SO_2.

[56]There was strong disagreement about the need for the deep levels of cuts being proposed in the later phases. It was therefore felt that more progress might be made on the urgent need for agreement on short and medium term cuts, if proposals for the longer term were put to the side to be resolved at a later stage.

[57]This was first proposed by the Dutch at a meeting of the Council of Ministers in March 1986.

[58]The criterion of economic prosperity was proposed by the Dutch at the meeting of March 1986.

[59]This was a proposal of the Unitcd Kingdom made at a Council Meeting in November 1986. The United Kingdom also wanted the reductions to apply to emissions from all sources, rather than just from large plant.

[60]This proposal was advanced at Council Meetings in March and May 1987.

[61]Under the proposal of the United Kingdom of November 1986, for example, reductions of only 30 per cent by 1995 were involved. An eventual reduction of 60 per cent was also included, but no date was set, and the year tentatively suggested was 2010!

[62]These are Commission estimates. See (1987) 145 ENDS Report at 20.

[63]As a result of such credits, the reductions required were lowered in the case of the United Kingdom from 35 to 26 per cent and from 57 to 46 per cent by 1993 and 1998, respectively.

deadlines[64] and for financial assistance from the Community to meet the cost of compliance.[65] No agreement was reached and at a subsequent meeting in March 1988 the deadlock continued.

The history of these proposals provides a powerful illustration of the way in which economic self-interest can undermine and marginalize both concern for the environment and the larger objective of economic integration within the Community. Ironically, however, the very existence of the draft Directive demonstrates the potential which exists for the environment to benefit where its interests coincide with those of economic integration. Whether this potential can ever be realized in relation to this Directive remains to be seen.

2. Motor Vehicle Exhaust Emissions

Motor vehicle exhaust fumes contain, among other things, carbon monoxide (CO), unburned hydro-carbons (HC) and nitrogen oxide (NOx).[66] These emissions are injurious to health and contribute to photochemical smog. It is their major contribution to the creation of acid rain, however, which is currently causing the most concern in Europe.

In the early 1970s the European Community recognized that if some Member States were to impose more stringent measures than others to control these emissions, this would create barriers to the free trade in vehicles, thus prejudicing the creation of a common market. Accordingly, the Community adopted a Directive in respect of petrol-engined vehicles that, *inter alia*, set limit values for emissions of CO and HC.[67] A subsequent Directive in 1977 imposed limit values for NOx emissions,[68] and three other Directives, the last in 1983, successively reduced the emission limits specified.[69]

These Directives merely followed advances in engine technology, and the actual limits were simply copied from agreements reached amongst a larger group of nations in the UN Economic Commission for Europe. The

[64]Requests for extensions of the deadline were made by the United Kingdom, Spain and Italy.

[65]The request for financial assistance was made by Spain.

[66]The exhaust fumes also contain lead, if leaded petrol is used. However, lead in petrol is being phased out in the Community. See Directive 85/210 OJ L96/25.

[67]Similar Directives generally exist in relation to diesel engines and, for the sake of simplicity, the paper therefore concentrates on petrol-engined vehicles only.

[68]77/102 OJ L32/32.

[69]74/290 OJ L159, 78/665 OJ L223/48 and 83/351 OJ L197.

Directives were, therefore, little influenced by environmental considerations.[70] Moreover, because the Directives were designed primarily to enhance economic integration through the removal of barriers to trade, it was not necessary to make compliance with limit values compulsory. The only obligation placed on Member States was not to introduce values *more stringent* than those contained in the Directives. Car manufacturers which respected the limit values set out in the Directives were therefore assured an opportunity to market their vehicles anywhere in the Community. In the absence of these measures, car manufacturers could have faced continually changing limits from State to State which, whether intended to do so or not, would have had the effect of non-tariff barriers to trade.

This comparatively lax approach to emission control would probably have continued had it not been for the growth of the acid rain problem, which prompted new proposals from the Commission involving substantial reductions in emissions from existing levels, and limit values similar to those already in existence in the United States.[71] These proposals were the first to consider the genuine demands of environmental protection, rather than merely what engine technology allowed and, for this reason, they envisaged the use of "add on" catalytic converter technology. Three-way catalytic converters are standard for new cars in the United States and Japan, where over 100 million are now fitted with them, but their use in Europe had not previously been seriously considered.

