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The applicability of the Swedish Ozone Regulation

Master thesis
20 points

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Environmental Law/Community Law

Autumn 2001

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Summary

The aim of this thesis is to answer the question whether the Swedish Ozone Regulation still is applicable.¹ The reason for this question was a verdict from the Swedish Environmental Court of Appeal² (The Swedish Court) stating that predominant reasons indicate that the Swedish Regulation no longer is possible to apply. Other institutions, like the County Administrative Board in Skåne did not quite agree with this statement.

I have made an analysis of the Swedish Court's statements about the applicability of the Swedish Ozone Regulation. First the relation between the Swedish Ozone Regulation and the old Community Regulation 3093/94 on ozone depleting substances was investigated.³ I found that the Swedish Ozone Regulation contained both stricter and divergent measures compared to the old Community Ozone Regulation.

For a Member State to have *stricter* national rules compared to a Community Regulation based on Article 175 in the Treaty of Amsterdam the rules have to comply with the Treaty and be notified to the European Commission. I have come to the conclusion that the Swedish rules are compatible with the Treaty although they constitute an import restriction. The reason for this is that the rules can be exempted under the Rule of Reason because they are applied in order to protect the environment and they are necessary, proportional and non-discriminatory and have a non-economical purpose. The Swedish rules were also notified to the European Commission and the Commission has not yet started any proceedings against the Swedish rules, which could be interpreted as an approval of the national rules. I have found that all the prerequisites for allowing stricter national rules in Article 176 are met.

As mentioned above the Swedish rules were also *divergent* compared to the old Community Ozone Regulation. For divergent rules to be allowed they have to be compatible with the provisions in the Treaty, especially Article 28, which regulates the free movement of goods. As I stated before, the Swedish rules constitute an import restriction and are therefore prohibited according to Article 28. However, I have found that the Swedish rules can be exempted under the Rule of Reason and that makes them allowed and applicable in comparison with the old Community Ozone Regulation.

Today the old Community Ozone Regulation has been replaced with a new Regulation, 2037/2000⁴ on ozone depleting substances that regulates both

¹ Hereinafter called the Swedish Ozone Regulation.

² Translation of the Swedish Miljööverdomstolen.

³ Hereinafter called the old Community Ozone Regulation.

⁴ Hereinafter called the new Community Ozone Regulation.

substances and products. However the Swedish Ozone Regulation is still stricter than the new Community Ozone Regulation is on some areas.

According to the Swedish Court already the fact that the old Community Ozone Regulation was replaced makes it difficult to apply the Swedish Regulation. The reason for this is that the Swedish Ozone Regulation was supposed to complement the old Community Ozone Regulation and this Regulation does not exist anymore. I have come to the conclusion that the reference in the Swedish Ozone Regulation could be interpreted as a reference to Community rules on the subject and not just to the one from 1994.

The Swedish Court further argues that the Community Regulations direct applicability and the loyalty principle in Community law also makes it difficult to apply the Swedish Regulation. I am of the view that this does not render the Swedish Regulation non applicable since it is stated in an Article in the Treaty that it is allowed with stricter national rules under certain conditions if the Community Regulation is based on Article 175.

According to my opinion Community law does not make the Swedish Ozone Regulation void or non-applicable. The Community Regulations were based on Article 175 and according to Article 176 it may be allowed with stricter national rules if they comply with the Treaty and are notified to the European Commission. ***The Swedish Ozone Regulation is according to my understanding compatible with the Treaty and has been notified to the European Commission and no infringement procedure against the Regulation has been taken by the Commission. The Regulation is therefore still possible to apply.***

Preface

I would like to thank those who have helped me in the process of writing my Thesis.

Abbreviations

EC	European Community
EEA	European Environment Agency
EEC	European Economic Community
EES	Europeiska Ekonomiska Samarbetsområdet, European Economic Cooperation, between EU and 5 EFTA Countries
EG	Swedish for EC
EU	European Union
CFC	ChloroFluoroCarbons
DS	Department Series
HBFC	HydroBromoFluoroCarbons
HCFC	HydroChloroFluoroCarbons
HD	Supreme Court in Sweden (Högsta Domstolen)
NVV	Swedish National Environment Protection Board (Naturvårdsverket)
PCP	PentaChloroPhenol
PSC	Polar Stratospheric Clouds
SEA	Single European Act
SEK	Swedish Krona
SOU	Swedish Official Governmental European Commission Reports (Statens offentliga utredningar)
UNEP	United Nations Environmental Programme
US	United States of America

1 Introduction

1.1 Aim of the Thesis

I have chosen to examine if the Swedish Ozone Regulation still is applicable. The reason why I chose this subject is that I think it is very important that we take good care of our environment. Sweden is in many areas one of the leading states regarding the protection of the environment. For example in the area of ozone depleting substances Sweden has a more progressive phase out plan than the Community. Is it still possible for Sweden to lead the way in the field of environmental protection or does our membership in the Community force us to lower our standards and goals for the protection of the environment. This general question is wider than the aim of my thesis but I hope to shed some light on this problem by highlighting one particular area.

In a Case from June 2001 the Swedish Environmental Court of Appeal stated that it today is difficult to apply Swedish Ozone Regulation. The reasons for this according to the Swedish Court are:

- That the Community Regulation the Swedish Regulation is supposed to complement has been withdrawn and replaced with a new Community Regulation.
- Community Regulations have direct applicability according to Article 249 in the Treaty.
- Member States should be loyal according to Article 10 in the Treaty.

In the Swedish Court's judgement it was stated that predominant reasons indicate that the Swedish Ozone Regulation is no longer possible to apply.

This judgement was not expected by, for example the County Administrative Board in Skåne⁵ since they in their day to day business apply this Swedish Regulation.

My task is to analyze this verdict in the light of Community Law and to see if the Swedish Regulation is still applicable.

1.2 Method and Material

To answer the question of this thesis I have used a comparative method. I will shortly describe the environmental legislative development in Sweden and in the Community. Further the environmental effects of ozone depleting substances will be displayed. The international agreements on this subject will be noted. After laying out these facts I will examine the Articles of the Treaty that concerns environmental issues. The Swedish rules on the field of

⁵ Translation of Länsstyrelsen in Skåne, Sweden.

environmental protection after the membership in the Community will be described with emphasis on the result of the negotiations on the regulation of ozone depleting substances. Since the validity of the Swedish Ozone Regulation was questioned by the Swedish Environmental Court of Appeal the facts and statements in the Case mentioned above will be noted. The Swedish Court's statements will be analyzed as will the relationship between the Swedish Ozone Regulation and the Community Ozone Regulations 3093/94 and 2037/2000.

The starting point of my thesis is the Verdict from the Swedish Environmental Court of Appeal where the Court noted that predominant reasons speak in favour of that the Swedish Ozone Regulation no longer is possible to apply. Other instances, like the County Administrative Board in Skåne, did not quite agree with this verdict.

In order to do my investigation on Community law and its impact on the field of environmental protection I have consulted the Treaty and a variety of books and articles on the subject, where the works of Professor Jan H Jans, Peter Pagh, Said Mahmoudi and Ludwig Krämer have been of great value. Also Swedish Official documents like the Government Proposition 1994/95:19 and the Swedish Official Governmental European Commission Reports concerning our membership in the Community and the consequences for the environment have been useful. The Community case law as found in the cases from the European Court of Justice has been very helpful in order to understand and interpret the Articles in the Treaty. These cases have been found on the EUR-Lex website⁶ where also other documents like European Commission decisions and the Official Journal could be found.

Other useful reports have been received at the European Environment Agency in Copenhagen⁷ and from the United Nations Environment Programme's website⁸ where I have found information on international agreements like the Vienna Convention and the Montreal Protocol on ozone depleting substances. Regarding the science of ozone depletion I have consulted the University of Cambridge's website.⁹

When doing my analysis of the relation between the Swedish Regulation and the Community Regulations on ozone depleting substances I have been in contact with the European European Commission and specifically with Mr Phil Callaghan and Mr Peter Wessman.¹⁰ I have also consulted the Swedish

⁶ From EUR-lex website 1 September- 9 December 2001: <http://europa.eu.int/eur-lex/> .

⁷ The European Environment Agency also has a website, 1 September- 9 December 2001: <http://www.eea.eu.int> where I have found useful information.

⁸ United Nations Environment Programme's website, 1 September- 9 December 2001: <http://www.unep.org/ozone>.

⁹ University of Cambridge's website 15 September 2001: <http://atm.ch.cam.ac.uk>.

¹⁰ Phil Callaghan and Peter Wessman at the Information Centre, Environment Directorate – General, European Commission.

Department of Environment and natural resources and the Swedish National Board of Trade who have helped me to answer the question about whether notification has been made or not. The Swedish Ozone Regulation and the Community Ozone Regulations have of course been of greatest importance in this analysis.

2 Development of environmental law

2.1 History of Swedish Environmental Law

Here follows a brief description of the history of Swedish environmental law with emphasis on the chemical regulation. The Swedish chemical rules "...can be traced back to the 17th Century when the king prescribed certain rules and measures for the medicine- and pharmaceutical professions."¹¹ This was according to Lidforss the "...background of the Ordinance of Arsenic of 1876."¹² In this Ordinance import and production of Arsenic was to be controlled and the regulation divided the substances into two groups. When the Poisoning Ordinance came 1906 this regulation also divided poison into two different groups due to their degree of toxicity. This Ordinance covered control of import, production and marketing of the toxic substances as well. The Ordinance of Poison of 1943 included rules on trade and use of products containing poison and rules regarding precautionous handling of the substances. In the Ordinance from 1962 only substances and preparations were covered and a definition of 'poisonous substances' was introduced.¹³ In 1973 the Health Protection Act¹⁴ came and this Act did not just regulate chemicals but also products containing dangerous chemicals. In 1985 the Chemical Products Act came and was supplemented by several regulations on different chemicals, like for example the Ozone Regulation.¹⁵ After the 1st of January 1999 environmental laws are gathered in the Environmental Code.¹⁶

The Environmental Code entails similar rules as the Chemical Products Act, although the principle of substitution out of technical regards is placed among the Code's general rules of consideration. A judgement from the Environmental Court of Appeal can be appealed to the Swedish Supreme Court. A Certiorari is demanded. Judgements from the Environmental Court of Appeal that was tried in first instance by a municipality or an

¹¹ Lidforss, Marina, *A comparison between Swedish and EEC Environmental Policy and Law with particular Emphasis on Chemical Legislation*, (Stockholm 1994), at p 51.

