

MAASTRICHT AND THE ENVIRONMENT

-GERMAN PERSPECTIVE-

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## MAASTRICHT AND THE ENVIRONMENT - GERMAN PERSPECTIVE

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### A. Introduction

The Maastricht Treaty on European Union, signed on February 7, 1992<sup>1</sup>, postulates in its Preamble to introduce a "new stage of European integration"; Art. A (2) refers to "a new stage in the process of creating an ever closer union among the peoples of Europe". The Maastricht Treaty consists essentially of its three "pillars": Amendments to the existing Community Treaties (Titles II - IV), containing i.a. the schedule for the creation of an economic and monetary union, provisions on a common foreign and security policy (Title V) and provisions on cooperation in the fields of justice and home affairs (Title VI), all three of which are bound together within the constitutional order of the newly-created European Union.

The provisions on the protection of the environment do not appear to have been altered in a spectacular way - at least not at first sight. A thorough analysis, however, taking into consideration the German Supreme Court's<sup>2</sup> restrictive rules of interpreting the Maastricht Treaty, will produce a different picture: the amendments, although subtle, may entail far-reaching consequences such as lowering the Community-wide level of environmental protection and increasing the variety of environmental regulations and standards, thus impeding free trade and augmenting the potential for a distortion of competition.

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<sup>1</sup> see: Bulletin of the German Government Nr. 16, p. 113 of Febr. 12, 1992.

<sup>2</sup> see: decision of Oct. 12, 1993, EuR 1993, 294 ("Maastricht-Decision").

In Germany, the Maastricht Treaty encountered rather harsh critique and wide-spread firm opposition due to economic, political and legal considerations<sup>3</sup>: The Germans' "holy cow", the Deutsche Mark, symbol and guarantee for monetary stability and economic growth was scheduled to be "slaughtered". The German Länder (states) regarded the Maastricht Treaty as a (further) jeopardy to their competences and powers as granted by the German Constitution; they took refuge to the principle of subsidiarity<sup>4</sup> and to amendments to the German Constitution, introducing a cooperation procedure between the federal government, the federal parliament and the states whenever state interests are at stake in European affairs<sup>5</sup>. Another argument, apparently not raised in any of the other EC Member States, was the concern that the Federal Republic of Germany could

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<sup>3</sup> see: e.g. Hilf, Europäische Union: Gefahr oder Chance für den Föderalismus in Deutschland, Österreich und der Schweiz? EuR 1993, p. 327, Stein, p. 328, Schweitzer, p. 329; Frühauf/Gusinger, Europa ohne Grenzen - Alarm für die Umwelt, Spiegelverlag 1992; Pernice, Karlsruhe locuta - Maastricht in Kraft, EuZW 1993, p. 649; Schröder, Das Bundesverfassungsgericht als Hüter des Staates im Prozeß der europäischen Integration, DVBl. 1994, p. 316; Pipkorn, Das Subsidiaritätsprinzip im Vertrag über die Europäische Union-rechtliche Bedeutung und gerichtliche Überprüfbarkeit, EuZW 1992, p. 697; Ress, Umweltrecht und Umweltpolitik der europäischen Gemeinschaft nach dem Vertrag über die Europäische Union, Schriftenreihe des Europa-Instituts Saarbrücken, Nr. 291.

<sup>4</sup> see: Lambers, Subsidiarität in Europa - Allheilmittel oder juristische Leerformel?, EuR 1993, p. 229 (235); Art. 23 sec. 1 of the German Constitution incorporates subsidiarity as a basic principle of the European Union.

<sup>5</sup> see: Art. 23 German Constitution; Art. 50 and Art. 52 sec. 3a German Constitution provide for a cooperation of the Bundesrat (chamber of states) in European matters and empower the Bundesrat to establish a "Europakammer" (Chamber for European Affairs) which will take its decisions on behalf of the Bundesrat. The cooperation procedure between the federal bodies and the states is further specified in "Gesetz über die Zusammenarbeit von Bund und Ländern in Angelegenheiten der Europäischen Union (EUZBLG) - of March 12, 1993, BGBl. I, 313; see: Borchmann, Neue Bund-Länder-Vereinbarung über die Zusammenarbeit in Angelegenheiten der Europäischen Union, EuZW 1994, 172; Crossland, ELR 1993, p. 228 (236).

lose its quality as a sovereign state<sup>6</sup>. The democratic principle was considered to be violated by the Maastricht Treaty, as extensive competences were transferred to the European Council, consisting of the heads of Government who are lacking direct democratic legitimation by their respective people; the additional transfer of competences from the national states to the European Union was considered to erode the influence of the directly elected national parliament, thereby weakening each citizen's right to vote and to influence the democratic process<sup>7</sup>.

In its so-called "Maastricht-Decision", the German Supreme Court had to face the difficult task to balance the above political and constitutional arguments with the political pressure exercised by the other EC Member States, as the entering into force of the Maastricht Treaty depended (in the end) exclusively on the German Supreme Court ruling. The Supreme Court accommodated these conflicting strains by issuing a solid "yes, but"-decision, regarded as a "manual on the Law of the European Union on an exclusive level"<sup>8</sup> - and as a master piece of diplomacy<sup>9</sup>. This decision is considered to be a landmark decision on the relationship between the European Union and the Federal Republic of Germany as well as on the interpretation and application of European law (in Germany).

