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How tight is the Legal Straitjacket for Environmental Product Regulation?

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Is There Any Space Left in the EU Internal Market for National Product-Related Measures?

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Products have an effect on the environment. Depending on their composition, their production method and how they are used, they can either become a source of pollution, or they can be designed in such a way as to avoid negative secondary effects.

For instance, regulations set the sulphur or lead content of petrol, set out the list of chemical substances which may not be retailed, and impose restrictions related to the composition of packaging, the phosphate content of detergents and the maximum noise level for some types of appliances.

Most of these standards set at national level are derived from European law – whose objective to create a common market often leads to the harmonisation of technical standards relating to products – and occasionally also from international environmental conventions.

The advantage of such harmonisation at the European or, more rarely, at international level, is undeniable for producers and distributors since it allows the setting, on the scale of a large territory, of environmental standards which then govern the marketing of products and their free circulation within that area.

Norms that are strictly national assume, on the contrary, that the product will be conceived or adapted specifically in order to gain access to a par-

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ticular national market, necessarily smaller in scale than the large European territory.

So why do we mind to know if there is a space left in the EU internal market for *national* product-related measures? Why does it matter to evaluate what a national authority's latitude is in terms of being able to conduct an innovative product policy within its own territory? Why does this matter, particularly if we take as a starting point the assertion that this margin is necessarily limited and rather unwelcome from the producers' point of view?

It matters for three main reasons.

Firstly, because the level of environmental protection promoted by harmonised supranational legislation may still be considered by national authorities not to be sufficient. They may aspire to more ambitious objectives than the standard decided at supranational level.

Secondly, because many areas linked to product policy are not subject to such harmonisation. In these cases it is up to individual States to take the measures that they deem appropriate. Moreover, many rules of European law stem from the impetus of one State in particular, which, in so acting, opens the debate and poses the question as to whether the measure it takes should be applied on a larger scale.

Finally, because the process of drawing up and adopting these harmonised standards tends to be particularly lengthy and is likely, in the future, to take even longer at EU level, as a consequence of enlargement.

Legally speaking, there undeniably is a latitude for the adoption of such national measures concerning products. But this latitude is contained within limits which are not always very clear.

This chapter aims to schematically present, in a questions and answers format, the legal determinants which should be taken into account in the elaboration of such national product policies.

A. Primary or secondary legislation?

1. In examining whether a proposed measure is acceptable in the light of Community law, it is first necessary to determine whether the measure falls within the scope of a Community Directive, Regulation or Decision.

It is at first necessary to determine the framework for the proposed measure in order to assess the degree of leeway enjoyed by the Member State.

Case 1: **The issue is already very well regulated at Community level: a Regulation, a Directive or a Decision deals with the matter in question.**

In this hypothesis, the latitude left to Member states to adopt their own rules depends directly on the content and the legal basis of the European legislation at stake, the so-called secondary legislation. Secondary Community legislation has primacy over national law.

That assessment is carried out by analysing the legal basis of the Community text and its contents.

> *For instance, any national measure relating to the solvent content of paints must be evaluated in the light of the European Directive which deals with that issue.*

Case 2: **The proposed measure does not fall within the scope of secondary legislation. No specific rule regulates the issue at European level.**

In that case, the acceptability of the proposed measure is evaluated directly on the basis of the general rules laid down in the EC Treaty, which are characterised as "primary law".

> *For instance, there is no "European ecotax" on beverage containers. National measures which establish such exotaxes must be assessed in the light of primary law: it is necessary to ascertain that they are compatible with the general principles set out in the Treaty.*

2. When can the proposed measure be considered to fall within the scope of secondary legislation?

In order to know whether the proposed measure falls within the scope of secondary legislation, it is necessary to assess the extent to which the instruments of Community law which appear, *a priori*, to be relevant to the issue are harmonised.

It is possible that a Community instrument governs only some aspects of an issue, or only certain products, or only some stages in the life-cycle of those products.

It is therefore necessary to establish:

- *the scope of application of the measure of Community law:* does it concern the products intended to be covered by the measure being pro-

posed at national level? Does it cover the specific aspects referred to by the proposed measure?

> *A Community measure which sets labelling rules for products does not necessarily harmonise the rules relating to the composition of those products or the requirements relating to their energy efficiency.*
>
> *A Directive on toy safety does not necessarily guarantee the free movement of toys within Europe in respect of conditions such as their packaging or their heavy metal content.*

- *the objectives pursued by the Community measure*: there may be instances of "implicit harmonisation" which result from the spirit of a Community legal text.

> Thus, if a Directive provides that its objectives may be achieved by allocation of financial aid by the Member States, the Member State may not arrange to meet the objectives laid down by the Directive in another manner, for instance, by the creation of import bans.

The degree of harmonisation therefore makes it possible to assess the likely framework for the proposed national measure. So (i) either it will be assessed only in the light of secondary legislation (as in the case of complete harmonisation), or (ii) if the proposed measure goes beyond the scope of existing directives and regulations, its lawfulness will be assessed directly in the light of the EC Treaty.

The harmonisation carried out under secondary legislation may be total (no flexibility is intended) or minimal (the Directive allows the Member State to decide what system will be implemented in respect of that question).

3. When may a proposed measure be considered not to fall within the framework of secondary legislation?

The proposed national measure does not fall within the framework of secondary legislation in the three following cases:

1) The issue is not yet specifically regulated at Community level;

> *For instance, the placing on the market of product X1 is not regulated.*

2) The issue is regulated only in respect of certain products, other than those envisaged to be regulated at the national level;

Conditions for placing on the market are laid down for products X2 and X3 but not for product X1.

3) The rules which apply at Community level relate to the same products but for aspects of the life cycle other than those covered by the national measure (composition versus labelling, for instance, or placement on the market versus use) or for other environmental aspects.

The conditions laid down in secondary legislation as regards labelling do not prejudice the acceptability of national measures relating to minimal energy performance for electric appliances.

4. **When the national measure falls within the scope of secondary legislation, it is first necessary to examine the specificities of the Community measure: is it a Regulation, a Directive, a Decision, an Opinion or a Recommendation?**

In order to carry out their tasks, and in accordance with the provisions of the Treaty, the European Parliament acting jointly with the Council, the Council and the Commission are empowered to draft or adopt the following measures:

- *Regulations*
  A Regulation has general application. It is binding in its entirety, a very complete text which binds the Member State as regards objectives and the methods for implementing them. It is directly applicable, which means that it does not need to be transposed into national legislation: it automatically applies, as worded. However, in certain cases it requires supplementary legislation to be adopted at the national level in order to ensure its efficient implementation (creation of management bodies, setting up review and monitoring mechanisms, etc.).
- *Directives*
  A Directive is binding on all Member States to which it is addressed as to the result to be achieved, while leaving national authorities the power to choose the form and methods of implementation. Consequently, the Member State always has a certain degree of leeway, in principle, to adopt what it considers to be the most suitable measures for the purpose of achieving that objective.
- *Decisions*
  A Decision refers to very specific addressees, whether they are individuals or certain clearly defined Member States. It is directly binding in its entirety upon those to whom it is addressed.