¹² Lidforss, Marina, *A comparison between Swedish and EEC Environmental Policy and Law with particular Emphasis on Chemical Legislation*, (Stockholm 1994), at p 51.

¹³ Nilsson, Annika, *Att byta ut skadliga kemikalier Substitutionsprincipen – en miljörättslig analys*, (Göteborg 1997), at p. 73-75.

¹⁴ Translation of Lagen (1973:329) om hälso- och miljöfarliga varor.

¹⁵ Nilsson, Annika, *Att byta ut skadliga kemikalier Substitutionsprincipen – en miljörättslig analys*, (Göteborg 1997), at p.77-79. Translation of Lagen (1985:426) om kemiska produkter.

¹⁶ Rubensson, Stefan, *Miljöbalken - Den nya miljörätten, 2:a upplagan*, (Stockholm 2000), at p. 15-16.

administrative authority cannot be appealed according to the Environmental Code 23:8.¹⁷

In 1909 environmental laws on national parks and on protection of natural memorials came. In the 1930s groundwater and surfacewater protection was introduced.¹⁸ In 1952 the Nature Protection Law came and was replaced by the Nature Conservation Act¹⁹ in 1964 that "...established environment as an asset which should be protected and conserved."²⁰ The National Environmental Protection Agency was formed in 1967. With the international environmental law several Conventions on protection of animals, plants and biological diversity came. In 1969 the Environmental Protection Act²¹ came and entailed rules on protection of the environment against pollution of soil, water and air.

Before Sweden became a member of the Community Sweden entered the Treaty of European Economic Cooperation.²² The Treaty came into force the 1st of January 1994 and Sweden got an exemption for example for the national measures on CFCs and other ozone depleting substances. The exemption was to be surveyed again in 1995.²³ Sweden applied for membership in the Community in June 1991 and presented in 1993 its position on several environmental areas that was affected by a future membership. The starting point for Sweden in the negotiations was to find solutions that meant that the highest level of protection was applied and that no standards would be lowered.²⁴ The 30th of March 1994 the negotiations were completed. The result of the negotiations will be described in *Chapter 6*.

2.2 History of European Environmental Law

The development of European environmental law can be divided into six stages. Here I am only shortly describing the development. For more specific information about the Articles of the Treaty of Rome, see *Chapter 5*. The first stage commenced when the EEC Treaty came into force in 1958. At this time the cooperation was mostly of economic nature and no specific

¹⁷ Rubensson, Stefan, *Miljöbalken - Den nya miljöretten, 2:a upplagan*, (Stockholm 2000), at p. 88 and 109. Certiorari = prövningstillstånd. Environmental Code 23:9.

¹⁸ Westerlund, Staffan, *EG's miljöregler ur ett svenskt perspektiv*, 2nd edition, Naturskyddsföreningen, 1993, at p 41.

¹⁹ Translation of Naturvårdslagen (1964:822).

²⁰ Lidfors, Marina, *A comparison between Swedish and EEC Environmental Policy and Law with particular Emphasis on Chemical Legislation*, (Stockholm 1994), at p 14.

²¹ Translation of Miljöskyddslagen (1969:387).

²² Trade Agreement between EU and 5 EFTA Countries. Translation of EES, Europeiska Ekonomiska Samarbetsområdet. From Lönnaeus, Olle and Ryden, Daniel *Inge Naning hittar rätt*, Malmö 1995, at p 160.

²³ Naturvårdsverket, *Sverige och den europeiska miljöpolitiken*, (Stockholm 1993), at p. 85.

²⁴ SOU 1994:7, *EU, EES och miljön*, at p. 139.

attention was given to the environment.²⁵ The main reason for the creation of the EEC was to unite Germany and France who were enemies and to make them economically dependent so that the thought of going to war should not even occur.

In the 1960s and 1970s a growing interest of environmental problems could be seen and the second stage started in 1972 at a European Council Summit meeting when it was declared that economic expansion was not an end in itself but should help to decrease the differences in living conditions.^{26 27} The European Council stated that an environment policy within the Community would be valuable. To make that happen the Council asked the Community institutions to make an environmental action programme. The result of this can be exemplified by a part of what was stated in the declaration:

*"Whereas in particular, in accordance with Article 2 of the Treaty, the task of the European Economic Community is to promote throughout the Community a harmonious development of economic activities and a continuous and balanced expansion which cannot be imagined in the absence of an effective campaign to combat pollution and nuisance or of an improvement in the quality of life and the protection of the environment."*²⁸

During this stage decisions were based mainly on Articles 100 (now 94) and 235 (now 308) of the EEC Treaty. When the differences in national environmental rules had a negative effect on the common market Article 100 was used.²⁹ Article 235 was used as a supplement to Article 100 and could also alone be the legal basis for the environmental policy in the Community since it was stated in the ADBHU Case³⁰ that by extensive interpretation of Article 2 of the EEC Treaty environment protection was considered a goal of the Community.³¹

With the introduction of the Single European Act in 1987 the third stage commenced. This meant that the objectives of the environmental policy were put into the text of the Treaty for the first time. Articles 130r-t(now 174-176), 100a.3 and 100a.4(now 95.3 and 95.4) were the articles with which the environment policy was to be developed. The importance of Article 235 was decreasing with these new articles and only used in extraordinary cases.³² During this period the environment legislation was

²⁵ Jans, H Jan, *European Environmental Law*, (Groningen 2000), at p. 3-4.

²⁶ Nilsson, Annika, *Att byta ut skadliga kemikalier Substitutionsprincipen – en miljörettslig analys*, (Göteborg 1997), at p. 20.

²⁷ Jans, H Jan, *European Environmental Law*, (Groningen 2000), at p. 3.

²⁸ Jans, H Jan, *European Environmental Law*, (Groningen 2000), at p. 3-4.

²⁹ Jans, H Jan, *European Environmental Law*, (Groningen 2000), at p. 4.

³⁰ Case C-240/83, *ADBHU*.

³¹ Jans, H Jan, *European Environmental Law*, (Groningen 2000), at p. 5-6.

³² Jans, H Jan, *European Environmental Law*, (Groningen 2000), at p. 7.

mostly about limitation of discharge from certain pollution sources.³³ The introduction of Article 130r-t supported joint measures in the field of environmental protection. The environment policy of the Community and the environmental laws that was based on Article 130r-t was to a great extent limited to discharge from industries and similar and to the protection of nature.³⁴ The regulation of substances and products was connected to the area of free movement of goods and usually based on Article 100a.³⁵

In the 1990s broader strategies to control the use of natural resources were used and the fourth stage started with the entry of the Treaty of Maastricht in 1993.³⁶ In this Treaty the term "environment" was used for the first time in the key Articles 2 and 3 which stated the objectives and activities for the Community.³⁷ In Article 2 it was stated that the Community should promote economic activities and sustainable growth respecting the environment and in Article 3(l) "stated that one of the activities for attaining this was a policy in the sphere of the environment".³⁸ The Maastricht Treaty also meant that for the first time environment decisions could be taken with qualified majority.³⁹ In 1992 the Community's 5th environment action programme for the period 1992-2000 was "Towards sustainable development" and it aimed among other things to integrate environment considerations in the politics of all the other areas.⁴⁰ The action programme was based on the Brundtland report "Our Common Future" from 1987 that had as its central goal 'sustainable development'. In accordance with the Brundtland report a follow up international environmental conference was held 1992 in Rio. The result was among other things the Rio Declaration and the Agenda 21.⁴¹ The EC joined the Rio Declaration and the Agenda 21.⁴²

The Treaty of Amsterdam in 1997 started the fifth stage and according to Professor Jans Article 2 was considerably improved. "It now states that the Community shall have as its task to promote harmonious, balanced and sustainable development of economic activities."⁴³ It is also stated in Article 2 that the Community shall promote a high level of environment protection

³³ European Environmental Agency, *Information för att förbättra miljön i Europa*, (Köpenhamn 2000, printed in Belgium), at p. 16.

³⁴ Nilsson, Annika, *Att byta ut skadliga kemikalier Substitutionsprincipen – en miljörettslig analys*, (Göteborg 1997), at p 20, footnote 13.

³⁵ Nilsson, Annika, *Att byta ut skadliga kemikalier Substitutionsprincipen – en miljörettslig analys*, (Göteborg 1997), at p. 20.

³⁶ European Environmental Agency, *Information för att förbättra miljön i Europa*, (Köpenhamn 2000, printed in Belgium), at p. 16.

³⁷ Jans, H Jan, *European Environmental Law*, (Groningen 2000), at p. 7.

³⁸ Jans, H Jan, *European Environmental Law*, (Groningen 2000), at p. 8.

³⁹ Jans, H Jan, *European Environmental Law*, (Groningen 2000), at p. 8.

⁴⁰ European Environmental Agency, *Information för att förbättra miljön i Europa*, (Köpenhamn 2000, printed in Belgium), at p. 16.

⁴¹ Nilsson, Annika, *Att byta ut skadliga kemikalier Substitutionsprincipen – en miljörettslig analys*, (Göteborg 1997), at p. 17-19.

⁴² Nilsson, Annika, *Att byta ut skadliga kemikalier Substitutionsprincipen – en miljörettslig analys*, (Göteborg 1997), at p. 21-23.