Despite the attention devoted in these proposals to environmental needs, the legal justification for this development in emission control policy rested on Articles 100 and 235, thus recognizing the continued role of the policy in promoting economic integration. The language of the draft Directive, like that of earlier Directives, also suggested that economic integration remained an important consideration. In particular, the Directive continued the practice of expressing limit values in terms of the *maximum* stringency which Member States could demand before cars could be marketed in their countries. While this approach remained adequate to secure integration of markets, as will be explained below, effective protection for the environment demanded the expression of limit values as fixed and compulsory minimum, as well as maximum, standards.

The Commission's proposals were strongly supported by a number of Member States, particularly West Germany, but were vehemently opposed by others, notably the United Kingdom. There were essentially three objections to the proposals. First, it was argued that the cost to the consumer

[70]The partial exception was the 1983 Directive, which was adopted to take account of the increase in traffic density in highly urbanized areas.

[71]COM 84/226.

of using catalytic converters would be too high. Estimates of between £500 and £1000 were mentioned, though experience has shown that the actual cost is about £400.[72] Even so, this constitutes a substantial percentage increase in the price of some of the inexpensive cars on the market.

Second, in relation to sales of small cars, it was feared that Japanese manufacturers, who are well accustomed to working to United States emission standards, would be given a substantial advantage. Small and inexpensive cars constitute a substantial segment of the European car market and are the life blood of volume car manufacturers in Italy, France and the United Kingdom. Yet in designing cars for the European market, these manufacturers have given no consideration to catalyst technology. The immediate cost implications for European manufacturers of equipping small cars with this technology would be greater than for their Japanese competitors.

The final objection was to the use of catalytic converter technology at all for the control of vehicle exhaust emissions. One reason for this was doubt about their reliability and continuing effectiveness, particularly in light of the speed limits and driving conditions of Europe.[73] The primary reason, however, was that Europe's volume car manufacturers believe that catalytic converters are "dead-end technology",[74] favouring instead the use of "lean burn engines", which also provide higher fuel efficiency.[75] The Commissions's proposals threatened the continued development of lean burn engines which, unlike catalytic converters, could meet neither the limit values envisaged nor the timetable for implementation. In essence, therefore, what lay behind opposition to the Commission's proposals was the concern of Member States with volume car manufacturers on their territory to protect their industries and their economic self-interests.

In March 1985, following protracted negotiations, the Council finally agreed on a compromise solution, subject to reserves from two Member States.[76] In a departure from tradition, it was decided to split the European car fleet into three categories — small, medium and large — according to engine size, making it possible to impose different limit values and application dates for each category. Details of actual values and dates (which

[72]See (1987) 146 ENDS Report at 10.

[73]Such doubts were largely based on evidence from North America and on projections of how the technology might function under European driving conditions. See, however, *ibid.*, for recent evidence which appears to have removed most of these doubts.

[74]See J. Griffiths, "Lean Burn v. Catalysts: The Car Emissions Argument Goes On" *[London] Financial Times* (22 March 1985) 2.

[75]Note, however, that lean burn engines will generally require oxidation catalysts to remove hydro-carbons. These are, however, much cheaper than three-way catalytic converters.

[76]The reserves were entered by Denmark and Greece.

were not agreed upon until several months later), and the equivalent United States values, for comparison, are given in Table 2.

TABLE 2
Emission Limits[1] for Petrol Engined Vehicles (Grams/Test[2])

	Small Up to 1.4 litres	Medium 1.4 – 2 litres	Large Over 2.0 litres	U.S. equivalent for all cars (estimated[3])
CO	45	30	25	16
HC + NOx	15	8	6.5	4.6
NOx	6		3.5	2.4
HC				2.2
Date of Application				
New models	1.10.90	1.10.91	1.10.88	
All new vehicles	1.10.91	1.10.93	1.10.89	

Notes

1. The emission limits represent maximum stringencies. Member States may allow higher emissions but must not require lower ones.
2. This refers to the mass in the test procedure laid down by Directive 70/220.
3. These figures are themselves higher than the limits now being met by new cars on the United States market.