- *Recommendations and opinions*
  Recommendations and opinions have no binding legal force.
- *Green papers, communications and white papers*
  While not specifically provided for by the EC Treaty, green papers are non-binding measures by which the European institutions present information which they wish to discuss with civil society at large. Communications and white papers present the results of the thinking which takes place following that debate. These documents are not legally binding but they constitute basic elements of policy proposals.

The nature of the instrument in question has a major influence on the tasks devolved to the Member State. In the case of a directive, Member states must adopt their own implementation rules; they have some latitude in choosing the means they consider the most appropriate to reach the objectives set by the Directive. Regulations and Decisions, on the contrary, are directly applicable and do not require, in principle, a formal transposition at Member State level.

Nevertheless, the nature of the instrument does not reveal what leeway is afforded the Member States as regards the objective *itself* (the result to be achieved), which is set at Community level.

In order to know whether the State may strengthen the objective set at Community level by maintaining or adopting national measures which are more favourable to environmental protection, it is necessary to look at the *legal basis* of the Community measure.

B. The legal basis[3]

5. To understand the degree of flexibility allowed the Member State under secondary legislation as regards the objectives to be achieved, it is necessary to examine the legal basis of the Community measure.

5.1. *What is the legal basis of a Community measure?*

Directives, Regulations and Decisions are always adopted on the basis of one or several specifically identified Articles of the Treaty, which are identified in the preamble to the text in question.

3. See generally J.H. Jans, *European Environmental Law*, Europa Law Publishing, Groningen, 2000; L. Krämer, *EC Environmental Law*, 5th ed., Sweet and Maxwell, London, 2003.

These legal bases are important for several reasons:

a) They assert the competence of the European institutions.

They make it possible to specify the competence of the European institutions to act in respect of the issue in question. The legislative measure proposed must have a basis in one of the policies for which the Treaty confers competence to the European Communities, whether of a general nature (e.g. Article 95 EC on the establishment and functioning of the internal market) or of a specific nature (e.g. Article 175 EC for the protection of the environment).

b) They specify the procedure for adoption of the measure.

The choice of legal basis determines which procedure must be followed when adopting the provisions in question at Community level (co-decision or cooperation, qualified majority or unanimity, etc.), but it should be noted that the tensions which existed earlier between Articles 95 EC and 175 EC have calmed down following the reforms adopted under the Treaty of Amsterdam in 1997. While previously the choice made between the former Articles 100a EC and 130r EC determined the role of the European Parliament in the decision-making process and the rules relating to voting (majority or unanimity), the Treaty now provides for a co-decision between the Parliament and the Council, with qualified majority voting the rule (except in certain exceptional cases).

c) They determine the degree of flexibility allowed to the Member States for the purpose of adopting more stringent measures.

The choice of legal basis is decisive in assessing how much flexibility the Community measure allows Member States. It makes it possible to assess whether the objective pursued by a Directive or Regulation may be strengthened at national level. While classification as a "directive" or a "regulation" governs the degree of flexibility as regards the methods to be used in achieving the objective set by the Community measure, the legal basis answers the question as to whether that objective may itself be modified in the direction of stronger protection.

Thus, the eco-label Regulation 1980/2000,[4] which is based on Article 175 EC, and imposes conditions for the award of the European label, does not prejudice the Member State's power to adopt more stringent measures, for instance by make it mandatory to obtain the label.

4. Regulation (EC) No 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised Community Eco-label Award Scheme, OJ 2000, L237/1.

The discretion conferred on Member States to adopt more stringent measures of protection will be greater if the legal basis is "environmental" (Article 175 EC, ex-Article 130r EC), than if it is "internal market" (Article 95 EC, ex-Article 100a EC). In order to ascertain the room for manœuvre available to Member States to adopt or maintain any supplementary measures, it is necessary to refer to the legal basis of the text being considered (aside from determining the content of the text, carried out as described in section 9 below)

5.2. ***How is the legal basis for an instrument of Community law chosen?***

The legal basis for an instrument of Community law is chosen as a function of several factors open to judicial review. These include:

- *The content of the measure and its purpose;*

  A measure concerning waste management will a priori be based on Article 175 EC, given that its main purpose is related to environmental protection.[5]

- *The goal, the primary objective pursued by the Community legislature.*

  If the legislature seeks to achieve several objectives, it is the measure's *main purpose* will determine the most suitable legal basis.

  If the main objective is to harmonise national rules for the purpose of promoting the establishment of a common market, the measure will be based on Article 95 EC ("internal market", ex-Article 100a EC), even if the measure also has an environmental objective. That legal basis is often used to regulate conditions for placing on the market and the free movement of products.

  By contrast, if the centre of gravity, i.e. the main objective, of the measure is to protect the environment, its legal basis will be Article 175 EC (ex-Article 130r).

  Other legal bases are also possible, for instance when the Community legislature's main objective relates to other grounds of competence (health, consumer protection, agricultural policy, etc.), or if the measure was adopted at a time when the environment did not explicitly figure in the list of objectives pursued at Community level (ex-Articles 100 and 235 EC).

5. Case C-155/91, *Commission v. Council*, [1993] ECR I-939.

When a measure simultaneously pursues several objectives which are not incidental in nature, multiple legal bases may be used, provided that the procedures can be simultaneously applied. The fact that the Community instrument has various legal bases does not pose a problem when the adoption procedures are identical (for instance, co-decision). However, when they diverge, the instrument must take a single legal basis.

6. What are the implications of using Article 95 EC[6] of the Treaty as legal basis?

6.1. The objective of Article 95 EC

Article 95 EC seeks to achieve the harmonisation of conditions for the free movement of goods, in order to ensure the proper functioning of the internal market. In order to function efficiently, that harmonisation must be as complete as possible. In that context, supplementary national measures are not welcome, since they risk creating undesirable obstacles to free intra-Community trade.

Directives concerning products are often based on Article 95 EC (ex-Article 100a EC), given the direct effect of such measures on the free movement of goods in the internal market.

Considerable tension exists between protection of the environment and the internal market as regards conditions relating to placing products on the market. Since products are intended to circulate and to be the subject of physical movement for the purpose of trade, requirements for them to comply with environmental objectives affect their ease of access to the

6. See J.H. Jans, *o.c., supra* n. 3; L. Krämer, *o.c., supra* n. 3; S. Albin & S. Bär, "Nationale Alleingänge nach Amsterdam – Der neue Art. 95 EGV: Fortschritt oder Rückschritt für den Umweltschutz?", *Natur und Recht* (1999), p. 185; M. Dougan, «Minimum Harmonization and the Internal Market», *Common Market Law Review* 37 (2000), pp. 853-885; N. de Sadeleer, «Les clauses de sauvegarde prévues à l'article 95 du traité CE: l'efficacité du marché intérieur en porte-à-faux avec les intérêts nationaux dignes de protection», *Revue Trimestrielle de Droit Communautaire* (2002), pp. 53-73; *id.*, «Safeguard clauses under Article 95 of the EC Treaty», *Common Market Law Review* (2003); H.G. Sevenster, " The Environmental Guarantee after Amsterdam: Does the Emperor Have New Clothes? ", *Yearbook of European Environmental Law* 1 (2000), pp. 291-310; R. Verheyen, " The Environmental Guarantee in European Law and the New Article 95 EC Treaty in Practice– a Critique ", *Review of European Community & International Environmental Law* (2000), pp. 180-187; C.D. Ehlermann, "The Internal Market following the single European Act", *Common Market Law Review* 24 (1987), p. 398.

market of the Member State which takes the measure in question. It is therefore desirable that any such step be taken, at the very least, at EU level.