⁴³ Jans, H Jan, *European Environmental Law*, (Groningen 2000), at p. 8.

and improvement of the environmental quality. In Article 2 in the Treaty of Amsterdam it is stated that the Community shall form an internal market and promote a harmonious, well-balanced and sustainable development of the economical life and a high level of environmental protection and improvement of the quality of the environment.⁴⁴

It is not undisputed whether the goal of an internal market and the goal of a high level of environmental protection and improvement of the quality of the environment weigh equal. I have tried to get an answer to this question by asking the European Commission. I received an answer from Phil Callaghan⁴⁵ who said that:

“I would not say there was a hierarchy but it is possible, for example, for a Member State to introduce legislation to protect the environment that goes further than any EU legislation that might be in place. However, this legislation must not contravene other parts of the Treaty, in particular Articles 28 to 30, which are designed to ensure that no barriers to trade are erected within the single market. As with all things relating to economic progress and environmental protection a balance has to be struck. When a Member State wishes to introduce tougher environmental laws it must notify the Commission under Directive 98/34. This gives the Commission the opportunity to determine whether the proposed legislation contravenes other parts of the Treaty.”⁴⁶

From this answer it can be concluded that there is no absolute hierarchy between the goals. A balance has to be struck on a case by case procedure. Phil Callaghan further said:

“I am afraid that the true answer to the issue of balance between the environment, the economy and one might add social progress as well, is ultimately for the courts to decide. There is no general rule and you would have to look at the merits of a particular case, which is what the Commission has to do under the notification procedure. So understanding the rationale and need for environmental legislation (for example a legally binding target) as well as its wider impacts is key to making a balanced decision. That is why as a general rule the Commission prefers EU level legislation because single market issues etc are to some extent automatically taken into account in any Commission proposal. So for example if all economic operators had to stop using CFCs in refrigeration from the same date no one is placed at a disadvantage (excepting that there would still be costs involved). But for one Member State to ban CFCs in refrigeration from an earlier date might contravene the single market by putting in place a de facto trade barrier. I am sure you will appreciate this discussion could continue forever, but I hope this gives you an idea about the issues that need

⁴⁴ Kommissionen, *Amsterdamfördraget –Handledning från Kommissionen*, (Luxemburg 1999), at p. 163.

⁴⁵ Phil Callaghan at the Information Centre, Environment Directorate-General, European Commission.

⁴⁶ Email received from Phil Callaghan, the 13th of November 2001.

to be weighed up.”⁴⁷ That the national regulation of, for example CFCs constitutes an import restriction but could be exempted under the Rule of Reason will be discussed in *Chapter 7.2*.

Article 1 now says European Community and not as before European Economic Community.⁴⁸ Another improvement for the environment was the integration principle in Article 6 that stated that ”environmental protection requirements must be integrated into the definition and implementation of other Community policies, as a General Principle of EC law.”⁴⁹ According to the Commission the “key innovation is the obligation on the EU to take account of environmental protection requirements in defining and implementing all its policies...”⁵⁰

The sixth stage has just begun and it mainly concerns the enlargement of new Member States in Central and Eastern Europe. The new countries have to take over the whole body of existing European environmental law to become members of the Community.⁵¹

⁴⁷ Email recieved from Phil Callaghan, the 13th of November 2001.

⁴⁸ Nilsson, Annika, *Att byta ut skadliga kemikalier Substitutionsprincipen – en miljörättslig analys*, (Göteborg 1997), at p. 20-21.

⁴⁹ Jans, H Jan, *European Environmental Law*, (Groningen 2000), at p. 9.

⁵⁰ European Commission, *Treaty of Amsterdam – what has changed in Europe*, (Belgium 1999), at p. 13.

⁵¹ Jans, H Jan, *European Environmental Law*, (Groningen 2000), at p. 10.

3 Environmental effects of ozone depleting substances

Over the last 20 years stratospheric ozone has been depleted over Antarctica and now also over the Arctic. This is to a great extent the result of manmade chemicals containing chlorine. Examples of such chemicals are CFCs (ChloroFluoroCarbons), HCFCs (HydroChloroFluoroCarbons), and compounds containing bromine, halogen compounds and nitrogen oxides. The ozone layer stretches from about 10-40 km above the ground. Most of the ozone is produced in the tropics where the sunlight is the most intense.⁵²

CFC was a "common industrial product used in refrigerating systems, foams, air conditioners, aerosols, fire extinguishers, solvents and in the production of some types of packaging."⁵³ In the Community CFCs were phased out in 1995 but some countries, for example the developing countries, still use CFCs.⁵⁴ Almost all of the chlorine and 50 percent of the bromine in the stratosphere are the result of human activity.⁵⁵ Substances, that consists of both chloro and fluoro are called freons and have had large technical use. It is shown that when freons come out into the air they go to the stratosphere without breaking up.⁵⁶ HCFCs are called soft freons and contains less chloro than CFCs and are therefore less aggressive but still damaging to the ozone layer.⁵⁷ Soft freons have been used as replacements for hard freons.

For ozone loss to happen there are a few things needed. It all starts with that the "polar winter leads to the formation of the polar vortex, which isolates the air within it."⁵⁸ Within the vortex the temperature is so cold that Polar Stratospheric Clouds are formed (PSCs). Because the vortex isolates the air the cold temperature and the PSCs remain. When the PSCs form a reaction takes place and the inactive chlorine and bromine changes to more active

⁵² European Environment Agency, *Environment assessment report No 2, Environment in the European Union at the turn of the century*, (Copenhagen 1999), at p. 100.

⁵³ From University of Cambridge's website, 17 September 2001, <http://www.atm.ch.cam.ac.uk/tour/part1.html>.

⁵⁴ Europeiska miljöbyrån, *Miljön i Europeiska unionen vid sekelskiftet, Appendix till sammanfattning Fakta och slutsatser per miljöfråga*, (Köpenhamn 1999), at p. 7, And In Environmental signals 2001 from European Environment Agency it is stated that "There has been little change in the situation regarding the depletion of the stratospheric ozone layer since European signals 2000; emissions of ozone depleting substances are therefore not covered in this report, at p. 72.

⁵⁵ From University of Cambridge's website, 17 September 2001, <http://www.atm.ch.cam.ac.uk/tour/part3.html>.

⁵⁶ Andersson, Sonesson, Stålhandske o Tullberg, *Gymnasiekemi, 2 upplagan*, (Falköping 2001), at p. 142.

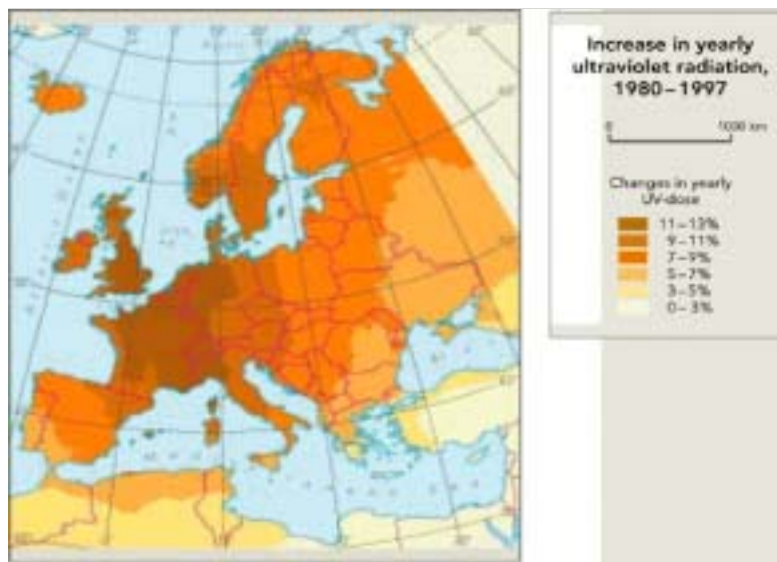
⁵⁷ Naturvårdsverket, *Sverige och den europeiska miljöpolitiken*, (Stockholm 1993) at p. 76.

⁵⁸ From University of Cambridge's website, 17 September 2001, <http://www.atm.ch.cam.ac.uk/tour/part3.html>.

forms. When the sunlight returns the chlorine split into chlorine atoms, which lead, to the depletion of the ozone layer.⁵⁹

Though Europe is a small part of the world it covers several climate zones and contains many different types of nature. The ecological conditions within Europe differ. For example the environmental reactions on certain substances and activities vary depending on if it happens in warm or cold climate.⁶⁰ In the North there are problems such as overfeed; forest damage and pollution of waterways. In places where a lot of people live the waste problem is big as well as overloaded traffic systems. Some countries feel more affected than others do for example the Netherlands worry about rising sea level as a result of the possible climate changes. Another example is the depletion of the ozone layer, which is a big worry for Northern Europe.⁶¹

Figure 1. Increase in UV Radiation 1980-1997.⁶²



In Europe the increase of ultra violet radiation is estimated to be greater in the North Western part because the total ozone layer on different heights decreases more here.⁶³ It is the use of CFCs and halons and the other ozone depleting substances that has contributed to the increase of chlorine and bromine in the stratosphere. Damage to the ozone layer started around 1980

⁵⁹ From University of Cambridge's website, 17 September 2001, <http://www.atm.ch.cam.ac.uk/tour/part3.html>.

⁶⁰ Westerlund, Staffan, *EG och makten över miljön*, Naturskyddsföreningen (1992), at p. 48- 54.

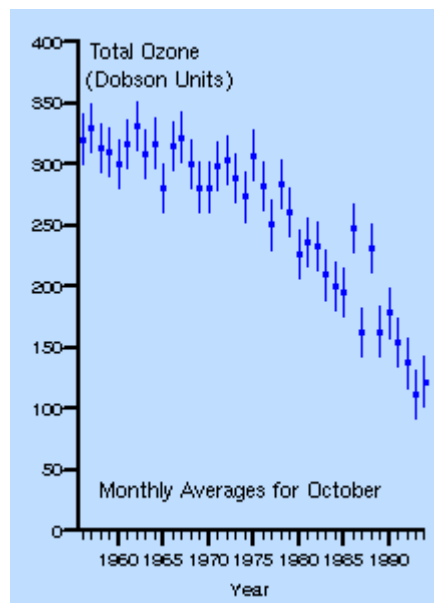
⁶¹ Naturvårdsverket, *Sverige och den europeiska miljöpolitiken*, (Stockholm 1993) at p. 8-9.

⁶² Source: EEA, 1999; RIVM, 12 November 2001 from EEA's website <http://www.eea.eu.int>.

⁶³ Europeiska miljöbyrån, *Miljön i Europeiska unionen vid sekelskiftet, Appendix till sammanfattning Fakta och slutsatser per miljöfråga*, (Köpenhamn 1999), at p. 7 and European Environment Agency, *Environment assessment report No 2, Environment in the European Union at the turn of the century*, at p. 108.

and reached its maximum around the year 2000.⁶⁴ According to British Antarctic Survey “This year's ozone hole has been one of the most severe on record in terms of the total amount of ozone destroyed.”⁶⁵ The international measures taken against the use of chlorofluorocarbons (CFCs), halons, and other ozone depleting chemicals made their production and emission drop significantly but scientists believe that it is unlikely that the ozone layer will be fully recovered before 2050 under condition that the phase-out continues as planned.⁶⁶

Figure 2. The graph shows the measured total ozone above the Halley Bay station in Antarctica. Each point represents the average total ozone for the



month of October.⁶⁷ The Graph shows how the ozone layer has decreased during a 30 year period.