The limits set for cars over 2 litres can only be met by fitting them with three-way catalytic converters. However, the extra cost of this to the consumer represents a relatively small proportion of the purchase price for a car in this category. Few technical difficulties arise, since most manufacturers producing cars of this size have for a long time been fitting them with catalytic converters for the lucrative United States market.

The limits for cars under 1.4 litres are only about half those for large ones, yet this category of cars accounts for approximately 50 per cent of current HC and NOx emissions in Europe. The emissions limits were set according to present "state of the art" engine technology, so that the installation of catalytic converters will not be required. Although the Community is currently considering a further tightening in emission limits for cars in this category beginning in 1992, the negotiations are deadlocked and it is very unlikely that any reduction which would necessitate the use of catalytic converters will be agreed upon. European car manufacturers have, therefore, been successful in securing protection from their Japanese competitors.

An agreement on medium-sized cars from 1.4 - 2 litres, which account for sixty per cent of all European sales, proved the most difficult to achieve. The limit values and the application dates can obviously be met by using catalytic converters. But, by the time the application dates are reached, it may be possible for manufacturers to achieve the emission limits using "lean burn" engines.[77] This keeps alive the lean burn development programme favoured by most manufacturers and offers the possibility of avoiding the higher cost of using catalytic converters.

It can be seen that this compromise agreement protected the European car industry and secured the economic interests of affected Member States. But where did it leave the environment and the battle against acid rain? Robin Grove-White, Director of the Council for the Protection of Rural England, commented that following the agreement

> [e]nvironmental priorities are running a rather poor second, if not third, against all the horse-trading which has gone on on industrial and political grounds.[78]

The broad aim of the Commission's original proposals had been to bring European emission standards in line with those in force in the United States. But by the time of the outline compromise in March 1985, the aim had become to set limit values which would have the *same effect on the environment* as those in force in the United States. A few months later, when the actual limit values were agreed upon, this statement itself had been reinterpreted to mean that the European Community's car fleet, when fully complying with the limits set, would emit no more NOx than the car fleet of the United States.[79] The actual effect that this level of emissions would have on the environment is unclear. What is clear is that even this objective will not be met by the limit values which have been agreed upon. This is because the European Commission's calculations assume that Europe's car population and mileage travelled will remain constant, whereas present predictions are for substantial increases in both.[80] As a result, one expert has predicted that eventual reductions in NOx emissions are likely to be in the order of 20 per cent of existing levels, rather than the 50 per cent claimed by the Commission.[81]

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[77]Oxidation catalysts will also be required. See *supra*, note 75.

[78]ENDS Report, *supra*, note 72 at 9.

[79]The United States car fleet emits about 1.5 million tonnes of NOx per year, while the Community's car fleet emits about 3.2 million tonnes.

[80]Vehicle miles in the United Kingdom are expected to increase by up to 50 per cent by the year 2000, while the Dutch car fleet, for example, is expected to grow by between 30 and 50 per cent by 2010.

[81]This prediction was made by an official from the Dutch Environment Ministry speaking at a conference in London on "The Clean Car: A Challenge for Europe", which was organized by the European Environmental Bureau and was held on 12 March 1987.

Emission reductions of this order of magnitude are a very long way from the Commission's original aim to match United States standards. They are also in stark contrast to the policy being followed by a group of countries who are members of the UN Economic Commission for Europe, but who do not also belong to the European Community. The "Stockholm Group" (Sweden, Norway, Austria and Switzerland) require "state of the art" emission standards equivalent to United States limits for all vehicles, irrespective of engine size. This can only be achieved by fitting three-way catalytic converters.

The recent history of the Community's efforts to control vehicle emissions provides further clear evidence of how the economic interests of individual Member States (in this case those playing host to volume car manufacturers) can prevail over the demands of environmental protection. However, insofar as an aim of the policy was to preserve intact the economic integration which had been achieved by the harmonizing effect of earlier Directives, the record is more encouraging. Viewed from this perspective, the actual emission limits are immaterial. What is important is that they exist and that manufacturers know the maximum emission control standards which any Member State can demand. Provided they comply with these standards, they will have a right of free access to all the Community's markets. Measured against these criteria, the compromise agreement was a success.