In order not to favour trade to the detriment of other values recognised by the Treaty, Article 95 provides certain guarantees. It states that measures proposed at European level concerning health, safety, and environmental and consumer protection are to take as a base a high level of protection, taking account in particular of any new development based on scientific facts.

Though the level of protection ensured by secondary Community legislation does not necessarily have to be the highest possible level, it may not be non-existent, weak or intermediate. Moreover, that obligation may be subject to judicial review, if the Court finds that there has been a manifest error of assessment.

6.2. What are the conditions for adopting more stringent measures of protection?

When the objective pursued at national level is not achieved by Community law, Article 95 provides the Member State the possibility of adopting more stringent measures of protection, subject to compliance with very strict requirements.

Those measures may be of two kinds:
- provisional measures, or
- permanent measures.

6.2.1. Provisional measures: the safeguard clause laid down in Article 95(10) EC

Article 95(10) EC authorises the Community legislature to include, within the newly created measure, a safeguard clause in respect of Member States which wish to adopt more stringent protective measures, on a provisional basis.

In such cases, the possibilities for exceptions are specifically laid down by the text of the secondary legislation itself. It is for the Member State, when transposing that text, to decide whether or not to make use of it.

Thus, Directive 2001/18/EC of 12 March 2001 on the deliberate release of GMOs into the environment contains a safeguard clause (Article 23). This authorises Member States provisionally to restrict or prohibit the use and/or sale of a GMO as or in a product on its territory, even if that use

and/or sale has received a written consent which complies with the procedure laid down by the Directive, because of new or additional information which gives grounds for considering that the GMO presents a risk to the environment or human health.[7]

The existence of such a safeguard clause is often interpreted to mean that a subject has been fully harmonised.

6.2.2. Permanent measures

6.2.2.1. Requirements concerning the content of the proposed national measure

The requirements laid down by Article 95 EC vary depending on whether the intention is to introduce new provisions (Article 95(5)) or to maintain provisions existing prior to the relevant instrument of Community law (Article 95(4)).

In both cases, those requirements must be strictly construed, given that they lead to a level of protection which the Community act does not in principle authorise.

a) Introduction of a new measure

The proposed measure must be considered as new when it does not form part of the body of national legislation at the time when the Community measure is adopted.

It must satisfy the following conditions:

1. It must be based on new scientific evidence relating to the protection of the environment or the working environment.

> *Member States must present a risk assessment dossier setting out the cause-and-effect relationship between the regulated activity and suspected damage. Nevertheless, to require the Member State to submit irrefutable evidence would be contrary to the precautionary principle.*

2. The measure must be necessary on the grounds of a problem specific to the Member State.

7. Case 6/99, *Greenpeace France*, [2000] ECR I-1651.

In a case concerning pentachlorophenol, it was demonstrated that the Danish population ran a higher allergy risk than other populations as the result of genetic predisposition, eating habits and natural environment.[8]

3. The problem must have arisen after the adoption of the harmonisation measure.

The proposed provisions will be rejected if the Commission takes the view that they constitute a means of arbitrary discrimination, or a disguised restriction on trade between Member States or an obstacle to the functioning of the internal market.

b) Maintenance of an existing measure

If the measure already exists in national law, the requirements for its maintenance are less strict.

The Member State must notify the Commission of the reasons for the maintenance of the national measures on grounds of major needs referred to in Article 30 EC (which include protection of health and public security) or relating to the protection of the environment or the working environment.

However, in contrast to the preceding case, it need not prove that the risk is specific to the Member State.

c) Scope of the Commission assessment

The proposed provisions under a) and b) above will be rejected if the Commission takes the view that (i) they constitute a means of arbitrary discrimination, (ii) or a disguised restriction on trade between Member States, (iii) or an obstacle to the functioning of the internal market. The Commission's assessment should respect the principle of proportionality between the objectives pursued by the Member State, and the effect of the measure on the free movement of goods.

8. Commission Decision 1996/211, OJ 1996, L68/32.

6.2.2.2. Requirements concerning the form of notification

a) Introduction of the dossier

The envisaged national measure must be notified to the Commission, which will approve or reject the adoption of the measure at national level.

The notification must take place sufficiently soon after publication of the Directive so that the Commission may give its opinion on it during the transition period, before the date of the Directive's entry into force. In the time period preceding the Commission's decision, a standstill is imposed on the Member State: it may not adopt the proposed measure.

In case a new national measure is introduced, the scientific dossier must accompany the notification. It is for the Member State to prove that the conditions laid down by the Treaty for obtaining derogation are fully satisfied; it bears the burden of proof.

When the information provided by the Member State is incomplete, the Commission must reject the application.

b) Period granted to the Commission to take a decision

Since the entry into force of the Treaty of Amsterdam, the Commission has six months in which to assess the notifications it receives and to decide whether to approve or reject the national provisions in question. That period may be extended up to a maximum period of one year when justified by the complexity of the dossier and in the absence of a threat to human health.

In the absence of a decision by the Commission within six months, the national provision is deemed to have been approved.

The notification must therefore take place as soon as possible and at least six months before the expiry of the Directive's transposition period, so that the Commission may take a decision in due time.

c) Penalty for failure to notify

Failure to notify excludes the Member State from benefiting from the derogation. If the measure is nevertheless adopted at national level, it can be annulled by the Court of Justice.

6.2.3. May the Member State challenge a rejection by the Commission?

If the Member State disputes a rejection by the Commission, it may bring an action before the Court of Justice on the basis of Article 230 EC.

Any Member State may, in addition, bring an action before the Court of Justice if it considers that another Member State is making improper use of the leeway allowed under Article 95 EC. The Commission itself may challenge the national measure before the Court for improper use of powers (Article 95(9) EC).

7. What are the implications of the use of Article 175 EC[9] of the Treaty as a legal basis?

Article 175 EC (ex-Article 130s EC) is the legal basis for measures which may be adopted by the European institutions in order to protect the environment.

In order for Article 175 EC to be the suitable legal basis for a measure, it is not sufficient that the measure simply relates to the environment. The environmental objective must be the main objective aimed at, constituting the measure's centre of gravity.

> *If the main objective of a measure relating to substances dangerous for the environment is to harmonise conditions for the free movement of those products in Europe, the measure's centre of gravity will require the choice of Article 95 EC as the appropriate legal basis, even if the measure envisaged deals with environmental concerns.*

According to the current wording of the Treaty, Community policy on the environment aims at a high level of protection and is based on the principles of precaution and preventive action, the principle of rectification of environmental degradation at source and the polluter-pays principle (Article 174 EC).

Article 176 EC states: "The protective measures adopted pursuant to Article 175 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaty. They shall be notified to the Commission."

9. J.H. Jans, *o.c., supra* n. 3; L. Krämer, *o.c., supra* n. 3; N. de Sadeleer, *Le droit communautaire et les déchets*, Bruylant/L.G.D.J., Bruxelles/Paris, 1995; *id.*, «Les limites posées à la libre circulation des déchets par les exigences de protection de l'environnement», *Cahiers de Droit Européen* 5 (1993), pp. 672-696; *id.*, *Environmental Principles*, Oxford University Press, Oxford, 2002, pp. 341-354.