As the German Supreme Court ruling has to be regarded as the official and authoritative German legal interpretation of the Maastricht Treaty, and as this decision is laying the ground

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<sup>6</sup> see: Schröder, Fn 3, p. 317; Fastenrath, Maastricht und ein Trugschluß. Deutschlands Eigenstaatlichkeit in der Europäischen Union, FAZ Nr. 185 of Aug. 12, 1993, p. 5.

<sup>7</sup> see: statements of plaintiffs in Maastricht proceedings before the German Supreme Court, Fn 2, p. 299 et seq.

<sup>8</sup> see: Pernice, Fn. 3.

<sup>9</sup> see: Schröder, Fn. 3, p. 316.

for the application and construction of the environmental provisions of the Maastricht Treaty in Germany, it is imperative to analyse its basic holdings and to sketch the Supreme Court's understanding of the legal structure of the European Union.

## **B. The Maastricht-Decision of the German Supreme Court**

### **I. Outline of the Maastricht-Decision**

According to German constitutional law international treaties have to be ratified by a formal approval act<sup>10</sup>. The approval act ratifying the Maastricht Treaty was challenged by five plaintiffs claiming the violation of various constitutional provisions. Due to the procedure chosen<sup>11</sup> the Supreme Court's review of the Maastricht Treaty or the approval act, respectively, was restricted to the question whether any of the plaintiffs' individual constitutional rights were violated, i.e. the Supreme Court could not examine the overall compliance of the Maastricht Treaty with the German Constitution (such as the federal principle). Due to this limited angle the Supreme Court had to dismiss all but one complaint and based its judgement exclusively on the examination whether the plaintiff's right to vote<sup>12</sup>, construed as the citizen's right to influence the democratic decision making process, was violated by the Maastricht Treaty or the approval act, respectively. Nonetheless, the Supreme Court took the chance to develop its view of the legal structure of the European Union, its relationship to

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<sup>10</sup> see: Art. 59 sec. 2 Basic Law (Grundgesetz); Crossland ELR 1993, 236.

<sup>11</sup> see: Art. 93 sec. 1 No. 4 a Basic Law (Verfassungsbewerde).

<sup>12</sup> see: Art. 38 Basic Law in conjunction with Art. 79 sec. 3 and Art. 20 Basic Law.

the Federal Republic of Germany and its legislative bodies, and the (future) application and construction of EC law, the latter having a major impact on the interpretation of environmental competences and the Community-wide environmental protection as designed by the Maastricht Treaty. The essentials of the Maastricht-Decision may be sketched as follows:

- The Maastricht Treaty does not create "United States of Europe", comparable to the United States of America. The European Union is characterised as a "Staatenverbund", i.e. as a supranational organisation and association of sovereign states, whose power and competences are derivative, i.e. granted by the Member States<sup>13</sup>. This basic understanding of the European Union leads to the following consequences:
- Art. F sec. 3 EU Treaty does not provide the European Union with a "competence-competence", i.e. the power to extend its competences and raise the financial means which it deems necessary to achieve the objectives of the Treaty. The tasks conveyed upon the European bodies by the EU Treaty do not allow the conclusion that the European Union may create or assume the competences necessary to fulfil these tasks. To the contrary, the European Union may only claim such competences which are explicitly assigned to it by the EU Treaty (principle of enumerated competences)<sup>14</sup>.
- The competences transferred to the European Union by the EU Treaty are described in a sufficiently specific way. Each step beyond or change of this clearly defined

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<sup>13</sup> Maastricht-Decision, Fn. 2, p. 312 et seq.

<sup>14</sup> Maastricht-Decision, Fn. 2, p. 316.

integration programme will not be covered by the German approval act but evoke the need of a new approval by the German legislative bodies.

- A clear line of distinction has to be drawn between the interpretation of the Treaty and amendments to it. This distinction has a significant impact on the future application of provisions empowering the European Union to enact legislation: The dynamic extension of the existing EC-Treaties - and of the environmental protection on the EC-level - was based i.a. on a generous application of Art. 235 EC Treaty, on the "implied powers"-doctrine (EC-annex competence to round off the explicitly conveyed competences) and on the "effet utile" principle (i.e. the EC Treaty has to be construed in a way that the EC-competences are expanded to the utmost extent possible); contrary to this broad and EC-friendly understanding developed by the European Court of Justice, the German Supreme Court demands that the EC bodies take into consideration when applying the competence provisions that the EU Treaty distinguishes clearly between the limited and enumerated powers conveyed upon the EU and an amendment to the Treaty and that the interpretation of the Treaty may not result in an extension of competences. Such an "extensive interpretation" of competence-transferring provisions would not be binding on the Federal Republic of Germany<sup>15</sup>.
  