⁶⁴ From Nordiska Ministerrådet, *Så skyddar vi ozonskiktet, Ett nordiskt perspektiv*, (Nordiska Ministerrådet 1997), at p. 15.

⁶⁵ From British Antarctic Survey website: 15 November 2001, http://www.antarctica.ac.uk/Key_Topics/Ozone/ozonetoday.html.

⁶⁶ European Environment Agency, *Environment assessment report No 2, Environment in the European Union at the turn of the century*, at p. 99.

⁶⁷ Graph from University of Cambridge's website 18 September, <http://www.atm.ch.cam.ac.uk/tour/part2.html>.

4 International Agreements on Substances that Deplete the Ozone Layer

4.1 Global environmental initiative

”The destruction of the ozone layer, which protects all living things from harmful ultraviolet solar radiation, was one of the first, global environmental problems to be understood by the general population and tackled by the international community.”⁶⁸ This was a ”pioneering global environmental initiative, establishing a system of world-wide regulation of production and use of the chemicals which damage the ozone layer”.⁶⁹ Europe’s responsibility is emphasized by the fact that Europe contributes with approximately one third of the global annual emissions of ozone depleting substances.⁷⁰

The EC and Sweden together with a large group of countries came to an agreement about phasing out the chemicals that deplete the ozone layer – the Vienna Convention and the Montreal Protocol. In the Protocol minimum rules are set up regarding ozone-depleting substances and nothing in the Protocol prohibits states from having a more progressive phase out.⁷¹ The goal was the same for the EC and for Sweden though the timetable and the measures used have been different.⁷²

4.2 The Vienna Convention

The United Nations Environment Programme (UNEP) started working on the problem with ozone depletion in 1977.⁷³ In 1981 the Governing Council set up a group with the task to prepare a ”global framework convention for the protection of the Ozone Layer. Its aim was to secure a general treaty to tackle ozone depletion.”⁷⁴ In Vienna in 1985 nations agreed and the Convention for the Protection of the Ozone Layer was born. Nations agreed

⁶⁸ From European Environmental Agency’s Website, 25 September 2001, <http://themes.eea.eu.int/Environmental_issues/ozone>.

⁶⁹ European Environment Agency, *Environmental assessment report No 2, Environment in the European Union at the turn of the century*, (Copenhagen 1999), at p. 104.

⁷⁰ From European Environmental Agency’s Website, 26 September 2001, <<http://reports.eea.eu.int/92-826-5409-5/en/page028new.html>.

⁷¹ Regeringens proposition 1994/95:19 p 258

⁷² NVV, *Sverige och den europeiska miljöpolitiken*, (Stockholm 1993), at p. 43.

⁷³ From United Nations Environment Programme, 26 September 2001, <http://www.unep.org/ozone/treaties.shtml>.

⁷⁴ From United Nations Environment Programme, 26 September 2001, <http://www.unep.org/ozone/vienna.shtml>.

to "... take appropriate measures in accordance with the provisions of this Convention and of those protocols in force to which they are party to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer."⁷⁵ With the Convention the nations also agreed to cooperate with each other in scientific research.⁷⁶ Nothing in the Vienna Convention prohibits states from taking additional national measures.⁷⁷ 28 nations signed the Convention in Vienna.⁷⁸

4.3 The Montreal Protocol

In 1987 the Montreal Protocol on substances that deplete the ozone layer was adopted by the nations who signed the Vienna Convention and some additional states.⁷⁹ The Member States of the Community is counted as one member when it comes to fulfilling the demands in the Protocol.⁸⁰ When the Montreal Protocol was established the EC was the braking mechanism and the US was the pushing one. Since then the roles have become the opposite.⁸¹ The EC was in the beginning negative to the regulation of HCFCs whom earlier was the most important replacement for CFCs. With the Copenhagen Amendment in 1992 a change in course direction can be seen. The reason for this according to the Swedish National Environment Protection Board⁸² could be that the British chemical giant ICI made a decision not to continue with HCFCs but instead develop compounds free from HCFC that do not deplete the ozone layer. The German Company Hoechst had earlier made a similar decision.⁸³

In the negotiations of the Protocol in 1992 France was obstructing ambitious restrictions and future phase out of HCFCs. The reason according to Swedish National Environment Protection Board being that the state owned French company Atomec is one of the biggest producers of HCFCs of the world.⁸⁴ The large industries seem to have a huge influence and it is according to Swedish National Environment Protection Board to a great extent the chemical industries' timetable for development of replacements that control the phase out in the European Community.⁸⁵ One should not

⁷⁵ Vienna Convention 1985, Article 2.1

⁷⁶ Vienna Convention 1985, Article 2.2a-d

⁷⁷ Vienna Convention 1985, Article 2.3

⁷⁸ From United Nations Environment Programme, 26 September 2001, <<http://www.unep.org/ozone/vienna.shtml>>.

⁷⁹ Total signatories were 46, From United Nations Environment Programme, 26 September 2001: <<http://www.unep.org/ozone/treaties.shtml>>.

⁸⁰ Nordiska Ministerrådet, *Så skyddar vi ozon skiktet, Ett nordiskt perspektiv*, (Nordiska Ministerrådet 1997), at p. 14.

⁸¹ NVV, *Sverige och den europeiska miljöpolitiken*, (Stockholm 1993), at p. 74.

⁸² Translation of Naturvårdsverket.

⁸³ NVV, *Sverige och den europeiska miljöpolitiken*, (Stockholm 1993), at p. 75-76.

⁸⁴ NVV, *Sverige och den europeiska miljöpolitiken*, (Stockholm 1993), at p. 76.

⁸⁵ NVV, *Sverige och den europeiska miljöpolitiken*, (Stockholm 1993), at p. 76.

forget the impact of the environmental organizations that by bringing reports on the depletion of the ozone layer have helped to push for the phase out. Individual states have also contributed to the phase out. Countries like Sweden and Germany have showed that CFCs can be replaced relatively quickly. The depletion of the ozone layer is unfortunately even quicker.⁸⁶

The Protocol set up a schedule for the phase out of CFCs and halons. With the Copenhagen Amendment in 1992 the phase out was speeded up and limits for the production of HCFCs were set up.⁸⁷ According to the Montreal Amendment in 1997 halons, CFCs and HBFCs should be phased out since 1994 and 1996. Regarding HCFCs the phase out started in 1996 and will continue gradually until 2020⁸⁸ with a tail of 0,5% until 2030 to service existing equipment.⁸⁹ For the developing countries the phase out is a bit slower with total phase out of CFCs 2010 and HCFCs 2040.⁹⁰ The Protocol has been modified a few times. Last modification was in 1999 in Beijing.⁹¹ The Protocol's objective is to reduce and in the future to eliminate the emissions of manmade ozone depleting substances.⁹² Since CFC was prohibited in 1996⁹³ the smuggling of CFC has "become a lucrative business, yielding enormous profits."⁹⁴ The recovery of the ozone layer will be delayed with a few years if the smuggling continue at the same rate.

⁸⁶ NVV, *Sverige och den europeiska miljöpolitiken*, (Stockholm 1993), at p. 76.

⁸⁷ Today 131 Nations have ratified the Copenhagen Amendment, From United Nations Environment Programme, 26 September 2001: <<http://www.unep.org/ozone/treaties.shtml>>.

⁸⁸ In the EU consumption should be phased out by 2015.

⁸⁹ European Environment Agency, *Environmental assessment report No 2, Environment in the European Union at the turn of the century*, (Copenhagen 1999), at p. 104.

⁹⁰ European Environment Agency, *Environmental assessment report No 2, Environment in the European Union at the turn of the century*, (Copenhagen 1999), at p. 104.

⁹¹ Today 16 nations have ratified the Beijing Amendment, From United Nations Environment Programme, 26 September 2001: <http://www.unep.org/ozone/treaties.shtml>.

⁹² From United Nations Environment Programme, 26 September 2001 <<http://www.unep.org/ozone/treaties.shtml>>.

⁹³ 1995 in the EU.

⁹⁴ European Environment Agency, *Environmental assessment report No 2, Environment in the European Union at the turn of the century*, (Copenhagen 1999), at p. 105-107.

5 Community Law in the field of environmental protection

5.1 Community rules concerning stricter national measures

According to Geert Van Calster “Almost by definition the environmental standard reached in harmonising legislation does not meet the expectations of the ‘greenest’ Member State.”⁹⁵ In order to reach their environmental goals these Member States can apply the environmental safeguard clause of Article 95.4 and 95.5 or as the case may be, to the safeguard clause of Article 176 (depending on the legal base of the legislation at issue). Van Calster further argues that “...the environmental safeguards contained in Article 95 and Article 176 have not (yet?) received the widespread application that was predicted at the time of their conception. However it is probably not far off the mark to suggest that these clauses will be more regularly invoked after the planned EU enlargement.”⁹⁶

5.1.1 The difference between stricter and divergent measures

Stricter measures are at hand when a Member State regulates something that is already regulated by the Community and the national measures goes further than the Community legislation does. For example, if a Member State has rules that stipulates that it is prohibited to sell or use a substance from the 31 of December 2001 and the Community prohibits the same from the 1st of January 2004, it can be stated that the national rules are stricter. If a Member State prohibits the use of a substance that is not covered by any Community legislation the national rules regarding this should be viewed as divergent not stricter.

The important task is to determine whether a matter is within or outside the scope of the Community legislation. If it is established that a Community Directive/Regulation regulates the matter one has to see if the Community legislation is totally harmonizing or if it only lays down minimum rules. When an issue has been regulated within the Community the Member States can only act according to what the Community directive or regulation allows and depending on what legal base the Community legislation is enacted.⁹⁷

⁹⁵ Van Calster, Geert, *European Law Review* Vol 25, No 4 August 2000, *Trade and environment, a watershed for Article 30*, at p. 338.

⁹⁶ Van Calster, Geert, *European Law Review* Vol 25, No 4 August 2000, *Trade and environment, a watershed for Article 30*, at p. 338.

⁹⁷ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 102.

There are two main legal bases for the Community's environmental legislation, that is, Article 175 and Article 95.