This means that Community harmonisation takes place in this case at only minimal level: the Member States may, in the process of transposition, set objectives which are more stringent than the Community requirements, and adopt legislation to that end.

Nevertheless, such proposed measures are subject to requirements relating to both the content of the standard and the procedure for notification to the Commission."

a) Requirements relating to the content of the national rule

The Court of Justice acknowledges that it is for the Member State to choose the level of environmental protection which it wishes to see applied in its territory, as long as the envisaged measures are measures which strengthen the objective sought by the Community measure. The purpose of Article 176 EC is not to provide a means of applying less stringent measures or delaying the implementation of Community law.

Measures developed at national level under Article 176 EC may be new measures or measures which already existed when the Community legislation in question was adopted but which the Member State wishes to maintain.

Those measures must be compatible with the Treaty and secondary legislation. Measures may not constitute arbitrary discrimination, or a disguised restriction on trade between Member States. Obstacles to the movement of goods which might be created are to be the least restrictive possible as regards intra-Community trade.

The fact that national measures pursue objectives set by the Community harmonisation measure, while strengthening them, makes them appear necessary in principle.

b) Formal conditions

Proposed national measures must be notified to the Commission.

However, Article 176 does not contain comparable details to those laid down in Article 95 EC as regards the effects of notification.

No time-limit has been laid down for communicating national legislation. However, implementation of the notification system requires close cooperation between the Commission and the Member States and it is for the latter, pursuant to Article 10 (ex-Article 5) EC, to notify as early as possible the national provisions which they intend to apply, so that the Commission may efficiently exercise its control.

8. Cases where Community measures take a different legal basis

8.1. Articles 94 EC (ex-article 100 EC) and 308 EC (ex-article 235 EC)

A certain number of measures adopted in the field of the environment remain based on either Article 94 (ex-Article 100, on the approximation of laws) or on Article 95 (ex-Article 235, residual authority) or, most often, on both of these together. These legal bases are those which were formerly used when no specific environmental basis was contained in the Treaty.

The directives adopted on those bases often expressly grant Member States the right to take measures which are either more or less binding than those provided for by the Community harmonisation measure.

Where the right to adopt stricter standards is provided, Member States which wish to make use of that derogation are nevertheless required to comply with the rules of the Treaty (primary legislation) and, in particular, Articles 28 *et seq.* EC. Thus, the national measure which is stricter than the Community harmonisation measure is valid in so far as it satisfies the conditions of necessity and proportionality. In addition, such a measure must comply with the substantive and formal conditions laid down by the harmonisation measure.

8.2. Other possible articles

A measure concerning the environment may find its centre of gravity in the legal bases relating to the common agricultural policy (Article 37), public health (Article 152), consumer protection (Article 153) or the common commercial policy (Article 133 EC).

In that case, it is necessary to refer to the articles cited in the preamble to the Community text being considered in order to determine the leeway conferred on the Member State for the purpose of adopting more stringent protective measures.

As regards consumer protection, for instance, Article 153(5) EC states that

Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.

In this area, the objective pursued at European Union level is worded as follows:

"In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.

The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through measures adopted pursuant to Article 95 in the context of the completion of the internal market and by measures which support, supplement and monitor the policy pursued by the Member States."

Consumer protection may therefore be established on the basis of two legal foundations, under Articles 95 and 153 EC.

C. The content of the rule

9. **When an instrument of secondary Community legislation exists, a preliminary analysis of its provisions must also be carried out in order to determine which tasks are explicitly conferred on the Member State.**

In order to delimit the Member State's latitude under an instrument of secondary legislation, its content must also be determined.

Directives sometimes explicitly allow Member States leeway to adapt their provisions to reflect national realities, either by providing the possibility of derogations, or by stipulating, for instance, that "Member States may set more stringent rules as regards scope and procedure". The text thus sometimes expressly empowers the State to adopt more stringent protective measures. It is therefore important to take note of the powers granted to Member States in parallel with examination of the legal basis of the text.

If such a possibility of derogation is laid down in a directive based on Article 95 EC, it can be used only under conditions of strict compliance with the conditions or formalities which have been laid down.

10. Does the instrument of Community law comply with the principle of subsidiarity?

Measures adopted at European level must be justified on the basis of the subsidiarity principle, in accordance with Article 5 EC, which states that "the Community shall take action... only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

The measure issued at European level will be justified in the areas which fall within the competences shared with the Member States:

- when the issue in question has transnational consequences and the objectives of the proposed action cannot be adequately achieved by action on the part of the Member States: the "scale" of the proposed measure must be examined;
- when it is proved that the effects of a measure adopted at European level are broader than the effects of a measure adopted at national level and can be better achieved at that level: the "added value" of the Community measure must be examined.

Value added is also established when the action adopted at Member State level might come into conflict with the Treaty, for instance by giving rise to distortions in competition or the free movement of goods, which is frequently the case when product standards are set.

A Member State may bring an action before the Court of Justice to decide on the lawfulness of the instrument of Community law as regards respect for the principle of subsidiarity. The action must, however, be brought within two months of publication of the instrument.

D. Checking compliance with primary law[10]

11. When is it necessary to assess compliance with the Treaty independently of provisions of secondary legislation?

If it is established that no Community act of secondary legislation (regulation, directive, decision) governs the area addressed by the national measure, or if Community harmonisation exists but proves to be partial or incomplete, the lawfulness of the proposed national measure must be tested in the light of the general rules laid down in the Treaty, classified as "primary law".

12. What are the implications of the general principle which prohibits creating obstacles to intra-Community trade?

The implementation of the fundamental principle of the free movement of goods laid down in the EC Treaty rests, *inter alia,* on a general prohibition on barriers. The concept of a barrier in the widest sense refers to any disturbance affecting a product which circulates within the territory of the Community. National measures which seek to promote environmen-

10. See A.R. Ziegler, *Trade and Environmental Law in the European Community*, Clarendon, Oxford, 1996; G. Van Calster, *International & EU Trade Law. The Environmental Challenge*, Cameron & May, London, 2000; D. Geradin, *Trade and the Environment. A Comparative Study of EC and US Law*, Cambridge University Press, Cambridge, 1997; B. Jadot, "Mesures nationales de police, libre circulation des marchandises et proportionnalité", *Cahiers de Droit Européen* (1990), p. 437; L. Krämer, «L'environnement et le Marché unique», *Revue du Marché Commun* (1993), p. 48; *id.*, "Environmental Protection and Article 30 EEC Treaty", *Common Market Law Review* (1993), pp. 111-143; H. Temmink, «From Danish Bottles to Danish Bees: The Dynamics of Free Movement of Goods and Environmental Protection - a Case Law Analysis», *Yearbook of European Environmental Law* 1 (2000), pp. 61-102; J. Wiers, *Trade and Environment in the EC and the WTO. A Legal Analysis*, Europa Law Publishing, Groningen, 2002; N. de Sadeleer, "Le principe de proportionnalité: cheval de Troie du marché intérieur?", *Law and European Affairs* (1993), pp. 379-389; N. Emiliou, *The Principle of Proportionality in European Law. A comparative study*, Kluwer Law International, London/The Hague/Boston, 1996; O. McIntyre, "Proportionality and Environmental Protection in EC Law», in J. Holder (ed.), *The Impact of EC Environmental Law in the United Kingdom*, J. Wiley, Chichester, p. 101; T. Trinidas, *The General Principles of Law,* Oxford University Press, Oxford, 1990, pp. 124-162; W. Van Gerven, "Principe de proportionnalité, abus de droit et droits fondamentaux", *Journal des Tribunaux* (1992), p. 306; W. Van Gerven, «The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoint from Continental Europe», in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe*, Hart, Oxford, 1999, pp. 37-63.

tal protection are likely to create barriers to intra-Community trade, particularly if they cover products, since these are essentially intended to move beyond borders.