That the needs of economic integration can be met, while so little is being achieved for environmental protection, illustrates a point made earlier in this paper when it was suggested that the demands of each are not always coterminous. If the former is allowed to predominate, the rhythm of progress of environmental protection policy will be linked to and driven by the economic agenda of the Community. Similarly, the content of environmental policy will be conditioned by the needs of economic integration. The present policy is potentially disastrous for the environment, not only because expressing limit values in terms of maximum stringencies places a ceiling on the emissions reductions allowed. This approach *also* enables Member States to ignore with impunity the new limit values and retain instead their existing emission standards, or adopt any other levels desired, provided that they are less, rather than more, stringent than the agreed limit values. Indeed, the implementing Directive will, like the earlier Directives on vehicle emission levels, be known as a measure of "optional harmonization", thus highlighting its true economic nature.

This major flaw in vehicle emission control policy illustrates well the danger of grafting environmental objectives onto policies which rely for

their legal justification[82] and have, hitherto, had as their primary aim, the securing of economic integration. Immediately after the compromise agreement had been reached, three of the larger Member States (Italy, France and the United Kingdom) indicated that they might ignore some or all of the new limit values. The United Kingdom has subsequently confirmed that it will not implement the new limit values for cars with engine capacities over 2 litres by the dates provided in the Directive. The United Kingdom has also indicated that it is only prepared to implement the new limit values for smaller medium cars, provided that France, Italy and Spain agree to do likewise. For the car manufacturers, this is not a serious problem. Provided that they are able to comply with the new limit values, where Member States require it, they are guaranteed a Community-wide market for their cars. No more can be asked of them and the primary requirement of economic integration is satisfied.[83] However, where Member States continue to set emission standards less stringent than the limit values, manufacturers will have the option to save costs by, for example, not fitting a catalytic converter. It is an option which they are certain to exercise. As a result, even the predicted 20 per cent cut in NOx emissions may be in question, making it difficult for the policy to maintain its credibility.

While some Member States have been indicating their unwillingness to enforce the agreed limit values, Denmark has been resisting formal adoption of the Directive on the ground that it is too weak. It is mainly Denmark's reserve that has prevented implementation of the policy since 1985.[84] The Danes argue that, on environmental grounds, they need to have the ability to impose more stringent emission limits for the small cars which dominate their fleet. Their position illustrates Community environmental policy at its worst. While Denmark's neighbours, Norway and Sweden, are cutting emissions to United States standards, its membership in the Community means that, if the present policy is implemented, it may be forced to accept much higher limits. Here we have an example of how the demands of economic integration, when incorporated in a Community environmental policy, can work in direct opposition to environmental protection.

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[82]The policies are elaborated under Article 100.

[83]Economic integration policy would, of course, benefit further from a policy based on uniform fixed and compulsory limit values, rather than one based on maximum permissible stringency. Indeed some car manufacturers are now recognizing that differing emission standards will increase costs and create additional production and marketing difficulties. It is also likely that these costs and difficulties will fall disproportionately on some manufacturers as against others. The fact remains, however, that the Directive is of great benefit to the car industry. All manufacturers may now tailor their products to its requirements, confident in the knowledge that this will guarantee them access to all the Community's markets. In contrast, the Directive *guarantees* the environment nothing at all.

[84]The Greek reserve, which was aimed at securing Community money to pay for air pollution abatement measures in Athens, was of less significance.

The impasse reached as a result of the Danish reserve was finally broken at a meeting of the Council of Ministers on 21 July 1987. At the meeting, Denmark had the (from their point of view, very dubious) privilege of being responsible for the Commission's first use of the qualified majority voting provisions contained in Article 100A of the *Treaty of Rome*, as amended by the *Single European Act*.[85] As was customary, the draft Directive had originally been issued under Articles 100 and 235. Following the coming into force of the *Single European Act* on 1 July, the Commission had the option to reissue it under Article 130S, as environmental policy, or use Article 100A, on the basis that it had as its object "the establishment and functioning of the internal market". Not surprisingly, the Commission chose the latter course, in order to take advantage of the majority voting procedures available. In doing so, however, they underlined once again the fundamental nature of the policy as economic rather than environmental.