5.1.2 Community legislation based on Article 175 in the Treaty of Amsterdam

It was stated in the Waste Framework Case that the Community should use Article 175 as the legal base when the primary objective with the rules is to protect the environment.⁹⁸ According to Jans you could say that if general environmental measures have a diffuse effect on the internal market and when the effect is "...no more than a logical consequence of a particular environment measure..." the measures fall within the scope of Article 175.⁹⁹ The Community Ozone Regulation might be seen as an example of this. This regulation will be discussed in more detail in *Chapter 7*.

The Community's environmental policy is given mainly in the Articles 174-176 in the Treaty of Amsterdam. The goals are to preserve, protect and improve the quality of the environment, to protect human health, careful and rational use of natural resources and to promote measures at international level to deal with regional or worldwide environmental problems.¹⁰⁰ The principals of the Community's environmental policy are high level of protection, precautionary principle, prevention principle, source principle (stop pollution by its source), polluter pays principle and the safeguard clause that gives the Member States the right to take temporary measures for non-economical environmental reasons subject to a Community inspection procedure.¹⁰¹ The Community directives and regulations based on Article 175 should be interpreted with regard to these principles.¹⁰²

The principle of aiming at a high level of protection is achieved by taking into account the different conditions within the Community's various regions. This principle does not mean that the Community necessarily has to choose the, technically speaking, highest level of protection to be compatible with Article 174.2. This is because the Member States according to Article 176 are allowed to keep or introduce stricter measures.¹⁰³ According to Jans the "high level of protection principle is one of the most important substantive principles of European environment policy. It is stated at various places of the EC Treaty."¹⁰⁴ With the Treaty of Amsterdam and Article 2 the principle became one of the general objectives in the Community.¹⁰⁵

⁹⁸ Case C-187/93 European Parliament v Council Waste Framework Directive, at para 3.

⁹⁹ Jans Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 53.

¹⁰⁰ Stated in Article 174.1 in Treaty of Amsterdam.

¹⁰¹ Stated in Article 174.2 in Treaty of Amsterdam.

¹⁰² Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 31.

¹⁰³ Case C-341/95, *Safety Hi Tech*, at para 47.

¹⁰⁴ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 31.

¹⁰⁵ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 31.

When the Community's secondary legislation do not hinder stricter national rules it is called minimum harmonization. In the *Tridon* Case the European Court stated that when it comes to species regulated in the Regulations 3626/82 or 338/97 on protection of species of wild fauna and flora, these Regulations do not prohibit Member States from keeping or introducing stricter measures if they comply with the Treaty. Article 15 in Regulation 3626/82 states that such measures may be introduced or kept and Regulation 338/97 was enacted based on Article 130s.1 (now 175.1). According to Article 130t (now 176) in the Treaty protection measures enacted according to Article 175 shall not prohibit stricter national rules if they comply with the Treaty and are notified to the Commission.¹⁰⁶

According to Jans 'compatible with the Treaty' means "...that the requirements of the free movement of goods, the rules on competition and the provisions on taxation must be observed in national environmental rules."¹⁰⁷ In the *Dusseldorp* Case the European Court noted that Article 175 permits Member States to adopt rules only if they are compatible with Article 30 (now 28) or can be seen as mandatory requirements according to the Rule of Reason or covered by the exemption in Article 36 (now 30) of the Treaty.¹⁰⁸

There is a discussion going on between legal writers whether secondary legislation based on Article 175 can be totally harmonized. According to some "Article 176 merely expresses the principle that in general decision-making under Article 175 takes the shape of minimum harmonization but does not limit the Council's powers, by way of 'self-binding' of setting total harmonized standards."¹⁰⁹ The most prevailing view according to Jans is though that the Community cannot in secondary legislation for example based on Article 175 prohibit stricter measures because this is allowed according to the Treaty, Article 176 and the Treaty is at all times of a higher order than secondary legislation. Article 176 would have no meaning if secondary Community legislation based on Article 175 could be totally harmonized. Furthermore the principles in Article 174.2 for regulation in the field of environmental protection indicate that legislation based on Article 175 cannot per se hinder Member States from taking stricter measures.¹¹⁰

However this discussion seem to have been settled in the *Fornasar* Case where the European Commission argued that the list of harmful waste in Directive 91/689 on hazardous waste and in Decision 94/904 shall be viewed as exhaustive and that Community law prohibits any complement to this list.¹¹¹ However the European Court stated that the Directive was enacted based on Article 130s (now 175) with the purpose to carry out the

¹⁰⁶ Case C-510/99, *Tridon*, at para 45.

¹⁰⁷ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 117.

¹⁰⁸ Case C-203/96 *Dusseldorp*, at para 50 and 70.

¹⁰⁹ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 118.

¹¹⁰ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 118.

¹¹¹ Case C-318/98, *Fornasar*, at para 35.

precautionary principle and the principle of preventive measures noted in Article 130r.2 (now 174.2). In accordance with these principles it is for the Member State to prevent, decrease and as much as possible remove pollution or nuisance by taking measures to eliminate known risks.¹¹² The Member States are not hindered to take stricter protection measures in order to prohibit abandoning, dumping and uncontrolled final care taking of dangerous waste.¹¹³ It can be stated that Community law in the field of environmental protection does not strive for a total harmonization of the rules.¹¹⁴

According to Jans there is one strange thing about this decision and that is that it "...has been taken not by a plenary court but by a small chamber of three judges!"¹¹⁵ This might mean that this matter is not finally decided according to Jans. I am of the view that if the Community wants to regulate a matter totally the primary objective cannot be to protect the environment but to approximate legislation in order to make the internal market work. If this is the case the Community should base legislation on Article 95 and it is possible with total harmonisation. If the primary objective really is to protect the environment a Member State should not be hindered from taking more environmentally protective measures since this indeed improve the state of the environment. In the *Nederhoff* Case the Court stated that for stricter national rules to be allowed they have to be consistent with the aim of the directive/regulation.¹¹⁶

The freedom for the Member States to take national measures according to Article 176 means according to Jans that it can be done "under the same rules as if there had been no harmonization, but Article 176 most definitely does not give the Member States a licence to act in contravention of the provisions of Article 28 et seq, or to fail to meet their commitments to the Community in other respects, for instance secondary legislation."¹¹⁷

5.1.3 Community legislation based on Article 95

When the primary aim of the Community's secondary legislation is to harmonize market conditions and make the internal market work the legal base should be Article 95. The confusion lies in that the Community legislation can have more than one objective. For example a directive could aim both at protection of the environment and harmonization of market conditions. To be able to choose the right legal base for this legislation the Community has to decide what the primary objective is. According to Jans "...not every harmonization of national products necessarily falls within the

¹¹² Case C-318/98, *Fornasar*, at para 37.

¹¹³ Case C-318/98, *Fornasar*, Judgement at para 1.

¹¹⁴ Case C-318/98, *Fornasar*, Judgement at para 46.

¹¹⁵ Jans Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 120.

¹¹⁶ Case C-232/97, *Nederhoff*, at para 58.

¹¹⁷ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 120.

scope of the Article”.¹¹⁸ This was also shown in the Chernobyl Case 70/88 where the Court stated that if a regulation only has the incidental effect of harmonizing the conditions for the free movement of goods within the Community it should not be based on Article 100a (now 95).¹¹⁹

If a Member State after a matter has been regulated based on Article 95 deem it necessary to keep national rules based on essential needs according to Article 30 or protection of the environment or working environment, the Member State shall notify the Commission these rules and the reason for keeping them.¹²⁰ The Commission shall within six months after a notification according to 95.4 and 95.5 approve or disapprove the national rules since it has been established if these are means of arbitrary discrimination or disguised trade barriers between the Member States and if they will be a hinder for the functioning of the internal market. If the Commission does not make a decision within this period the national rules notified according to 95.4 and 95.5 are approved.¹²¹

The example that follows here demonstrates the provisions that have to be at hand for national stricter rules to be allowed when Community legislation is based on Article 95. In the Commission decision 1999/833 it was noted that the German national rules in many respects were stricter than Directive 94/60 on use and marketing of creosote and similar.¹²² The directive was based on Article 100a (now 95).¹²³ Germany grounded its request in the protection of peoples' health. The Commission investigated if the German rules were necessary and proportionate. It is for the Member State to show that the measures are well grounded.¹²⁴

The Netherlands, Sweden and Denmark submitted new scientific evidence that showed that even creosote that contains less than 50ppm (the level of the directive) could be carcinogenic and that the risk cannot with certainty be established. With regard to the uncertainty regarding creosote and with regard to the precautionary principle it is according to the Commission motivated to take measures to decrease the risks. The national rules that Germany notified to the Commission were proportionate.¹²⁵ The limitation applies to all products without distinction, no matter if they are produced in Germany or imported to Germany. The Commission therefore stated that the German rules were not arbitrary discriminating.¹²⁶

¹¹⁸ Jans Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 53.

¹¹⁹ Case C-70/88, *Chernobyl*, at para 17 and 18.

¹²⁰ Stated in Article 95.4.

¹²¹ Stated in Article 95.6. Before this provision the Court stated in Case C-317/97 *Kortas*, at para 33-38 that a Member State is not authorized to apply national rules under Article 100a.4 until it has obtained a decision from the Commission confirming them.

¹²² Commission Decision 1999/833, *Creosote*, at para 2 and 12.

¹²³ Commission Decision 1999/833, *Creosote*, at para 14-20.

¹²⁴ Commission Decision 1999/833, *Creosote*, at para 33-34.

¹²⁵ Commission Decision 1999/833, *Creosote*, at para 99-100.

¹²⁶ Commission Decision 1999/833, *Creosote*, at para 103.