There are, however, exceptions to this general prohibition, the precise scope of which must be established.

13. What are the implications of legal characterisation as a barrier?

In order to be acceptable where a dispute is brought before the Court of Justice, potential obstacles must satisfy strict conditions, which vary according to whether the measure in question establishes a financial charge (customs duties and measures having equivalent effect, measures of internal taxation) or a technical restriction (quantitative restrictions and measures having an equivalent effect).

This distinction is basic, for it determines how articles which cannot be cumulatively applied to a single national measure will be used among various areas of application. The articles concerned are:

- Articles 25 EC *et seq.* (charges having equivalent effect to customs duties);
- Articles 28, 29 EC *et seq.* (quantitative restrictions and measures having equivalent effect);
- Articles 90 EC *et seq.* (discriminatory internal taxation measures).

In order to assess the acceptability of the potential obstacle created by the national measure in question, it is necessary to establish the category to which it exclusively belongs, in order subsequently to evaluate the conditions under which a potential obstacle might be permitted – conditions which differ considerably according to whether the measure falls within Article 25, 28, 29 or 90 EC.

14. Prohibition on customs duties and charges having equivalent effect

Article 25 EC prohibits customs duties on imports and exports, whether these are tariffs or fiscal measurs. Customs duties are a charge levied when a border is crossed, determined on the basis of a percentage of the value of the good in question.

Fiscal charges which lead to the same result are also prohibited. The prohibition thus refers to unilateral measures adopted by a State in respect of a specific product on the basis of or at the time of its import or export

into or from the Community, but which excludes a similar national product ("like product"). This is the case, *inter alia*, when the proposed measure appears to apply to both national and imported products although its practical effect is to affect only foreign products, to the exclusion of national products (for instance, when the charge levied is refunded, but only to national taxpayers).

That prohibition is widely construed by the Court of Justice and does not allow any derogation.

However, it does not relate to fiscal measures which come under internal taxation and are applicable without distinction.

15. Prohibition on creating discriminatory internal taxation in respect of foreign products (Article 90 EC)

Member States have significant freedom to establish or amend domestic requirements. Fiscal measures adopted at national level also benefit from a presumption of legitimacy in the light of Community law. That presumption will be refuted, however, if the fiscal measure sets up a system which discriminates against foreign producers.

The Member State cannot, in effect, impose a taxation regime whose effect is to protect only its nationals and thereby to discriminate against foreign producers, as stated in Article 90 EC:

"No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products."

The taxation measures referred to here are all taxes and other fiscal charges which come under a general domestic taxation system and apply to products.

In order to be admissible, the charge must be part of a general taxation regime which applies the same criteria to domestic and foreign products and which is objectively warranted by the goal which provided the impetus for its application. The proposed tax must have the same effects on all taxpayers, be they domestic or foreign. The amount of tax to be paid cannot be greater for imported products. Similarly, the tax base and the means of collecting the tax must be identical.

In addition, Article 90(2) prohibits indirect fiscal discrimination. That is taxes which apply in a general manner to a category of products but where it can be observed that the goods referred to are not produced on the national territory but that they compete with another category of products which are produced on the national territory but are not subject to the tax. Thus, a Member State may not adopt protectionist fiscal measures in respect of foreign products which are in competition – even partially, indirectly or potentially – with national products.

The aim of this Article is to ensure that internal taxation is completely neutral as regards competition between national and imported products. That principle of identical taxation is therefore also valid for products which, without appearing to be similar, present analogies as regards their use. The relevant criterion in this regard is the interchangeability of products. It is necessary to ascertain whether products have sufficient properties in common to be considered an alternative choice for the consumer. The assessment of discrimination requires, in principle, the existence of a comparative element between national production and its competition. Failing such production, the measure in question would appear to fall outside the scope of Article 90 EC (it must then be ascertained whether it falls within Article 25 EC or Article 28 EC), but the position of the Court of Justice is not settled in that regard.

Article 90 thus unconditionally prohibits measures of internal taxation of a discriminatory or protectionist nature. That does not mean, however, that differentiated taxation cannot be accepted. In the light of settled case-law, it is admissible under three conditions:

a) ***The distinction must be based on an objective criterion.***

> In that regard, the Court of Justice takes the view that the nature of the raw materials and the means of production used to produce electricity constitute objective criteria which warrant the application of a differentiated fiscal policy as regards products and energy.[11] An exemption from consumption tax in favour of regenerated oils, and imposition of a progressive tax as a function of the number of cylinders of vehicles being taxed are also based on objective criteria.

11. Case C-213/96, *Outokumpu Oy*, [1998] ECR I-1777.

b) ***The objective sought must be legitimate.***

Article 90 EC does not prohibit Member States from establishing differentiated fiscal regimes as regards competing products when the objective sought is compatible with a Community policy, such as protection of the environment.

c) ***Its detailed rules must avoid any form of direct or indirect discrimination.***

In that regard, particular attention must be given to *de facto* discrimination. The assessment will consider all the characteristics of the taxation measure including, of course, the tax itself, but also the tax base, the means of collection and the system of penalties.

16. Prohibition of technical barriers

Article 28 EC prohibits quantitative restrictions on imports as well as all measures having equivalent effect which affects trade between Member States. Similarly, Article 29 EC prohibits restrictions on exports.

Any trade measure taken by Member States which is likely to restrict intra-Community trade – directly or indirectly, actually or potentially – is to be considered a measure having equivalent effect to a quantitative restriction.

This is not an absolute prohibition.

At present, two actions which may create barriers are permitted, subject to very specific conditions.

The first is based on Article 30 EC. The second possibility arises from an interpretation of the Court of Justice in what is known as the *Cassis de Dijon* case.

16.1. Derogations permitted under Article 30 EC

Article 30 EC permits restrictions to intra-Community trade. These are based on the reasons set out below but are subject to the condition that they do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Those reasons include: public morality; public policy; public security; the protection of the health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial or commercial property.

Non-arbitrary discrimination may therefore be permitted when it makes possible the achievement of one of the objectives set out in Article 30 EC.

However, the reasons relied on by the national government can only be upheld in a restrictive manner. The conditions laid down by the Article may not be interpreted broadly. This means that measures specifically relating to environmental protection and which cannot be covered by the notions of health or the protection of animals or plants – as would be the case, for instance, for waste recycling – do not fall within that Article (see section 16.2) and cannot be accepted in this context.