Under the new legislative procedures introduced by the *Single European Act*, the policy agreed upon by a majority of the Council was subsequently approved by the European Parliament, and has now been adopted. However, Denmark has taken further action. Paragraph 4 of Article 100A provides that:

> If, after the adoption of a harmonisation measure by the Council acting by qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Art. 36, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions.
>
> The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.
>
> [T]he Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for under this Article.

Relying on this provision, Denmark has indicated to the Commission that it intends to adopt stricter emission standards because they are necessary for the protection of its environment. The Commission will now take Denmark to the European Court of Justice for "making improper use of the powers provided for under" Article 100A by imposing emission standards which represent "arbitrary discrimination or a disguised restriction on trade" in cars between Members of the Community. The outcome is uncertain, but there is no doubt that it will serve to highlight the conflict which can arise between economic integration and environmental protection, when both are stated to be the objects of Community policy.

[85]In fact, no vote was taken, it being apparent that, with only Denmark and Greece opposing, the necessary qualified majority would be secured.

III. Analysis

The above examples offer some insight into the complexity and dynamics of the relationship between environmental policy, economic integration and the economic self-interest of Member States. They demonstrate how both environmental policy and economic integration policy can, on occasion, be thwarted by the economic self-interest of one or more Member States, and how environmental protection policy can become lost in a battle between opposing economic forces. In particular, they show how environmental policy develops within a framework designed to serve the needs of economic integration, how this can influence the content of Directives on the environment and how environmental policies are justified and promoted according to their ability to effect harmonization of the European economies.

If one looks at the affinity between environmental policy and economic integration policy from an environmental perspective, it is clear that the basic imperative of economic integration did not only provide a legal basis for environmental policy prior to the *Single European Act.* More importantly, it has played a major role in providing the impetus needed to develop an environmental policy, although this does not, of course, say anything about the quality of that policy. Looking to the future, the availability of qualified majority voting procedures for measures promoting economic integration is likely to provide added impetus to the development of environmental policy, as the recent moves on the vehicle emission control policy demonstrate.[86]

This said, however, it is important to challenge the assumption which often appears implicit in much of the discussion of European Community environment policy, that the environment can only benefit from greater harmonization and economic integration. As our examples show, the interests of the two are not invariably the same, and this must be recognized and taken into account if environmental policy is not to suffer, as it has in the case of the vehicle emission control policy. Dangers of this kind are latent in much of the environmental policy which is developed with a view to promoting economic integration. Thus, if one looks again at the proposals for large combustion plants, or even the Directive on dangerous substances in water, one can see that *any* level of reduction in emissions, or any limit values, satisfy the needs of economic integration, *provided they are uniform.* For environmental policy, on the other hand, the absolute amount of any reduction and the limit values set may be critical. Difficulties of this nature may be overcome if the needs of both types of policy are recognized and

[86]But note the reservations expressed *supra,* note 23.

accepted. Clearly, an absolute reduction in emissions, for example, in an amount required to meet the genuine needs of environmental policy can also be applied in a uniform manner across the European Community to further the ends of economic integration.

In other circumstances, however, economic integration policy and the needs of the environment may be contradictory. One example of this, which has not yet been resolved, concerns an aspect of the Community's policy on waste. In order to reduce the environmental problems caused by disposable bottles and cans for beverages, as well as to conserve energy and natural resources, the Community has adopted a Directive which encourages re-use and recycling of beverage containers.[87] Under the Directive, action programmes must be prepared which, *inter alia*, encourage and facilitate greater use of refillable containers. Preceding the adoption of this Directive, Denmark had banned completely the use of non-returnable containers for carbonated soft drinks and beer. The ban, which does not apply to exports, was enthusiastically supported by the Danish brewing industry, because the extra cost of transporting the empty bottles back made it uneconomic for German breweries to export bottled beer to Denmark.[88] Complaints from the German brewers have led to Denmark's ban being challenged by the Commission as a breach of Article 30 of the Treaty, in the form of a non-tariff barrier to trade.[89] Yet, their policy might fairly be regarded as an enthusiastic implementation of the Directive on beverage containers.