According to the Commission there was no disguised trade barrier either since modern and better alternatives to creosote exists and is produced in Germany and in the other Member States. There is a real interest to protect peoples' health and that is the reason for the national rules and not to create disguised trade barriers.¹²⁷ The Commission also stated that there was no evidence that the German rules are a disproportionate hinder for the internal markets functioning in relation to the goals aimed at. The national rules were approved by the Commission according to Article 100a.4 (now 95.4).¹²⁸

5.2 Community rules concerning divergent national measures

If the Community has not regulated the matter in question Member States can regulate themselves with consideration of the Community's interests. The Community and the Member States have shared competence in the field of environmental protection. If the Community does not protect the environment it must not prevent Member States from doing so.¹²⁹ But when Member States regulate to protect the environment they cannot go against the principles and objectives of the Treaty, such as the free movement of goods and the functioning of the internal market. Article 28 in the Treaty of Amsterdam comprises a founding rule about the establishment of the internal market. The purpose of the Article is to contribute to the free movement within the Community.¹³⁰

According to Jans it is very likely that national environmental protection measures regarding potentially dangerous products will be subject to the prohibition in Article 28. This does not mean that such national measures per se are prohibited.¹³¹

Measures that treat goods from other Member States in another way than national goods are in principal prohibited. Even a measure that formally treats national and imported goods alike can in reality mean that the marketing of the imported goods gets complicated and could therefore be a forbidden trade barrier.¹³² This follows from the Dassonville Case that stated that every trading rule could be a trade barrier if it direct or indirect, actually or potentially hinders the trade between the Member States.¹³³ In

¹²⁷ Commission Decision 1999/833, *Creosote*, at para 107-111.

¹²⁸ Commission Decision 1999/833, *Creosote*, at para 125-127.

¹²⁹ Krämer, Ludvig, *Environmental Protection and Article 30 of the EEC Treaty*, Common Market Law Review 1993, at p. 114-115.

¹³⁰ Nilsson, Annika, *Att byta ut skadliga kemikalier – substitutionsprincipen – en miljörättslig analys*, (Göteborg 1997), at p. 287.

¹³¹ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 210.

¹³² Nilsson, Annika, *Att byta ut skadliga kemikalier – substitutionsprincipen – en miljörättslig analys*, (Göteborg 1997), at p. 290-297.

¹³³ Case C-8/74, *Dassonville*, at para 1 in the Summary.

the Cassis de Dijon Case the Court said that the prohibition in Article 28 covers national rules which sets a certain technical standard if the rules strikes imported goods which are legally produced and marketed in another Member State. The Court also stated that products that are lawfully produced and marketed in one of the Member States must be given access to the market in another Member State.¹³⁴

In the Keck Case the Court pinpointed which type of rules that can be covered in Article 28. The prohibition covers technical rules about how goods should be designed, what form, size, and weight and structure, presentation, labelling or packaging. The principal rule is that other Member States' requirements on their products are to be accepted in other Member States where the goods are imported. In this case the Court also noted that national laws might prohibit or restrict certain selling arrangements without being seen as a hinder directly or indirectly, actually or potentially for the trade between Member States.¹³⁵

5.2.1 When divergent national rules are allowed

Article 28 has direct effect but is not absolute. Article 30 and the Rule of Reason/Cassis de Dijon doctrine gives possibilities for Member States to keep national rules under certain circumstances such as with regard to health and environment. The establishment of an internal market is not the sole objective of the Community but also a good state of the environment.¹³⁶ After the Treaty of Maastricht and Amsterdam the respect of the environment has been given a greater role. According to Annika Nilsson Articles 28 and 30 have not changed in letter but that does not have to mean that the relative importance of the free movement of goods is totally unchanged. If other areas such as respect of the environment are given more weight it has to affect other objectives' relative weight.¹³⁷

According to Article 30 a Member State can restrict and prohibit import if it is **necessary** in order to *protect peoples and animals health* and to preserve plants and if the restriction or prohibition does not constitute a means of arbitrary discrimination or disguised trade barrier. Article 30 should be interpreted narrowly since it is an exemption rule and this can be seen in the Wallon Waste Case where the Court said "...that non-harmful wastes which do not directly threaten life and health cannot be justified under Article

¹³⁴ Case C-120/78, *Rewe-Zentral AG*, at para 3 in the Summary and Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 234-235.

¹³⁵ Case C-267/91 and C-268/91, *Keck*, at para 15, 16 and the Summary.

¹³⁶ Nilsson, Annika, *Att byta ut skadliga kemikalier – substitutionsprincipen – en miljörättslig analys*, (Göteborg 1997), at p. 287-288 and Case C-240/83, *ADBHU*, at para 13.

¹³⁷ Nilsson, Annika, *Att byta ut skadliga kemikalier – substitutionsprincipen – en miljörättslig analys*, (Göteborg 1997), at p. 288-289.

30.”¹³⁸ But the Court has in some cases made a wider interpretation of Article 30. For example in the *Improsol Case* where the Court said that “...pesticides present significant risks to the health of humans and animals and *to the environment* and proceeded to hold the import restriction in question justified in the light of Article 30.”¹³⁹ According to Jans it is apparent that not only health interests but also certain environmental interests can fall within the scope of Article 30 but Jans then concludes that it remains to be seen which line will be pursued by the Court.¹⁴⁰ I am of the view that Article 30 was possible to apply in the *Improsol Case* because there was a threat to human health, the fact that it also constitutes a risk to the environment does not make Article 30 void. What it shows is that if there was no direct threat to human health the measure could possibly be exempted under the Rule of Reason.

The Member State who wants to restrict or prohibit has the burden of proof that the provisions in Article 30 are met. To show the necessity does not mean to show undisputed scientific evidence of this since the precautionary principle is to be applied. The restriction or prohibition may be allowed if there is a “...strong suspicion that the substance in question poses a health threat.”¹⁴¹ This was stated in the *Alpha Toolex Case*.¹⁴² If a measure is necessary it remains to see if it does not constitute an arbitrary discrimination or a disguised trade barrier. The meaning of arbitrary discrimination could according to Jans be that it is possible to treat national products and imported ones differently if it is “...based on grounds capable of objective justification.”¹⁴³ A disguised trade barrier is at hand when the “...restrictive effect is not limited to what is necessary to protect the interest referred to by the rules.”¹⁴⁴ According to Jans this reminds to a great extent of the proportionality principle and it could be discussed if this provision “...adds anything at all.”¹⁴⁵

In order for a measure to be **proportionate** it has to for example be suitable for the protection in mind. It is for the Member State to prove the causal link between the measure and the interest they want to protect. It is not certain if the causal link has to be clear or if it is sufficient that the measure has positive influence. In the *Red Grouse Case* it was sufficient that the measure had positive influence and to some extent a causal connection.¹⁴⁶ If there

¹³⁸ Case C-2/90, *Commission v Belgium, Wallon Waste Case*, at para 33. This is also stated in Allgård, Olof and Norberg, Sven, *EU och EG-rätten, Studentutgåva*, (Stockholm 1999), at p. 313.

¹³⁹ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 243 and *Improsol Case C-125/88 Nijman*.

¹⁴⁰ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 243-244.

¹⁴¹ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 242.

¹⁴² Case C-473/98, *Alpha Toolex*, at para 40-49.

¹⁴³ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 246.

¹⁴⁴ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 246.

¹⁴⁵ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 246.

¹⁴⁶ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 255, Case C-169/89 *Gourmetterie v.d. Burg Red Grouse Case*.

were a less restrictive measure at hand to obtain the same result the Member State should choose that one otherwise it would seem disproportionate.¹⁴⁷ The Court puts high demands on that the measure has not been taken in a way that gives it more extensive trade restrictive effect than necessary. A balance of interests should be made between the national protection interest and the Community interest so that the free movement of goods on the internal market not unnecessarily gets impeded. If the limit of what is necessary is exceeded the exemption cannot be approved.

According to Community case law trade restrictions and prohibitions may be justified on other grounds than Article 30. In the Cassis de Dijon Case and other following cases the Court stated that if no Community rules existed free movement could be restricted if the rules treated domestic and imported products without distinction and if the rules were necessary in order to satisfy mandatory requirements recognized by Community law. This is called the *Rule of Reason* exemption. In the Cassis de Dijon Case the following mandatory requirements were noted: public health, the fairness of commercial transactions and the defence of the consumer.¹⁴⁸ In the Danish Bottle Case the Court added “that the protection of the environment is a mandatory requirement which may limit the application of Article 30 (now 28) of the Treaty.”¹⁴⁹

There is a difference regarding exemption under Article 30 and exemption under the Rule of Reason and that is that the measures allowed under Article 30 can be applied with distinction while exemptions under the Rule of Reason must apply without distinction between domestic and imported products. That is a national measure exempted under the Rule of Reason cannot treat national products different from imported products.¹⁵⁰ For exemption under both Article 30 and the Rule of Reason it is clear that the purpose can only be **non-economic**. The exemptions under these both also have to be compatible with the proportionality principle as described above.

In some cases the Court has stated that when no Community rules exist it is for the Member State to decide the level of protection of peoples’ health and the environment. This is also to some extent supported by the precautionary principle.¹⁵¹ But according to Pagh it is to go too far to say that the Member States can choose the level of protection they want. The Court decides what is necessary for the Member States and this impedes the Member States’ freedom to choose the level of environmental protection.¹⁵²

In conclusion it can be stated that when the Community has not regulated an area it is for the Member States to decide what national measures to enact

¹⁴⁷ Case C-302/86, *Commission v Denmark, Danish Bottle Case*, at para 6.

¹⁴⁸ Case C-120/78 *Rewe-Zentral AG = Cassis de Dijon Case*, at para 8.

¹⁴⁹ Case C-302/86, *Commission v Denmark, Danish Bottle Case*, at para 8 and 9.

¹⁵⁰ Case C-302/86, *Commission v Denmark, Danish Bottle Case*, at para 6.

¹⁵¹ Jans, Jan H, *European Environmental Law*, (Amsterdam 2000), at p. 262.

¹⁵² Pagh, Peter, *EU Miljøret*, (Copenhagen 1996), at p. 183-184.

but the Member States must have all the objectives in the Treaty in mind, especially the goal of free movement. If the national measures affects trade it follows from Article 28 that it must be encompassed under the exemptions in Article 30 or the Rule of Reason to be allowed.