- Applying its enumerated competences, the European Union is further restricted by the principle of subsidiarity as laid down in Art. 3 b sec. 2 EC Treaty. This means that even when the European bodies are explicitly

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<sup>15</sup> Maastricht-Decision, Fn. 2, p. 324.

empowered by the EC Treaty to take action they have to make the additional "subsidiarity check" before they can do so. The principle of subsidiarity as stipulated in Art. 3 b sec. 2 EC Treaty, is (now) applicable to any kind of action taken by the European Community<sup>16</sup>. If the European Community intends to exercise its legislative power as determined by the EC Treaty it has to check first (and has to give an appropriate explanation according to Art. 190 EC Treaty) whether the objective of the measure envisaged cannot be sufficiently attained by actions of the Member States on the national level. If the EC decides that national action will not suffice the further conclusion has to be justified that the objective can be better attained at a Community level, taking into consideration the scope or the effects of the measure<sup>17</sup>.

- The federal government has to exercise its influence on the EC bodies in favour of a strict application of the subsidiarity provision; the federal parliament has to use its co-decision rights<sup>18</sup> in the same sense. It is to be expected that the Chamber of States (Bundesrat) will pay specific attention to the subsidiarity principle<sup>19</sup>.
- Community action is further restricted by Art. 3 b sec. 3 EC Treaty: Community action may not go beyond the

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<sup>16</sup> Before Maastricht, the principle of subsidiarity was only mentioned in the environmental provision Art. 130 r sec. 4 EC Treaty and had a different wording which was by far more in favour of Community actions: "The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States".

<sup>17</sup> Maastricht-Decision, Fn. 2, p. 324 et seq.

<sup>18</sup> see: Art. 23 sec. 3 Basic Law (German Constitution).

<sup>19</sup> Maastricht-Decision, Fn. 2, p. 325.

measures which are absolutely necessary and adequate to attain the objectives of the Treaty.

- If Community legislation is not covered by the EU Treaty as approved by the act of the German parliament it is not binding on the Federal Republic of Germany; the German legislative and administrative bodies would be prohibited to apply these Community acts in Germany. Although claiming a cooperative relationship with the European Court of Justice, the German Supreme Court usurps the authority to be the final instance (for Germany) to examine whether European legislation is within the scope of the EU Treaty<sup>20</sup>.

Summarizing the above holdings, the German Supreme Court, based on the democratic principle reserves competences to the maximum extent possible for the national state and its legislative bodies by construing the Treaty provisions on Community competences in an extremely narrow way and by declaring itself as the competent body to pass the final judgement on the compliance of (secondary) EU-law with the EU Treaty<sup>21</sup>.

## **II. Review of the Maastricht-Decision**

Although the German Supreme Court's Maastricht-Decision circumvents the consequence to declare the parliamentary act ratifying the Maastricht Treaty void, its narrow construction of EC-competences comes close to it as it leads to an inversion of the objectives underlying the Maastricht Treaty: accelerating and consolidating the process of European

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<sup>20</sup> Maastricht-Decision, Fn. 2, p. 312.

<sup>21</sup> see: Pernice, Fn. 3.

integration<sup>22</sup>. Insofar, the description of the Decision as a "masterpiece of diplomacy"<sup>23</sup> is justified: the Maastricht Treaty passed and the political disaster was averted, on the merits, however, the German Supreme Court stopped the development towards European integration and strengthened the national influence and competences. As one commentator put it: the German Supreme Court pulled the emergency brakes, at a point, however, when the European train had already reached a fullstop as regards the integration of European law and European politics<sup>24</sup>.

The approach chosen by the German Supreme Court is an exclusively national one, based on a specific dogmatic understanding of constitutional principles, in particular, the democratic principle. "Judicial self-restraint" is not the governing attitude of the Maastricht-Decision. The German Supreme Court did not restrict itself to declaring the Maastricht Treaty approval act valid or void, but used "obiter dicta", i.e. comments on the merits, which are not legally binding, in order to transport and publish its view on the construction and application of European law. The Maastricht-Decision is therefore considered to be a clear setback in the line of the Supreme Court decisions concerning European integration <sup>25</sup>.

Former Supreme Court decisions stated that secondary Community law has to be examined under the perspective whether it meets the standard of European primary law such as the EC-Treaties or the European Human Rights Convention; the necessity of an additional check of its compliance with

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<sup>22</sup> see: Meessen, Maastricht nach Karlsruhe, NJW 1994, 549; Pernice, FN. 3.

<sup>23</sup> see: Schröder, Fn 3, p. 316.

<sup>24</sup> Meessen, Fn. 21, p. 554; see also: Lane, New Community Competences under the Maastricht Treaty, Common Market Law Review 30, p. 939.

<sup>25</sup> Meessen, Fn. 21, p. 549 et seq.

German constitutional law was negated. The European Court of Justice's authority to pass the final judgement on the validity of secondary Community law was acknowledged<sup>26</sup>.

In light of the former increasingly pro-European jurisdiction of the German Supreme Court the Maastricht-Decision is undoubtedly a setback. One indication is the creation of the new term "Staatenverbund" meant to make clear that the European Union is not a federal state based on a European people and that the European Union is not an independent and autonomous legal subject but only the description of the Member States acting jointly<sup>27</sup>. More problematic in its consequences, however, is the German Supreme Court's approach to develop its own principles of interpretation of the EU Treaty negating the generous construction and application of EC-competence norms as stipulated by the European Court of Justice in its "implied powers" doctrine and the "effet utile" interpretation principle. There is an open conflict as regards the basic approach towards the interpretation of primary European law. As it is not to be expected that the European Court of Justice will abstain from applying its basic interpretation principles and will adopt the German approach, the question arises: whose interpretation and construction of the EU Treaty shall be authoritative? Shall the European Court of Justice's interpretation principles be binding on all Member States except the Federal Republic of Germany? Or does the "cooperative" approach of the German Supreme Court mean that EC legislation, although held to be in compliance with the EU Treaty by the European Court of Justice, has to pass an additional test in Germany, i.e. the compliance with the narrowly construed competence norms as

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<sup>26</sup> see: BVerfGE 73, 339 (387); BVerfGE 75, 223 (234); see also: Meessen, Fn. 21, p. 549 et seq.