As noted above, another negative effect of the relationship between economic integration and environmental policy, when viewed from the perspective of environmental policy, is that the demands of environmental protection tend to become lost in a dispute about how far economic integration should go, and to what extent Member States should be permitted to hold on to any competitive advantages that they may have. Take, for example, the dispute between the proponents of limit values and quality

[87]Directive 85/339.

[88]There is nothing, however, to stop German brewers either bottling, or bottling and brewing, in Denmark itself, provided returnable bottles are used.

[89]See ECJ — Case 302/86. The Irish Government has now also proposed restrictions on the use of cans and plastic containers for beer, cider, wine and soft drinks. These proposals have been made in direct response to the Directive on beverage containers. Details of the precise bans which are proposed are contained in the Irish Government's draft programme for implementation of the Directive. The Industry Committee for Packaging and the Environment (INCPEN) in Britain is now pressing the Commission to disallow the Irish draft programme on the basis that "[i]f the programme was to be accepted by the Commission, an environmental protection Directive would, in effect, be the vehicle used for erecting further barriers to intra-Community trade, despite the EEC's very commitment to the dismantlement of non-tariff barriers". See Memorandum submitted by INCPEN to the House of Lords Select Committee on the European Communities on the *Fourth Environmental Action Programme* (8th Report 1986/87 HL 135 at 116).

objectives during the negotiations that led to the Directive on dangerous substances in water. The eight Member States favouring limit values argued that limit values were necessary to ensure that industries in each Member State bore similar pollution control costs. The United Kingdom, however, favoured the use of water quality objectives, for reasons of economic self-interest. The United Kingdom's rivers are short and fast and its coasts are washed by a turbulent and tidal sea. The same standard of water quality likely to be achieved on the Continent of Europe by the use of the limit value approach could, therefore, often be achieved in the United Kingdom by the imposition of significantly more generous discharge limits, with consequential savings in industrial costs. For the United Kingdom to have agreed to mandatory limit values would, therefore, have been to surrender the significant competitive advantage offered by its fortuitous geographical circumstances. It should be remembered that while Britain may enjoy a comparative advantage in respecting water quality objectives, other geographical factors operate to the advantage of different Member States. Thus, German industry benefits, in terms of transport costs, from its proximity to continental markets and, to take a more facetious example, Italian lemon growers enjoy the benefits of a warm sun![90] However, such an *economic* justification for the United Kingdom's water pollution policy takes us a long way from the needs of the environment. This is not to say that economic and environmental issues can, ultimately, be separated. But, this accepted, it is surely regrettable that the economic arguments should systematically predominate over basic environmental concerns. For example, in choosing between the use of fixed limit values and water quality objectives, environmentalists would no doubt argue that one of the most important considerations was the relative effectiveness of the two approaches. Could water quality objectives be relied upon to guard against the unquantifiable, indirect and long-term effects of discharging dangerous substances into water? Questions of this kind involve matters of pollution control theory, which also need to be addressed, but which tend to be overwhelmed by economic considerations.

Similar observations can be made about the Community's efforts to control air pollution caused by large combustion plants. Here, Member States, threatened by proposals for uniform cuts in emissions in the promotion of competitive equality, largely ignored environmental considerations for reasons of economic self-interest. For the United Kingdom, the issue again concerned the preservation of the competitive advantage arising from its geographical location. Being an island off the coast of Continental Europe, exposed to Atlantic weather systems and westerly winds, the problems of dispersing air pollution have hitherto been less acute than for other

[90]This illustration is not original, having been used by Haigh, *supra*, note 2 at 36.

Member States, and the costs correspondingly lower. Acceding to the demands for substantial uniform reductions in emissions, in order to promote economic integration, would have meant surrendering this advantage. Logical though this argument was in economic terms, what it ignored was the serious environmental problem of long range, transboundary air pollution.