The discriminatory character of a measure will be considered acceptable if:

- it is based on non economic considerations – only pursuit of the public interest can justify a derogation;
- the proposed measure is warranted in the light of the objective pursued;
- the proposed measure is necessary and complies with the principle of proportionality. The measure is necessary if there is no alternative measure making it possible to achieve the same result and if it does not replicate control measures carried out in the country of origin. A measure is considered disproportionate if another measure, less restrictive of intra-Community trade, could have been adopted to achieve the same result.

16.2. The case-law in Cassis de Dijon[12]

The Court of Justice was led to rule on restrictions of a quantitative character which had been drawn up at national level in order to meet objectives other than those mentioned in Article 30 EC, among them protection of the environment.

The Court of Justice acknowledged the status of environmental protection as a "legitimate objective of general interest" which could form the basis for a possible barrier to trade.

12. Case 120/78, *Rewe-Zentral AG*, [1979] ECR 649.

According to that case-law, a national measure which creates barriers to intra-Community trade may be accepted under the following conditions:

a) **The situation in question must be a case where there is no secondary legislation; the subject has not been the subject of harmonisation at Community level.** That condition follows from the primacy of Community law over national law.

b) **Respect for the principle of non-discrimination.** The measure must not draw distinctions on the basis of the nationality of products or producers. It must in effect be "indistinctly applicable". Nevertheless, that principle must vary as regards conditions of public interest and proportionality, discussed below.

c) **The measure must pursue a legitimate objective of public interest.** This is the case as regards protection of the environment, recognised as "a major need in Community law" by the Court of Justice.

d) **The measure must be necessary and proportionate:** The measure must have a causal link to the objective pursued and be appropriate for achieving it. The assessment of whether the Member State is effectively pursuing the objective relied on will be made on that basis.
The measure is necessary if there is no alternative measure making it possible to achieve the same result; a result will be considered disproportionate if it is shown that another measure, less restrictive of intra-Community trade, could have been adopted to achieve the same result. Efforts must be made to reduce the impact of the measure on trade where possible.[13]

16.3. May national measures give rise to extra-territorial effects and cover conditions of manufacture or production outside the European Union?[14]

Measures adopted by States for the purpose of extra-territorial protection are likely to be classified as measures having equivalent effect to quantitative restrictions on exports of goods.

It is therefore necessary to ask whether such measures may be justified either under Article 30 of the Treaty or by the case-law in *Cassis de Dijon*. Until now, the Court has never addressed the question satisfactorily and its case-law is unclear.

13. Case C-309/02, *Radlberger*, [2004]ECR I-11763; Case C-463/01, *Commission v. Germany*, [2004]ECR I-11705.
14. J.H. Jans, *o.c.*, *supra* n. 3, P. Léger, *o.c.*, *supra* n.3; M. Fallon, *o.c.*, *supra* n. 3.

According to academic analysis, however, it is clear that a Member State may not adopt measures seeking to protect the environment on the grounds that the measure has as its main objective the protection of the environment in a third country. Cases of this sort must be examined on a case-by-case basis, on the understanding that it is above all States which ensure environmental protection in their own territory.

Of course, the lawfulness of such measures must be assessed with regard to WTO law, in the light of the debate on the extent of the similarity of competing products in respect of processes or production methods (PPM). In European law, and as regards the question concerning us, the analysis of similarity is of minimal interest in the context of the discussion on technical barriers (similarity of products is useful only for the application of Article 90 of the Treaty, not Article 28).

E. Notification procedures

17. The obligation for prior notification to the Commission of technical regulations within the meaning of Directive 98/34/EC

In order to avoid having the adoption of standards and technical regulations create quantitative restrictions to trade, Directive 98/34/EC[15] establishes a procedure for prior notification to the Commission of any "proposed technical regulation" envisaged by Member States.

That procedure supplements the prohibition on measures having equivalent effect to quantitative restrictions laid down in Articles 28 to 30 of the EC Treaty, as well as the harmonisation of national legislation through the medium of secondary legislation.

Its objective is to prevent technical obstacles to intra-Community trade which can result from differences between the national legislation of Member States relating to the production and marketing of goods, by requiring Member States to notify the Commission, in certain specific cases, of new measures being proposed at national level.

15. Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998, L204/37.

18. What is the purpose of the prior notification procedure concerning "technical regulations"?

The purpose of notification is to enable the Commission to obtain the most complete information possible so that it may effectively exercise its powers of control. Member States are therefore required to notify the full text which contains the draft technical regulation.

In addition to notifying the draft technical regulation to the Commission, the Member State is required to state the reasons which made the regulation necessary, unless those reasons are made clear by the draft text itself. The State must at the same time, where appropriate, notify to the Commission the texts of the main legislative provisions and the actual legislation which are directly concerned, unless these have been transmitted with an earlier notification, if knowledge of these is necessary in order to assess the scope of the draft. If necessary for that assessment, the proposed legislation must be sent to the Commission in its entirety, even if only some of its provisions constitute technical regulations.

> *Thus, the Court found that only the full notification of an Italian law on asbestos could enable the Commission to assess the full scope of the technical regulations which might be established.*[16]

Moreover, if significant amendments are made to technical regulations which have already been notified, the latter are also subject to the requirement for notification.

When a draft technical regulation seeks to limit the marketing or use of a substance, preparation or chemical product for reasons of public health, or the protection of consumers, or the protection of the environment, Member States are also required to transmit scientific evidence justifying the adoption of their measures.

That evidence includes reference to relevant information on the substance, as well as information on known and available substitute products and the effects the measures are expected to have as regards public health and the protection of consumers or the environment. In particular, a risk assessment must be carried out in accordance with Community legislation on chemical substances.

16. Case 289/94, *Commission v. Italy*, [1996] ECR I-4405.

19. What measures are likely to be subject to the Directive's notification requirement?

19.1. The measure must fall within the definition of "technical regulation"

The notification procedures laid down by the Directive apply to the adoption of any "draft technical regulation". This is defined as:

> *the text of a* technical specification *or of* another requirement, *including administrative provisions, which has been drawn up in order to establish it or finally have it established as a* technical regulation *and which is at a stage in its preparation where it is still possible to make substantial changes to it.*[17]

To clarify that definition, the following meanings should be noted:

"***technical specification***": *a* specification *contained in a document which* lays down the characteristics required of a product *such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking or labelling and conformity assessment procedures.*[18]

"***other requirements***": *a requirement, other than a technical specification,* imposed on a product for the purpose of protecting, *in particular, consumers or the* environment, *and which affects its* life cycle *after it has been placed on the market, such as conditions of* use, recycling, reuse or disposal, *where such conditions can* significantly influence *the composition or nature of the product or its marketing.*[19]

"***technical regulation***": technical specifications *and* other requirements, *including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of* marketing or use *in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10,* prohibiting *the manufacture, importation, marketing or use of a product.*[20]

The Directive provides various instances of "de facto technical regulations". These include:

17. Directive 98/34/EC, art. 1(10)
18. *Ibid.*, art. 1(2)
19. *Ibid.*, art. 1(4)
20. *Ibid.*, art. 1(9).

- laws, regulations or administrative provisions *of a Member State which refer either to technical specifications or to other requirements or to rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or to other requirements, compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions,*
- voluntary agreements *to which a public authority is a contracting party and which provide, in the general interest, for compliance with technical specifications or other requirements, excluding public procurement tender specifications,*
- technical specifications or other requirements which are linked to fiscal or financial measures *affecting the consumption of products by encouraging compliance with such technical specifications or other requirements or rules on services.*[21]

These concepts have also been extensively interpreted by the Court of Justice.