<sup>27</sup> see: Pernice, Fn. 3.

developed in the Maastricht Decision? In the extreme the approach chosen by the German Supreme Court may generate the consequence that the European Court of Justice may hold a Community action as being in compliance with the EU Treaty whereas the German Supreme Court, looking through its national constitutional glasses, may reach a different conclusion. Thus, the German Supreme Court created on the basis of national constitutional law an "opt out" reservation, not included in the EU Treaty, not to be exercised by the German parliament or government but by the German Supreme Court. If the other Member States follow the German example and develop their own rules of interpretation of the EU Treaty reserving the right for themselves to decide with binding effect for their respective territory whether they feel that e.g. an EC directive is in compliance with the EU Treaty - and who should harmonize the potentially different approaches chosen by the various Member States? - the binding and harmonizing effect of EC law could be nullified. We may get as many "authoritative" interpretations of the EU Treaty as there are Member States.

This potential effect of the Maastricht Decision is extremely destructive for the process of European integration, having as its main basis the general acceptance of all Member States that EC-legislation is binding on each and any of the Member States, unless there are explicit exemptions in the European law or the EC action is declared void by the European Court of Justice because it is not in compliance with the EC Treaty. An explicit exemption in favour of certain Member States is included in the political will of the Member States as formulated by the European Council and the European Parliament. A decision of the European Court of Justice on the compliance of secondary EC-law with the EU Treaty will be binding without exception for all Member States. By

introducing an "opt out"-reservation the German Supreme Court appears to have intruded into the political sphere disregarding, the political will of all Member States, including the Federal Republic of Germany, stipulated in Art. 164, 177 EEC Treaty that the European Court of Justice is designed to be the final instance to decide on the compliance of EC secondary law with the provisions of the EC Treaty. Art. 164, 177 EC Treaty were - at least so far - not held unconstitutional by the German Supreme Court.

The German Supreme Court has to control the compliance of the Maastricht Treaty as such with the German constitutional law. The interpretation and application of the Maastricht Treaty, however, is the realm of the European Court of Justice. This approach is imperative in order to avoid the legal insecurity entailed by national reservations as the one stated by the German Supreme Court.

The method often chosen by the Supreme Court to avoid the invalidation of a German legislative act by giving it a restrictive interpretation in conformity with the German Constitution, works as far as merely German laws are concerned and German courts or legislative and administrative bodies shall be bound, i.e. it is designed for the vertical hierarchy; the same method applied in the Maastricht Decision creates unsolvable problems as the relation to the European Court of Justice is a "horizontal" one. Such "cooperation" with the European Court of Justice does not seem to be appropriate from a European perspective.

As regards the application of the environmental provisions of the Maastricht Treaty and the European Community's objective to attain environmental protection at a high level<sup>28</sup>, the

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<sup>28</sup> Art. 100 a sec. 3 EC Treaty.

Maastricht-Decision leads to the question whether we will not only face a three-speed Europe as regards environmental protection<sup>29</sup>, set up in Art. 130 r to t EC Treaty, but a separate German track with a specific "opt out" possibility generated by the German Supreme Court, enabling the Federal Republic of Germany to uncouple its environmental standards and to determine on its own the speed of the environmental development in Germany. Beyond the aforesaid the vision of a multi-speed Europe arises if the other Member States follow the German example, in particular, in applying the principle of subsidiarity in an extensive way.

Before looking into this question the amendments to the environmental provisions brought about by the Maastricht Treaty shall be analysed under the perspective whether the environmental protection is strengthened or weakened by the Maastricht Treaty and whether a conflict between environmental protection on a high level on one hand and subsidiarity on the other is programmed which may invite the application of interpretation principles, such as the ones developed by the German Supreme Court, and may open the door for national side-tracks which will not promote the original goal of the Maastricht-Treaty, namely to further European integration.

## **C. Evaluation of the Environmental Provisions of the Maastricht Treaty**

### **I. The pre-Maastricht Situation**

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<sup>29</sup> see: ELR 1993, p. 473 (editorial); Epiney/Furrer, Umweltschutz nach Maastricht - Ein Europa der drei Geschwindigkeiten? EuR 1992, p. 369.

Although it was not mentioned in the original EEC Treaty, environmental protection was considered by the Court of Justice to constitute a mandatory requirement capable of justifying national barriers to the free movement of goods, at first implicitly, as an "essential objective" of the Community<sup>30</sup>, and then explicitly<sup>31</sup>. Even prior to the entry into force of the Single European Act, a large amount of Community legislation had been adopted in the field by authority of Art. 100 and/or 235 the ostensible and primary purposes of which were the harmonisation of national laws which impeded the Common market or a levelling of the playing field for purposes of competition.