It would, of course, be wrong to blame the affinity between environmental policy and economic integration policy for these failings. Even if there were no association between the two, environmental policy would still be liable to be emasculated by the economic self-interest of Member States and their unwillingness to assume the costs of effective environmental policy. But, removing the economic integration dimension would, at least, make it possible to assess the costs and benefits of environmental policy free from extraneous factors. It would also prevent Member States, particularly the United Kingdom, from rejecting environmental policy initiatives on the ground that they constitute unnecessary harmonization measures that threaten national sovereignty when, in truth, they are rejected largely for reasons of economic self-interest.

There is no doubt, however, that insofar as it was the objective of the environmental program to advance the economic integration of the Community, this has been successful. The development of a European environmental policy has spawned a wide range of Directives that have harmonized varying national laws and policies. Indeed, as we have noted, the main legal foundation for most of these measures has been Article 100, a provision concerned exclusively with promoting economic integration.

However, economic integration policy too can suffer from its association with environmental policy, where the interests of the two are at variance. Referring again to the Directive on dangerous substances in water, we can see that, while it can at least be argued that water quality objectives may be useful environmentally,[91] they certainly do nothing to standardize industrial costs and promote equal competition. Similarly, if an agreement on air pollutant emissions from large combustion plants allowed for substantial differences in the reductions to be achieved by individual Member States, this might be environmentally sound, provided the overall reduction was sufficient. In terms of economic integration, however, it would introduce new competitive distortions.

There are other environmental Directives that leave a large amount of discretion in the hands of Member States. The effect of this may be to permit

[91]See the earlier discussion in text accompanying note 37.

varying implementation measures, some adding significantly to industrial costs or otherwise distorting competition and the free movement of goods. The Danish law banning "one way" beverage containers is a case in point.

The above examples have also revealed how environmental policy and the collective Community goal of economic integration has been undermined by the economic self-interest of Member States.[92] Concerns about the economic costs of environmental policy initiatives are frequently invoked. Calculations concerning the direct and indirect effects of proposals on the productivity and competitiveness of home industries, as well as their likely impact on jobs, exert a powerful influence upon the positions adopted by individual Member States. Major industrial organizations also apply relentless pressure at both the domestic and community level in order to protect their economic interests. By objecting to Community environmental policy initiatives, a Member State may not only avoid a deterioration in its competitive position, it may obtain significant economic advantages. Community initiatives on environmental matters are often taken under pressure from Member States who, because of domestic problems and internal political pressures, have *already* begun to act on a national level, thus imposing additional financial burdens on their industries and economies. Where this has happened, there is a great temptation for Member States with decaying or fledgling industries and inferior productivity records, to exploit the competitive advantage and resist any moves to establish a general Community policy. A good example of this is the twin track decision of West Germany to retro-fit all its large and medium sized power stations with gas flue desulphurization equipment and, at the same time, to press in the Community for major reductions in SO_2 emissions of all Member States. This decision has imposed a major financial burden on West German industry, which can only work to the advantage of competitors who have not had to incur similar costs. Another, perhaps more alarming, example of this kind, concerns the disposal of dangerous and toxic wastes. In the absence of adequate Community Directives on this problem, Member States such as Germany, Belgium, Holland and France have imposed strict controls on the disposal of these types of waste, thus greatly inflating treatment and disposal costs. The United Kingdom, on the other hand, has done virtually nothing.[93] The result has been an eightfold increase in the tonnage of such waste imported into the United Kingdom for treatment and/or disposal, in a period of only two

[92]Clearly, other factors play a part. These may include differing national traditions and ways of doing things but, more tangibly, dislike of State intervention and a desire to leave things to market forces may play an important role.

[93]This has alarmed a number of local authorities and even the Government's own Hazardous Waste Inspectorate. For further details see (1986) 148 ENDS Report at 6-7.

years.[94] The actual and potential economic benefits to the United Kingdom of this trade in dangerous and toxic waste are considerable. The effect is to create a strong economic disincentive for the Government of the United Kingdom to either strengthen domestic law, or to agree to stricter Community-wide controls. There is no sign yet that conflicting pressures from environmentalists will be powerful enough to overcome this major disincentive to constructive action.