5.3 Summary of when stricter and divergent national rules are allowed.

In order to make the discussion in Chapter 5 a bit more clear I have made a quick guide as shown below:

Figure 1. When Stricter national rules are allowed		
Legal base	Article 95	Article 175
When to choose:	Primary objective: market integration	Primary obj.: environmental protection
Effect on Internal Market:	Specific effect on the competitive position of companies	Incidental, logical consequence of a particular environmental measure
Exemption rule	Article 95.4 and 95.5	Article 176
Prerequisites		
1.	Based on essential needs according to Art 30 or protection of environment	Under the same conditions as if there was no harmonization (see Figure 2.)
2.	Well-grounded(necessary,proportional non-economical) MS has to prove.	
3.	No arbitrary discrimination no disguised trade barrier	
4.	No hinder for functioning of the Internal Market in the future	
5.	Notify the Commission Commission approves or disapproves (Art 95.6)	

Figure 2. When divergent national rules are allowed		
Legal base	No Community rules exist regarding the matter - but the free movement and the internal market shall not be impeded - according to Art 28	
Exemption rule	Article 30	Rule of Reason
Prerequisites		
1.	Protect Peoples, animals health and preserve plants from real an direct danger	Protect environment, public health fairness of commercial transactions defence of the consumer (= mandatory requirements)
2.	Measure must be necessary, proportional, non-economic purpose. MS has to prove.	Measure must be necessary, proportional, non-economic purpose. Member States has to prove.
3.	No arbitrary discrimination or no disguised trade barrier	<i>Must treat national and domestic products the same</i>
4.	Causal connection between measure and aim of measure	Causal connection between measure and aim of measure
5.	Don't have to notify if there is no Community standard.	Don't have to notify if there is no Community standard.

6 Swedish rules in the field of environmental protection

6.1 After the membership in the Community

According to Ulf Dinkelspiel, the Swedish "Europaminister", the Swedish demands were met to a great extent in the negotiations for membership in the Community. Dinkelspiel further stated that most environmental rules within the Community sets minimum standards and that Member States are allowed to set stricter rules.¹⁵³ As shown in *Chapter 5.1* this is not entirely true, environmental rules can also be harmonizing/approximating, which could mean that Member States are not allowed to have stricter national rules. There is only limited possibility to keep and introduce exemptions from harmonization rules according to Article 95.4 and 95.5.

On some areas there are no Community legislation and according to Dinkelspiel the Member States then decide themselves.¹⁵⁴ This is true but the national rules have to be compatible with the Treaty in general as well. In the area of chemical products this means that Member States may have national rules but if the national rules are an import restriction they can only be allowed if they meet the requirements for an exemption according to Article 30 or the Rule of Reason. (*See Chapter 5.2 for a more extended discussion.*)

The result of the negotiations were that whenever Community rules impose more stringent measures than the Swedish rules Sweden has to adjust its rules from day one of the membership. Sweden may keep some of its stricter rules for a transition period of four years from entering into membership and the Community promised to survey its rules.¹⁵⁵ Example of this is that Sweden may keep its stricter rules on classification and labelling of dangerous chemicals and the forth class and rules about cadmium, PCP and arsenik during the transition period.¹⁵⁶

According to the Swedish Department of Environment and natural resources¹⁵⁷ the result of the negotiations shall be interpreted so that Sweden may invoke the guarantee even in those cases where we have not participated in a decision on a directive or regulation and voted against.¹⁵⁸ If

¹⁵³ Utrikesdepartementet, *EU-avtalet*, (Lidköping 1994), at p. 5-10.

¹⁵⁴ Utrikesdepartementet, *EU-avtalet*, (Lidköping 1994), at p. 5-10.

¹⁵⁵ Swedens Treaty of Accession, Section V, Transitionsrules for Sweden, Chapter 1 Free movement of goods, section 1, Rules and environment, Article 112.

¹⁵⁶ Departementspromemorian *Sveriges medlemskap i Europeiska unionen, Ds 1994:48, Förhandlingsresultatet i korthet*, at p. 2

¹⁵⁷ Hereinafter called the Department of Environment.

¹⁵⁸ SOU 1994:7, *EU, EES och miljö*, at p. 139-142.

the surveying procedure is not finished when the transition period ends it means according to the Department of Environment that the period is prolonged because the Community has not kept its promise.¹⁵⁹

According to the Swedish Ministry of Foreign Affairs the aim is that the Community during this period shall adjust its rules to the stricter Swedish demands. If the Community do not reach the level of the Swedish rules after the four years Sweden will keep its rules with reference to the environment guarantee in Article 95.4.¹⁶⁰ This might not be entirely true because the environment guarantee is actually not a real guarantee. In order to attain an exemption according to Article 95.4 the Member State has to meet the requirements laid down in the Article as stated above. I am not going to investigate what happened after the transition period in general but I will describe what happened to a specific matter; the regulation of ozone depleting substances. See *Chapter 6.2*.

6.2 Results of membership negotiations on ozone depleting substances

Both Sweden and the Community have ratified the Vienna Convention on ozone depleting substances and its Montreal Protocol. In the Protocol minimum rules are set up regarding the phase out of these substances. Nothing in the Protocol prohibits states to have a more progressive phase out.¹⁶¹ The Community, Member States of the Community and Sweden have used this opportunity. The common rules in the Community are not fully harmonized either but leave some space for national laws.¹⁶² On the area of ozone depleting substances Sweden has been in the lead of phasing out CFCs and other ozone depleting substances during several years. The Community has not come as far as Sweden has in this process.¹⁶³

In the negotiations for membership in the Community the parties discussed among other things ozone depleting substances such as freons. In a common declaration Sweden and the Community have pointed out the importance to promote a high level of protection on the environmental area. In the declaration it was stated that it is important for Sweden to keep certain environmental rules with consideration of our cold climate.¹⁶⁴ According to the Department of Environment the result of the negotiations was that we might **permanently keep** our stricter rules on some areas. This goes for

¹⁵⁹ SOU 1994:7, *EU, EES och miljö*, at p. 142.

¹⁶⁰ Utrikesdepartementet, *EU-avtalet*, (Lidköping 1994), at p. 10.

¹⁶¹ This was described in *Chapter 4* International Agreements on ozone depleting substances.

¹⁶² Regeringens proposition 1994/95:19, at p.258.

¹⁶³ Naturvårdsverket, *Sverige och den europeiska miljöpolitiken*, (Stockholm 1993), at p. 84.

¹⁶⁴ Utrikesdepartementet, *EU-avtalet*, (Lidköping 1994), at p. 10.

example for the prohibition of some chemicals and the **faster phase out of ozone depleting substances**.¹⁶⁵

The result means that Sweden may permanently keep its stricter national rules on ozone depleting substances as it was when the Treaty was enforced, that is, the 1st of January 1995. The Swedish regulation in force at that time was Regulation 1988:716 on CFCs and halons etc.¹⁶⁶ The old Swedish Ozone Regulation was replaced by the Ozone Regulation 1995:636 on the 1st of July 1995. The negotiated Swedish Regulation would be the old Swedish Regulation and Sweden may keep its stricter national rules in this Regulation. However I cannot from the result of the negotiations answer the question whether the Swedish Ozone Regulation 1995:636 is applicable or not since it was the old Swedish Ozone Regulation that was negotiated. Changes to the Regulation have to be notified to the European Commission and approved by it to be applicable and allowed. In the next Chapter I will therefore investigate whether the new Swedish Ozone Regulation was notified and if the Regulation still is applicable.

¹⁶⁵ Departementspromemorian *Sveriges medlemskap i Europeiska unionen*, Ds 1994:48, *Förhandlingsresultatet i korthet*, at p. 2 also SOU 1994:7, *EU, EES och miljö*, at p. 139-142.

¹⁶⁶ Hereinafter called the old Swedish Ozone Regulation.

7 The applicability of the Swedish Ozone Regulation

7.1 About the Case M 2541-00 from the Swedish Court

As stated in the introduction the reason for this investigation is a verdict on the from the Swedish Environmental Court of Appeal stating that predominant reasons indicate that the Swedish Ozone Regulation no longer is possible to apply.¹⁶⁷ Other Swedish institutions, like the County Administrative Board in Skåne¹⁶⁸ did not quite agree with this verdict since they in their day to day business apply this regulation. My task is to analyze this verdict in the light of Community law and to see whether the Swedish Regulation still is applicable or not. In order to do so I will first describe the Case and the opinion of the Swedish Court and then I will examine the Court's arguments and apply Community law.

7.1.1 Facts of the Case

Engineering firm Ulf Thulin AB (the firm) imports and sells insulation plates made of **hard polyurethan material** for cooling constructions and firesafe doors and pipe basins made of hard polyurethan material for cooling constructions. On the 16th of June 1997 the Municipal Board for environmental protection in Malmö¹⁶⁹ imposed an administrative fine of 100 000 SEK on the firm, according to the 16§ Swedish Chemical Products Act, the 3§ Swedish Ozone Regulation 1995:636 and the 4§ Swedish law of administrative fine, if the firm did not seize the selling and marketing of polyurethan insulation produced with HCFC. In the injunction the firm is forced to pay the same amount every month that the firm continues with the selling and marketing of polyurethan insulation produced with HCFC.¹⁷⁰

The firm demanded that the Swedish Environmental Court of Appeal should remove the administrative fine. The firm also requested that the Swedish Court should get an advance notice¹⁷¹ from the European Court of Justice. The Municipal Board contested the change.¹⁷²

¹⁶⁷ The verdict cannot be appealed according to the Environmental Code 23:8, (miljöbalken).

¹⁶⁸ Translation of Länsstyrelsen in Skåne.

¹⁶⁹ Hereinafter called the Municipal Board

¹⁷⁰ Case M 2541-00 from Swedish Environmental Court of Appeal, at para. 2.

¹⁷¹ Translation of förhandsavgörande.

¹⁷² Case M 2541-00 from Swedish Environmental Court of Appeal, at para. 2.

According to the Environmental Code¹⁷³ and the law that regulates the entering into force of this law cases and matters that started before the 1st of January 1999 shall be heard according to the older laws. The procedure in the Case shall however follow the Environmental Code. The laws applicable to this Case are the Community Ozone Regulations and the Swedish Ozone Regulation. The Swedish Regulation complements the old Community Ozone Regulation that was issued based on Article 130s(now 175.1). The old Community Regulation was however replaced by the new Community Ozone Regulation also based on Article 175.1.¹⁷⁴

In the Swedish Ozone Regulation 3§ it is stated that it is forbidden to professionally sell or market chemical products and goods if the product is a part of or contains foam plastic that has been produced with CFC or HCFC. Polyurethan is covered by the 3§ in the Swedish Ozone Regulation according to the Swedish Environmental Court of Appeal.¹⁷⁵ The products of this Case are insulation plates and pipe insulation and according to the Court only insulation plates are covered by the Swedish Regulation.¹⁷⁶

The old Community Ozone Regulation only applies to substances, for example HCFCs, but not to products. The products in this Case are therefore not covered by the old Community Ozone Regulation. The new Community Ozone Regulation however applies to substances and products and equipment that contain these substances.¹⁷⁷ In Chapter II Article 5.1d i and v in the new Community Ozone Regulation the use of HCFCs shall be prohibited for production of all cellulose plastic **besides** integral cellulose plastic used for security purposes and **hard cellulose plastic for insulation** and from the 1st of January **2004 for production of all cellulose plastic**. At the same date as the use is forbidden the import and marketing of these products and equipment containing HCFC is also forbidden. Products and equipment produced before this date are not covered by the prohibition.¹⁷⁸ The products of this Case are not forbidden until the 1st of January 2004 according to the new Community Ozone Regulation.