The EEC Treaty was amended by the Single European Act to take significant account of the environment. Commission proposals for internal market legislation under Art. 100 a are required to proceed from a high level of protection<sup>32</sup>, and it may be invoked to justify national derogation from any such legislation<sup>33</sup>. Art. 130 r to 130 t provide guidelines and authority for Community action including the principles of prevention, rectification at source and "polluter pays"<sup>34</sup>, a commitment to international cooperation<sup>35</sup> and, an express competence for EC-legislation in the environmental field<sup>36</sup>. Art. 130 r sec. 4 contains the one express subsidiarity rule in the EEC Treaty and Art. 130 r sec. 2 the one integration clause: Community action is justified to the extent to which environmental protection can be better attained at Community

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<sup>30</sup> Case 240/83, Procureur de la République v. Association de Défense de Brûleurs d'Huiles Usagées, (1985) ECR 531, (549).

<sup>31</sup> Case 302/86, Commission vs. Denmark, (1988) ECR 4607.

<sup>32</sup> EEC Treaty, Art. 100 a sec. 3.

<sup>33</sup> EEC Treaty, Art. 100 a sec. 4.

<sup>34</sup> EEC Treaty, Art. 130 r sec. 2.

<sup>35</sup> EEC Treaty, Art. 130 r sec. 5.

<sup>36</sup> EEC Treaty, Art. 130 s.

level, and environmental protection requirements must be a component of the Community's other policies.

Based on these provisions, approximately 400 pieces of legislation have been passed up to now<sup>37</sup>.

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<sup>37</sup> Important legislative initiatives adopted under present Treaty rules include the environmental impact assessment directive (Dir.85/337, O.J.1985, L 175/40), access to environmental information directive (Dir. 90/313, O.J. 1990, L 185/56) the adoption of an integrated financial instrument for the environment (LIFE) (regulation 1973/92, O.J. 1992, L 206/1), and the establishment, pending agreement among the Member States as to its seat, of a European Environmental Agency and a monitoring and information network (regulation 1210/90, O.J. 1990 L 120/1); regarding the relationship of internal market provisions and environmental law; see: Pernice, Auswirkungen des europäischen Binnenmarktes auf das Umweltrecht - Gemeinschafts(verfassungs)rechtliche Grundlagen, NVwZ 1990, 201; see also: Breier, Umweltschutz in der Europäischen Gemeinschaft, NuR 1993, p. 457; Epiney/Furrer, Fn. 29, p. 377 et seq.

## II. The Environmental Provisions in the Maastricht Treaty

### 1. Outline

Maastricht re-emphasizes environmental policy but also muddies the waters significantly. Art. 2 of the EC Treaty recognizes for the first time environmental limitations to economic growth by numbering amongst the tasks of the Community "sustainable and non-inflationary growth respecting the environment", a rather tepid commitment from an environmentalist's point of view. Art. 3 (k) includes as a Community activity a policy in the sphere of the environment. The substantive provisions of Title XVI, Art. 130 r to 130 t, alter those of the EEC Treaty in the following respects: Community policy on environment is to aim at a high level of protection-while taking account of regional diversity<sup>38</sup>; environmental protection is to include the pre-cautionary principle, and its requirement must no longer to be a "component" of other policies but rather integrated into their definition and implementation<sup>39</sup>. The specific reference to subsidiarity, contained formerly in Art. 130 r sec. 4 EEC Treaty, is dropped in the environmental section and "upgraded" as a principle generally applicable to the entire EC Treaty (Art. 3 b EC Treaty). Legislation intended to adopt and implement Community policy is to be adopted by the Council in cooperation with, unanimously in consultation with, or in co-decision with the Parliament depending on its subject matter<sup>40</sup>. Harmonisation measures must include appropriate safeguard clauses permitting provisional national measures which protect the environment<sup>41</sup>. More stringent

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<sup>38</sup> Art. 130 r sec. 2 EC Treaty.

<sup>39</sup> Art. 130 r sec. 2 EC Treaty.

<sup>40</sup> Art. 130 s sec. 1 to 3 EC Treaty, see also: Nentwich, Institutionelle und verfahrensrechtliche Neuerungen im Vertrag über die Europäische Union, EuZW 1992, 235.

<sup>41</sup> Art. 130 r sec. 2 EC Treaty.

national protective measures are admitted but will be required to be notified to the Commission<sup>42</sup>. The Council is to be given specific authority to adopt general action programmes in the field<sup>43</sup>. In view of the cost of the prospective initiative, it may authorize temporary derogations and/or financial support from the Cohesion Fund<sup>44</sup>.

## 2. Evaluation

It is doubtful whether the balance of the Maastricht Treaty is positive as regards the protection of the environment. The Single European Act introduced into the EEC Treaty two principles which may be contrary in their outcome: environmental protection on one hand and national autonomy - explicitly stated<sup>45</sup> or implied in the principle of subsidiarity<sup>46</sup> - on the other. This potential conflict has been exacerbated by the Maastricht Treaty stressing and enhancing both principles.