A technical rule is defined as a function of its effects, not its objective.

> *In its Bic Benelux judgment of 20 March 1997,*[22] *the Court of Justice held that not only provisions whose immediate purpose is to hinder trade can constitute technical regulations, but also regulations which could give rise to such an effect while pursuing a different goal (for instance, environmental protection). Regardless of its environmental protection objective, a technical regulation relating to waste management or the protection of waters is therefore subject to the notification requirement. Directive 98/34/EC also applies to regulations falling within the scope of criminal law, since there is nothing to suggest that its scope is limited to products intended to be used otherwise than in connection with the exercise of public authority.*[23]

The Directive does not lay down a minimum threshold for the expected effect of the measures at issue (no *de minimis* rule) and does not draw distinctions on the basis of the value of the products in question or the importance of the markets involved. Draft technical regulations which have negligible economic impact are therefore subject to the notification requirement.

21. *Ibid.*
22. Case C-13/96, *SA Bic Benelux*, [1997] ECR I-1753.
23. Case C-226/97, *Lemmens*, [1998] ECR I-3711.

19.2. Are marking rules for products subject to the notification procedure?

The Court has on several occasions held that national measures which require goods to carry specific symbols, markings or labels must be classified as technical regulations.

> *Such is the case for specific and detailed marking or labelling requirements relating to the extension to medical and sterile instruments of the labelling requirements for medicinal products,*[24] *the limitation date on the labelling of medical instruments,*[25] *the geographical origin of olive oils,*[26] *the requirement to apply specific distinctive symbols to products subject to a tax applied to them as the result of ecological nuisance,*[27] *the conformity of electrical and gas appliances in furnished lodgings to specific technical standards laid down by Belgian law.*[28]

Nonetheless, a distinction must be drawn between enabling provisions which, since they do not produce any legal effect are not, in principle, subject to a notification requirement, and implementing measures which are adopted on the basis of those provisions and which must be notified.

A provision which requires the producer or importer of packaging to "identify" it, without however requiring a mark or label to be affixed to it, is not setting required characteristics for the product within the meaning of Article 1(1) of the Directive and therefore cannot be classified as a technical specification. However, the national court may conclude, in the light of all the elements of fact and of law, that the information requirement must be interpreted as imposing marking or labelling on the producer. In that case, it will constitute a technical specification, even if the precise details of that marking or labelling remain imprecise.

19.3. Are environmental agreements subject to notification?

Voluntary agreements to which the public authority is a contracting party and which seek compliance with technical specifications or other requirements are tantamount to "de facto technical regulations" which must be notified to the Commission.[29]

24. Case C-317/92, *Commission v. Germany*, [1994] ECR I-2039.
25. *Ibid.*
26. Case C-443/98, *Unilever*, [2000] ECR I-7535.
27. Case C-13/96, *supra* n. 25.
28. Case C-145/97, *Commission v. Belgium*, [1998] ECR I-2643.
29. *Ibid.*, art. 1(9)

19.4. Which provisions need not be notified?

The Court of Justice has held that the following provisions do not constitute technical regulations and therefore need not be notified:

- a provision setting the conditions for establishing security companies, since these do not define product characteristics;[30]
- a standard establishing limit values for concentrations of inhalable asbestos fibres in the workplace, since it *"does not define a characteristic required of a product"* and does not "*in principle fall within the definition of a technical specification and consequently cannot be regarded as a technical regulation which has to be notified to the Commission*";[31]
- a prohibition on advertising products which are not approved;[32]
- the obligation to provide information on a product in a specific language to the extent that it concerns a supplementary rule necessary for the effective transmission of information to the consumer;[33]
- an application for approval for an undertaking which collects and recycles packaging waste, which includes specifications referring to technical requirements which used packaging must satisfy.[34]

Moreover, Directive 98/34/CE does not apply to measures which Member States consider necessary "under the Treaty for the protection of persons, in particular workers, when products are used, provided that such measures do not affect the products".[35] Thus, a rule which reserves the use of certain appliances which are considered dangerous to certain qualified workers does not fall within the scope of the Directive.

Nor is notification required in case of urgency[36] and in the case of transposition of a binding Community act.[37]

As regards the urgency procedure, the Court of Justice has implicitly held that the existence of grounds which allow the urgency procedure to be relied on does not excuse Member States from the obligation to notify their technical rules.

In addition, the Directive provides that notification of a draft is not required

30. Case C-194/94, *CIA Security International*, [1996] ECR I-2201.
31. Case C-289/94, *supra* n. 19.
32. Case C-278/99, *Van der Burg*, [2001] ECR I-2015.
33. Case C-33/97, *Colim*, [1999] ECR I-3175.
34. Case C-159/00, *Sapod Audic*, [2002] ECR I-5031.
35. Directive 98/34/EC, art. 1, last indent.
36. *Ibid.*, art. 9(7).
37. *Ibid.*, art. 10(1), first indent.

> *where it merely* transposes the full text *of an international or European standard, in which case information regarding the relevant standard shall suffice.*[38]

International standards are understood to be those drawn up by the ISO and European standards those adopted by CEN and CENELEC.

To that must be added that the Directive also provides that Articles 8 (notification requirement) and 9 (standstill obligations) "shall not apply to those laws, regulations and administrative provisions of the Member States... by means of which Member State: comply with binding Community acts which result in the adoption of technical specifications".[39]

This is not redundant in relation to the exclusion mentioned in Article 8(1). The wording of Article 10(1) undoubtedly gives rise to certain difficulties in interpretation. The term "comply with" must be interpreted as "take over", "translate literally", "copy", "conform to", "follow", "model itself on". Therefore, a technical standard which does not simply reproduce in its entirety a provision of Community law cannot benefit from the exemption system. The Court has held that in order for transposition to be taking place, it is necessary to establish a direct link between the binding Community measure and the national measure.

Other exclusions relate to the implementation of judgments given by the Court of Justice of the European Communities,[40] which is self-evident inasmuch as the Court finds against Member States who have not transposed Community standards.

When Member States "make use of safeguard clauses provided for in binding Community acts", Articles 8 and 9 do not apply.[41] We have already referred to the conditions that must be satisfied for the implementation of safeguard clauses, which involve a Community review procedure.[42]

38. *Ibid.*, art. 8(1)
39. *Ibid.*, art. 10, first indent
40. *Ibid.*, art. 10(1), fifth indent
41. *Ibid.*, art. 10(1), third indent
42. See *supra* section 6.2.1.

20. What is the notification procedure and its effect on the adoption of a standard?

Upon receipt of notification of the draft technical regulation, the European Commission immediately brings it to the attention of the other Member States.

20.1. The status quo

The Member State which has notified the draft should postpone its adoption of a draft technical regulation for three months from the date of receipt by the Commission of its communication.[43]

If the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged may create obstacles to the free movement of goods, the Member State must postpone for six months the adoption of the draft technical regulation.[44]

That period begins from the date of receipt by the Commission of the communication.