It would be wrong, however, to assume that economic self-interest will always work to the disadvantage of environmental policy. It is rarely the case that Member States actively pursuing environmental protection policies are doing so for environmental reasons alone. Certainly, environmental initiatives are often taken in response to political pressure, but the importance of economic considerations when it comes to having these policies implemented should not be overlooked. West German environmental policy again provides a good example. The German Government firmly believes that its environmental programme will, in the long term, bring substantial economic as well as environmental benefits.[95] The decision to retro-fit power stations with emission control technology and to require substantial reductions in emissions from industry generally has given a major boost to West Germany's pollution control industry which, because of the advances it has made, can be expected to benefit substantially from exports as other countries decide, or are forced, to take similar action. Of more significance, however, is that rather than simply fitting emission control devices, West German industry is responding to demands for tighter controls by investing in new plant and machinery with "state of the art" pollution control technology built in. The Government's policy is, therefore, giving a major impetus to industrial investment and modernization. Research done for both the West German Government and German industry also suggests that the net effect of the country's environmental policies is likely to be favourable in terms of job creation.[96]

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[94]Between 1984 and 1986 imports of United Kingdom classified "special" waste, which must be notified, increased from 5,000 tonnes to 40,000 tonnes. However, many other substances are regarded as hazardous on the continent, but not in the United Kingdom, with the result that they are not notifiable. Estimates by the Department of the Environment are that at least 130,000 tonnes of this type of waste were imported in 1986 and, since then, the evidence from disposal companies suggests that even larger increases have occurred. For details, see (1986) 148 ENDS Report, *ibid.*

[95]Information here, and below, is based upon interviews with officials of the West German Interior Ministry (now Environment Ministry) in Bonn conducted in the Autumn of 1985.

[96]See "Environmental Policies: A Source of Jobs?" in *Environment and Economics* (Paris: OECD, 1985) 91 at 93. See also: R.U. Sprenger & G. Knaadgen *et al.*, *Struktur und Entwicklung der Umweltschutzindustrie in der BRD* (Berlin: Erich Schmidt Verlag, 1983); and R.U. Sprenger, "Environmental Technology" (1986): 1:1 European Env. Rev. 17 at 19.

Many environmentalists would regard the West German approach to be relatively enlightened. However, the relative strength of West German industry means that the costs of environmental programs can be absorbed without seriously eroding its competitive position in the European Community and beyond. One might also wonder whether the West German Government would be so enthusiastic about implementing environmental measures which have few, if any, economic benefits. It is worth noting, for example, that West Germany is the only country in the Community which has no speed limits on its motorways. Despite substantial public support for a speed limit, and evidence of the damaging effects in terms of higher exhaust emissions which contribute substantially to acid rain and forest "die back", the West German Government continues to resist proposals to introduce speed limits. It appears that the Government has been persuaded by the German manufacturers of larger cars (Mercedes, BMW) that speed limits would lead to a substantial drop in sales and profitability.

Conclusion

What emerges from this paper is a picture of European environmental policy caught up in a clash between the movement for economic integration in the Community, and the economic self-interests of Member States. More often than not, environmental policy finds itself allied with the forces for economic integration, on which it has, traditionally, had heavily to rely for its legal foundations. Economic integration is not, however, always the friend of environmental policy, as some of our examples have shown.

Recognition of the comparative impotence of environmental policy in the world of economics should not, however, lead us to the conclusion that Europe's environmental programmes are worthless or unnecessary. However modest the achievements to date may have been, it is doubtful if even this much would have been gained had Member States been left to their own devices. It is also unlikely that individual action would have been as effective, given the need for many environmental policies to be international in character if they are to succeed. In this respect, the European Community has the potential to fulfil a valuable function by bringing together a group of nations in pursuit of common environmental objects. In practice, action may be required on an even wider geographical basis involving, for example, the rest of Scandinavia or Eastern Europe.[97] Here though, the contribution

[97]Worldwide action might also be required. One example is the growing evidence of damage to the ozone layer caused by chlorofluoro-carbons (CFCs), which may necessitate world-wide agreement on the elimination of production. A start was made on this at an international conference in Montreal, Canada in September 1987 when some cuts in production were agreed upon.

that can be made by the Community, if it has agreed on a common position, is also of great value, and may be decisive. The lingering question is whether economic considerations will enable the Community to carry out these functions with sufficient regularity and vigour to make a real impact on the ever growing threats to the environment.