By deleting the term "economic" from the European Economic Community, the Maastricht Treaty indicated that the economy is no longer the primary or even exclusive focus of the European Community. The tasks and objectives of the European Union were extended, the integration programme was put on a broader basis encompassing beyond the traditional economic interest other areas in which European action is necessary due to the nature of the subject or desirable in order to move towards a European Union. Environmental protection has

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<sup>42</sup> Art. 130 t EC Treaty; see also: Council of Edinburgh, Conclusions of the Presidency, Part B, Annex 2, p. 7b.

<sup>43</sup> Art. 130 s sec. 3 EC Treaty.

<sup>44</sup> Art. 130 s sec. 5, Art. 130 d EC Treaty.

<sup>45</sup> Art. 130 t, Art. 100 a EEC Treaty.

<sup>46</sup> Art. 130 r sec. 4 EEC Treaty.

become an element of European politics (at least in principle) equally important to economic goals<sup>47</sup>. As a consequence, Art. 2 of the EC Treaty names environmental protection as one of the tasks of the Community. The environmental action programmes obtained an explicit legal basis in Art. 3 (k) EC Treaty. Although these provisions are more of a programmatic character and not directly enforceable<sup>48</sup> they are an important indication for the rank assigned to environmental concerns by the European Community. Art. 130 r sec. 2 EC Treaty introduces the, formerly only in Art 100 a sec. 3 EEC Treaty mentioned, principle that environmental protection shall be achieved at a high level. Regional differences have to be taken into consideration when defining the level of environmental protection. This means that environmental protection is not regarded to be absolute but dependent on differing regional situations. This may entail differing standards and politics in the Community, reducing the positive impact of this clause with regard to environmental protection significantly<sup>49</sup>.

A progressive step from an environmental point of view is the introduction of the so-called pre-cautionary principle "which enlarges the possibility to take measures already at a time when environmental damages are not to be expected yet<sup>50</sup>. Environmental protection is promoted from being a mere "component" of Community policies to be integrated into the definition and implementation of all Community policies. Like a spider's web economic and environmental objectives are now recognized to be interdependent, and environmental protection must by necessity be an integrated or comprehensive task

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<sup>47</sup> see: Breier, Fn. 36, p. 460; Ress, Fn. 3, p. 1.

<sup>48</sup> see: Epiney/Furrer; Fn. 29, p. 372 et seq.; Breier, Fn. 36, p. 460; Ress, Fn. 3, p. 9.

<sup>49</sup> see: Epiney/Furrer, Fn. 29, p. 383 et seq.

<sup>50</sup> see: Epiney/Furrer, Fn. 29, p. 384 et seq.

(Querschnittsaufgabe) inextricably interwoven with all other Community policies<sup>51</sup>. The position of the European Parliament taking usually a progressive stand as regards environmental protection has been further strengthened by the co-decision procedure<sup>52</sup> .

These undoubtedly positive traits of the Maastricht Treaty, consolidating and enhancing environmental protection in the Community, are diminished by Treaty provisions extending the already existing explicit or implicit derogations in favour of national measures thus creating a real risk to develop the "two-speed Europe", designed in the EEC Treaty, into a "multi-speed Europe"<sup>53</sup> as regards the standard of the environmental situation in the various Member States.

The Single European Act established a "two-speed Europe" as it provided for a "standard" environmental protection basis created by measures taken pursuant and Art. 130 r/s EEC Treaty, and the derogation in Art. 130 t EEC Treaty, allowing Member States to maintain or introduce more stringent protective measures. The EEC Treaty contained only a derogation in favour of the environment. This result was not significantly altered by the principle of subsidiarity as originally stated in Art. 130 r sec. 4 EEC Treaty:

"The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States."

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<sup>51</sup> Art. 130 r sec. 2 EC Treaty; see: Epiney/Furrer, Fn. 29, p. 386; Lane, Fn. 24, p. 971.

<sup>52</sup> Art.89 b EC Treaty; see also: Breier, Fn. 36, p. 460; Nentwich, Fn. 40.

<sup>53</sup> see: Editorial, ELR, 1993, 473; Epiney/Furrer, Fn. 29.

Subsidiarity was thus stipulated in positive terms, interpreted as the task to choose the most appropriate action level. Already then some commentators understood the "better"-clause as the stipulation of the principle of subsidiarity, i.e., the Member States are primarily competent to enact the necessary legislation as regards environmental issues<sup>54</sup>. The latter construction was obviously adopted by the Maastricht Treaty.

The Maastricht Treaty provides the European environmental vehicle with three gears: besides the "standard" and "high-speed" provisions established by the EEC Treaty, Art. 130 s sec. 5 EC Treaty introduces a negative derogation: if an environmental measure entails excessive costs for one Member State an exemption and/or financial support from the Cohesion Fund<sup>55</sup> may be granted. Thus, a three-speed Europe is explicitly established by the Maastricht Treaty<sup>56</sup>.

A multi-speed Europe may be provoked by the so-called subsidiarity rule. This rule was deleted in Art. 130 r and is now established in Art. 3 b EC Treaty; thus it is generally applicable to all provisions of the EC Treaty. The subsidiarity rule as stipulated by Art. 3 b EC Treaty differs significantly from the "old" one, insofar as it introduces an additional test:

In those fields not falling in its exclusive competence the Community takes action only according to the principle of subsidiarity, only if and so far as an objective of measures envisaged cannot be sufficiently achieved at national level and, therefore, can be better

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<sup>54</sup> see: Krämer, in v.d.Groeben/Thiesing/Ehlemann, Kommentar zum EWG-Vertrag, 4. edition 1991, p. 3981 et seq.; Krämer, Environmental Protection and Art. 30 EEC Treaty, Common Market Law Review 30 (1993), p. 111.