20.2. Derogations

Nevertheless, notification of "technical specifications or other requirements which are linked to fiscal or financial measures affecting the consumption of products by encouraging compliance with such technical specifications or other requirements" enjoy a derogation.

These measures may enter into force from the time they are communicated to the European Commission, without the Member State having to postpone their adoption during the period laid down for their examination by the Commission and the other Member States.[45]

For such measures, control takes place *a posteriori* and thereby offers less assurance than the *a priori* control in general law. Nevertheless, in *Bic Benelux*, the Court interpreted that derogation very strictly: it found that the notion of need linked to a fiscal measure is limited to measures which *exclusively* constitute accompanying fiscal measures. That is not the case

43. Directive 98/34/EC, art. 9(1)
44. *Ibid.*, art. 9(2)
45. *Ibid.*, art. 10(4)

for the marking of a product subject to an ecological tax in order to inform the public of the product's effects on the environment.[46]

Finally, the detailed observations and opinions which could be issued by the Commission and other Member States, as regards technical specifications or other requirements linked to fiscal or financial measures, may "concern only the aspect which may hinder trade and not the fiscal or financial aspect of the measure".[47]

21. Effect of detailed observations and opinions on the adoption of the draft technical regulation

If a detailed opinion is addressed to a Member State, it is required to report to the Commission on the action it proposes to take on that opinion. Directive 98/34/EC provides that the Member State "shall take such comments into account as far as possible in the subsequent preparation of the technical regulation".[48]

In other words, the Member State retains the possibility of adopting its technical regulation even if it has been the subject of a detailed opinion. In that regard, the procedure laid down by Directive 98/34/EC differs from the authorisation procedure provided for in Article 95(6) EC.

If the draft technical regulation which has been the subject of objections on the part of the Commission or another Member State is adopted without those objections being taken into account, the Commission retains the right to send a letter of formal notice to the Member State under Article 226 EC.

Finally, Member States are required to communicate "the definitive text of a technical regulation" to the Commission without delay.[49]

22. Coordination with other notification procedures

Article 8(5) of the Directive provides that "when draft technical regulations form part of measures which are required to be communicated to the Commission at the draft stage under another Community act, Member States may make a communication within the meaning of paragraph 1

46. See *supra* n. 25.
47. Directive 98/34/EC, art. 8(1), sixth indent.
48. *Ibid.*, art. 8(2)
49. *Ibid.*, art. 8(3)

under that other act, provided that they formally indicate that the said communication also constitutes a communication for the purposes of this Directive".

23. What is the penalty for failure to comply with the notification procedure?

Infringement of the notification requirement, like the adoption of a national technical regulation during a suspension period, constitutes a substantive procedural defect which can lead to technical regulations that have not been notified to the Commission being inapplicable to individuals. It therefore constitutes a serious source of legal uncertainty.

In principle, all State bodies should refrain from applying technical regulations which have not been communicated to the European Commission in draft form, as well as any technical regulation adopted without respect for the periods prescribed by the Directive.

The case-law makes clear that failure to respect the notification procedure renders the national measure inapplicable, so that it can no longer be enforced against individuals.[50] The rights of individuals can be provisionally protected by national courts, while waiting for the the European Court of Justice to give its judgment following a reference for a preliminary ruling on whether the national measure must be notified. Finally, an individual who has had to comply with a technical regulation adopted in non-compliance with the Directive is entitled to obtain compensation for damage suffered to the extent that the conditions set out in the case-law are met.

In addition, failure to comply with Community procedures can have effects on contractual relationships between individuals.

The unenforceability of national technical regulations is, however, limited to cases where the objective of Directive 98/34/EC has been compromised. If the failure to notify technical regulations to the Commission constitutes a procedural defect whose effect is to make those regulations unenforceable against individuals, that non-application only applies to the extent that it impedes the use and marketing of a product which does not conform to those regulations. A technical regulation used in the cour-

50. Case C-194/94, *supra* n. 33.

se of criminal proceedings which has not been notified to the Commission is not covered by that case-law.

E. Conclusions

The analysis of European law, to be carried out in order to determine the leeway accorded to national authorities for adopting a proactive product policy, must concentrate on the following concerns:

1. First of all, it is necessary to consider whether the issue is subject to harmonisation at European level and, if so, to seek the legal basis for the relevant legislation. If the legal basis is Article 95 EC, there will be very little leeway for national action. If the legal basis is Article 175 EC, that implies that the national authorities may adopt more stringent measures of protection, which must, however, comply with the EC Treaty.

2. Next, it is necessary to ascertain the extent of the harmonisation effected by that legislation in order to determine which cases would not be covered by those Community measures and where the national power to act would therefore still take precedence.
If the issue has not been harmonised or has not been fully harmonised at Community level, there is indeed leeway to adopt national measures, provided that they comply with the rules laid down by the EC Treaty.
Some of the rules laid down by the Treaty are not open to discussion (for instance, it is not possible to create customs duties), while other rules are more ambiguous and difficult to interpret, in particular when they seek to resolve conflicts between environmental concerns and the free movement of goods.

The following paths may prove promising, however, for the purpose of justifying specific action by Member States:
(a) when measures are based on Article 30 of the EC Treaty and promote the protection of health and of biodiversity (provided they do not constitute arbitrary discrimination);
(b) when technical or quantitative restrictions on the movement of goods created at the national level result from a genuine concern to protect the environment and are necessary in order to achieve the desired result;
(c) when national provisions of a fiscal nature result from a genuine concern to protect the environment and are designed in such a way that they do not discriminate between national and foreign producers.

3. Finally, particular attention should be given to procedural requirements under European law, in particular as regards the notification of proposed provisions to the Commission prior to their adoption. Those requirements may have a decisive effect on the conditions for adopting the measure at national level, *inter alia* because in certain cases they require suspension of the domestic legislative or regulatory process for periods ranging from three to six months, at least.

A challenge by the European Commission or by other Member States to the legitimacy of proposed national rules will in the last resort, if the national authority remains convinced of the need for those rules and decides not to withdraw them, be brought before the Court of Justice of the European Communities, so that it may rule on the lawfulness of the national measure in the light of Community law, *inter alia* by balancing the interests which will be affected. If the Court takes the view that the national measure is incompatible with European law, the Member State will have to consider it inoperative and not implement it.

In addition, compliance with notification procedures is particularly important because national courts are empowered to declare inapplicable any national provisions which have not been adopted in compliance with those notification procedures.

Let no one harbour any illusions: national provisions which favour the environment and relate to products constitute a handicap for products intended for distribution throughout Europe, in that they impose specific conditions which are not required in order to have access to markets in other States. Nevertheless, the case-law of the Court of Justice of the European Communities considers that protection of the environment is of such importance that it may justify such disadvantages for private economic interests, provided that the environmental concern is genuine and does not disguise protectionist intentions.

A measure which genuinely aims to protect the environment therefore enjoys a real degree of legitimacy. Even if it will have to overcome many hurdles in order to demonstrate its merits, such a national measure may often play the very important function of a *catalyst for further action*. It may trigger positive interest or, on the contrary, concern among other Member States and at European level and lead to a debate on whether the proposed national measure should be applied on a larger scale and thus provide impetus for further harmonization – the so-called snowball effect.