<sup>55</sup> Art. 130 d EC Treaty; see also: Breier, Fn. 36, p. 461.

<sup>56</sup> see: Epiney/Furrer, Fn. 29, p. 403.

attained, due to its extent or effects, at Community level.

The word "subsidiarity" is now explicitly used in Art. 3 b EC Treaty. There is, however, barely a term in the EC Treaty which has experienced that many interpretations as the term "subsidiarity"<sup>57</sup>. Some construe the subsidiarity rule as a provision creating rights and obligations for the Member States: they have to take care that the objectives of the Community are also achieved by the Member States. If they are not capable or willing to attain the Community goals, the Community may act<sup>58</sup>. Others reduce the subsidiarity rule to a mere declaration of political intent, not justiciable<sup>59</sup>, or attribute not very much importance to it as it will have only limited justiciability<sup>60</sup>. The Council of Environmental Ministers explained in its decision on the Fifth Environmental Action Programme that the application of the subsidiarity rule may neither set back existing Community policies nor impede a future efficient development in this

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<sup>57</sup> see: Lambers, Subsidiarität in Europa - Allheilmittel oder juristische Leerformel? EuR 1993, 229; Blanke, Das Subsidiaritätsprinzip als Schranke des Europäischen Gemeinschaftsrechts? ZG, 1991, 133; Constantinesco, "Subsidiarität": Magisches Wort oder Handlungsprinzip der Europäischen Union?, EuZW 1991, 561; Hochbaum, Kohäsion und Subsidiarität - Maastricht und die Länderkulturhoheit, DÖV 1993, 285; Hummer, Subsidiarität und Föderalismus als Strukturprinzipien der Europäischen Gemeinschaft?, ZfRV 1992, 81; Konow, Zum Subsidiaritätsprinzip des Vertrags von Maastricht, DÖV 1993, 405; Pipkorn, Das Subsidiaritätsprinzip im Vertrag über die Europäische Union - rechtliche Bedeutung und gerichtliche Überprüfbarkeit, EuZW 1992, 697; Scherer, Subsidiaritätsprinzip und EG-Agrarform, DVBl. 1993, 281; Schmidhuber/Hitzler, Die Verankerung des Subsidiaritätsprinzips im EWG-Vertrag - ein wichtiger Schritt auf dem Weg zu einer föderalen Verfassung der Europäischen Gemeinschaft, NVwZ 1992, 720; Schmidhuber, Das Subsidiaritätsprinzip im Vertrag von Maastricht, DVBl. 1993, 417; Stewing, Subsidiarität und Föderalismus in der Europäischen Union, Köln 1992, Das Subsidiaritätsprinzip als Kompetenzverteilungsregel im Europäischen Recht, DVBl. 1992, 1516; Toth, The Principle of Subsidiarity in the Maastricht Treaty, CMLR 1992, 1079; Sedemund/Montag, Die Entwicklung des Europäischen Gemeinschaftsrechts, NJW 1994, 625; Oppermann/Classen, Die EG vor der Europäischen Union, NJW 1993, p. 5, 8.

<sup>58</sup> see: Epiney/Furrer, Fn. 29, p. 374.

<sup>59</sup> see: Lambers, Fn. 57, p. 229.

<sup>60</sup> see: Breier, Fn. 36, p. 461.

field<sup>61</sup>. This view of a limited importance of the subsidiarity rule as regards Community competences is sustained by others stating that the "acquis communautaire" has to be maintained. If an intended measure is a clear annex to a measure previously taken by the Community, a Community competence shall be assumed<sup>62</sup>. The subsidiarity rule is regarded to give the Community the competence to take action only vis-à-vis specific Member States: one outcome would be a development of a variable geometry/subsidiarity hybrid whereby Community action would be justified and lawful in some Member States which had showed themselves unable or disinclined to comply with acceptable standards of environmental protection, but not in others which had not<sup>63</sup>. The roman-catholic encyclica "Quadragesimo Anno", dated 1931, is quoted in order to define what "subsidiarity" means<sup>64</sup>.

This rather limited selection of definitions of "subsidiarity" and its legal effects shows that the subsidiarity rule may be given the interpretation suiting best the political goal envisaged, in particular, as neither the meaning nor the justiciability of the "old" subsidiarity rule has ever been tested in the European Court of Justice.

Regardless of the aforementioned interpretations of the subsidiarity rule the wording of Art. 3 b EC Treaty evokes the following questions:

- (1) which areas fall within the exclusive competence of the Community and what is the extent of these competences? How do these competences have to be construed - narrow (similar to the German Supreme Court) or extensive (as

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<sup>61</sup> Decision of Council of Dec. 16, 1992, Com (92) 23.

<sup>62</sup> Schmidhuber/Hitzler: Fn. 57, NVwZ 1992, p. 720 (723).

<sup>63</sup> see: Lane, Fn. 24, p. 971.

<sup>64</sup> see: Lambers, Fn. 57, p. 230; Pipkorn, Fn. 57, p. 698.

applied by the European Court of Justice, using the "implied powers"-doctrine and the "effet utile"-interpretation)?

- (2) How shall the (new) subsidiarity rule, containing a negative and positive test, be applied? When is an action at Member State level "sufficient to attain a Community goal"? What will be the standard for "sufficiency"? What are the criteria forming the basis for the sufficiency judgement? How is this combination - not sufficient on Member State level, and therefore better on Community level - to be construed?
- (3) Who is going to pass the final judgement whether the subsidiarity rule has been applied in an adequate way (justiciability?)<sup>65</sup>.
- (4) Does the subsidiarity rule have any impact on the construction of competence norms as developed by the European Court of Justice, i.e. does the intent underlying the introduction of the subsidiarity rule, to reduce Community action, have any impact on the extensive interpretation of Community competences and request that the "implied powers" and "effet utile" principle are given up by the European Court of Justice<sup>66</sup>?

None of these questions can be answered at the moment in a definitive way. A host of uncertainties is connected with the construction and application of the subsidiarity rule. The variety of interpretations invites to pick the one which seems to be most suitable

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<sup>65</sup> see: Lambers, Fn. 57, p. 234 et seq.; Pipkorn, Fn. 57, p. 699.

<sup>66</sup> see: Oppermann/Classen, Fn. 57, p. 8; Maastricht Decision, Fn. 2.

to the respective political intents. Depending on the context the subsidiarity rule may have a different impact. In the field of cultural affairs the subsidiarity rule may enhance and protect cultural diversity. An effective protection of the environment, however, air and water not being confined to national and regional borders, may be seriously impaired by a construction of the subsidiarity rule as a means to preserve national and regional diversity as regards environmental legislation and standards. The Maastricht Treaty, enhancing the environmental protection and upgrading it on one hand introduces on the other a principle which has no clearly defined legal content, which protects interests not connected with a better protection of the environment, and which may be abused as a vehicle to reserve or regain national competences which may be contraproductive as regards an ever better protection of a naturally integrated environment. Differing national environmental standards may impede inter-state trade and create a distortion of competition.

**D. The Impact of the Maastricht-Decision on the Environmental Provisions of the EC Treaty**

The openness of Art. 3 b EC Treaty, in particular, the subsidiarity rule allows national side tracks such as the one chosen by the German Supreme Court. The unresolved conflict between environmental protection on a high level on one hand and protection of national and regional authority on the other, basic questions of the applicability and justiciability of the subsidiarity rule not having been decided yet, provides the entity applying the principle with

vast discretion. A broad construction of the subsidiarity principle in conjunction with the principle of limited competences may even lead to the conclusion that the broad interpretation of Community principles as developed by the European Court of Justice can no longer be sustained, like the German Supreme Court held. Although the German Supreme Court is not competent according to Art. 164, 177 EC Treaty it reserved the right to check whether a specific Community action, e.g. in the environmental field, is in compliance with Art. 130 r to t EC Treaty, these competence norms being construed in a narrow way, excluding the application of "implied powers" and "effet utile". Following the general line of the Maastricht-Decision, the - until now - dynamic and extensive construction of EC competence provisions in the environmental field will have to be construed in a narrow way in order to avoid the result that the German Supreme Court declares a specific piece of environmental legislation as not binding in Germany. By introducing such a national "opt out" possibility the German Supreme Court tries to influence indirectly the interpretation of competence norms on the EC level. If the Community desires that a piece of Community legislation be binding in all Member States it has to stick to the (narrow) construction of EC competence provisions as stated by the German Supreme Court.

## **E. Résumé**

The German Supreme Court advocates in its decision on the Maastricht Treaty a narrow interpretation and application of Community competences introduced, maintained or amended by the Treaty on European Union. The dynamic expansion of environmental protection on the Community level, propelled by an extensive application of Art. 235 EC Treaty, by the principles of "implied powers" and "effet utile" developed by the European Court of Justice, is significantly slowed down by the German Supreme Court's restrictive interpretation of the principle of enumerated EU-competences and its extensive construction of the principle of subsidiarity in the way most favourable to the preservation of national influence and legislative competence.

The German Supreme Court usurps the right to pass the final judgement whether an EU-action is within the scope of the integration programme of the Maastricht Treaty as approved by the German parliament. If the Supreme Court reaches the conclusion that a specific EU-action does not meet the standards established by the Supreme Court, i.e. extends the EC-competences as provided by the Maastricht Treaty, the EU-decision will not be binding on Germany. Although claiming a "cooperation" with the European Court of Justice, the German Supreme Court intrudes with the above ruling into the realm of the European Court of Justice, negating basic principles established by the E.C.J. and challenging its authority to pass the final and (Community-wide) binding judgement on the compliance of secondary EU-legislation with the EU Treaty, thus creating a German "opt-out"-provision.

The provisions on the protection of the environment do not appear to have been altered in a spectacular way by the Maastricht Treaty. A thorough analysis, however, taking into consideration the above rules of interpretation established by the German Supreme Court will produce a different picture: The amendments may entail far-reaching consequences such as lowering the Community-wide level of environmental protection and increasing the variety of environmental regulations and standards, thus impeding free trade and augmenting the potential for distortion of competition.