7.1.2 The Court's opinion

The question posed by the Swedish Environmental Court of Appeal was whether Swedish Ozone Regulation still is possible to apply. The Swedish Ozone Regulation was issued based on the Swedish Chemical Products Act and is now supported by the Environmental Code. The Regulation is therefore still applicable according to Swedish law. The Swedish Ozone

¹⁷³ Translation of Miljöbalken.

¹⁷⁴ Case M 2541-00 from Swedish Environmental Court of Appeal, at para. 3.

¹⁷⁵ Case M 2541-00 from Swedish Environmental Court of Appeal, at para. 5.

¹⁷⁶ Case M 2541-00 from Swedish Environmental Court of Appeal, at para. 6.

¹⁷⁷ In the Annex V to Regulation 2037/2000, Combined Nomenclature includes in point 5, insulation plates, insulation panels and pipe insulation. Case M 2541-00 from Swedish Environmental Court of Appeal, at para. 3-4.

¹⁷⁸ Community Regulation 2037/2000, Chapter II, Article 5.4

Regulation was supposed to *complement* the old Community Ozone Regulation and the Swedish Environmental Court of Appeal argues that already because of the fact that the old Community Regulation no longer exists and has been replaced by a new Regulation it is difficult to apply the Swedish Ozone Regulation.¹⁷⁹

The Court discussed the relationship between the Swedish Ozone Regulation and the old Community Ozone Regulation and posed the question: If the Swedish regulation still is possible to apply - is it allowed to contain stricter or divergent rules compared to Community Regulation 1994? The old Community Ozone Regulation was based on Article 130s (now 175.1) and according to Article 130t (now 176) Member States may introduce or keep national stricter rules if they comply with the Treaty of Rome. The Community does not strive after a total harmonization on the field of environmental protection.¹⁸⁰

The Swedish Environmental Court of Appeal continued to discuss whether the Swedish Ozone Regulation consists of stricter measures compared to the old Community Ozone Regulation or if the measures instead should be viewed as divergent to this Regulation. The Swedish Environmental Court of Appeal said that there are arguments that speak for that the Swedish Regulation *is divergent* to the old Community Ozone Regulation because the Swedish Regulation covers both substances and products while the old Community Regulation covers only substances. If the national Regulation is divergent it means that the notification procedure in Article 176 will not apply.¹⁸¹ According to the Swedish Court no notification to the European Commission has been made. That is although not enough according to the Swedish Court to make the national Regulation non-applicable no matter if the national rules are stricter or divergent. This does mean that it is unknown what the European Commissions point of view regarding the Regulation's compatibility with the Treaty of Rome is.¹⁸²

The Swedish Court comes to the conclusion that reasons speak in favour of that the Swedish Ozone Regulation consists of divergent rules compared to the old Community Ozone Regulation. Therefore, according to the Court the question must be raised *whether the Swedish Regulation has support by the general rules in the Treaty of Rome, particularly Articles 28 and 30*. Circumstances that speaks in favour of support are that the new Community Ozone Regulation also includes products that contain HCFC and that it may be assumed that this Regulation is compatible with the Treaty of Rome. Another way to see this, according to the Swedish Court, is that the coming into being of the now applicable Regulation and the former Regulations are reflections of what was compatible with the Treaty at the time of their respective application; in any case regarding the question in this Case.

¹⁷⁹ Case M 2541-00 from Swedish Environmental Court of Appeal, at p. 6-7.

¹⁸⁰ Case M 2541-00 from Swedish Environmental Court of Appeal, at p. 7-8.

¹⁸¹ Case M 2541-00 from Swedish Environmental Court of Appeal, at p. 8.

¹⁸² Case M 2541-00 from Swedish Environmental Court of Appeal, at p. 8.

Facts/circumstances that points in this direction is the role of the European Commission according to both the old and the new Community Ozone Regulation when it comes to determining the use of the substances in the Regulations. Furthermore there are rules in the new Community Regulation that means that a prohibition on marketing of such products will start the 1st of January 2004 at the earliest, and that the prohibition does not cover products that are produced before this date.¹⁸³ The Swedish Court never took a stand in this Case if the Swedish national rules were compatible with the general rules of the Treaty or not.

The next question for the Swedish Environmental Court of Appeal was the relationship between Community law and the Swedish Ozone Regulation *since the new Community Ozone Regulation entered into force*. The Swedish Regulation is now to some parts covered by the new Community Regulation. The Swedish Court asked the question: Can the Swedish Regulation be applied when Article 249 in the Treaty of Amsterdam states that Regulations are direct applicable in the Member States and they are obliged not to hinder the direct effect of the Regulations.¹⁸⁴ This is stated in some cases by the European Court and in Article 10 in the Treaty of Amsterdam, the loyalty principle. The Swedish Court argued that, with reference to the statements of the European Court about the Regulations direct applicability and the contents in Article 10, the loyalty principle and the coming into being of the now applicable Regulation 2000, predominant reasons speak in favour of that the Swedish Regulation no longer is applicable.¹⁸⁵ In the next sections I will discuss and analyze the statements of the Swedish Environmental Court of Appeal.

7.2 Analysis of the Swedish Court's statements about the Swedish Ozone Regulation's relation to the old Community Ozone Regulation

In *Chapter 7.1.2* I described the Swedish Environmental Court of Appeal's opinion and in this section the statements regarding the relation between the Swedish Ozone Regulation and the old Community Ozone Regulation will be analyzed.

7.2.1 Divergent not stricter measures

The Swedish Environmental Court of Appeal argued that there are reasons that speak in favour of that the Swedish Regulation is divergent to the old Community Ozone Regulation because the Swedish Regulation covers both substances that deplete the ozone layer and products containing these

¹⁸³ Case M 2541-00 from Swedish Environmental Court of Appeal, at p. 9.

¹⁸⁴ Case M 2541-00 from Swedish Environmental Court of Appeal, at p. 9.

¹⁸⁵ Case M 2541-00 from Swedish Environmental Court of Appeal, at p. 10.

substances while the old Community Regulation only covers the substances. The Court said that since it points in the direction of Swedish Regulation being divergent one must investigate if the Swedish Regulation has support in the Treaty's general provisions, particularly Articles 28 and 30. The Swedish Court noted the pros and cons of support in the Treaty but did not take a stand in this matter.

I intend to discuss if the Swedish Regulation could be seen as divergent to the old Community Ozone Regulation, and if so, whether the national rules are allowed. To determine if the national legislation is divergent or not it is important to see whether the matter lies within the scope of the Community legislation. In the *Burstein* Case the European Court of Justice had to decide if Directive 76/769 relating restrictions on the marketing and use of certain dangerous substances and preparations was applicable only to PCP, its salts and esters and to preparations produced from those substances or also to products treated with those substances and preparations. The Court stated that the Directive did not regulate products treated with those substances and preparations so the Member States were free to regulate this matter under the conditions that the national rules were compatible with the Treaty.¹⁸⁶ This situation seems similar to the one in the Case I am investigating.

7.2.1.1 Both Stricter and Divergent measures

When looking at the relation between the Swedish Ozone Regulation and the old Community Ozone Regulation it can, according to my opinion be stated that the Swedish Regulation contains both stricter and divergent rules. Stricter because the phase-out rate in the Swedish Regulation is faster concerning some of the substances compared to the Community legislation and divergent because it regulates products as well. To find out if the Swedish Ozone Regulation is allowed compared to the old Community Ozone Regulation I have to investigate if Sweden may have stricter *and* divergent measures compared to Community Regulation.

Since the Community Ozone Regulation is based on Article 130s (now 175) *stricter* national measures are allowed if they comply with the Treaty and have been notified to the European Commission according to Article 176. Compatible with the Treaty means for example that the requirements of the free movement of goods must be observed. For *divergent* national measures to be allowed they must also comply with the Treaty but there is no requirement of notification.¹⁸⁷

It can be concluded that in order to find out if both the stricter and the divergent Swedish measures are allowed they have to comply with Article 28. According to Article 28 it is prohibited with import restrictions. Even a measure that formally treats national and imported goods alike can in reality

¹⁸⁶ Case C-127/97, *Burstein*, at para. 24.

¹⁸⁷ This was described in Chapter 5.1.

mean that the marketing of imported goods gets complicated and could therefore be an import restriction. This follows from the Dassonville Case that stated that every trading rule could be a trade barrier if it direct or indirect actually or potentially hinders the trade between the Member States.¹⁸⁸ The Swedish Ozone Regulation could be seen as an import restriction and is therefore prohibited in accordance with Article 28. For the Swedish Regulation to be justified it has to comply with Article 30 or the Rule of Reason.

7.2.1.2 Exemption Rules

As described in Chapter 5.2 Article 30 and the Rule of Reason are the means by which exemption from Article 28 can be made. For national rules to be exempted under Article 30 the rules have to be taken in order to protect peoples and animals health, to preserve plants, to protect national treasures of artistic, historical and commercial ownership. However such prohibitions or restrictions are not allowed to constitute a means of arbitrary discrimination or disguised trade barrier between the Member States.

Could the Swedish Ozone Regulation be seen as necessary with consideration of the interest to protect peoples and animals' health and life? The products containing the substances could be seen as posing more of a long-term threat to people and animals health and life than a direct threat. Does it have to be a direct threat or could it be long-term threats as well? Krämer argues that to limit the use of substances that damages the ozone layer aims at protection of the environment although many of these substances may cause cancer and constitute a threat to human life this is an indirect risk and the measures remains mainly environmental.¹⁸⁹

If national measures cannot be justified under the exemption rule in Article 30 there is still the possibility of exemption from Article 28 under the Rule of Reason/Cassis de Dijon doctrine. If the ozone regulation cannot be justified in order to protect peoples' health and life it should according to my understanding at least be seen as justifiable in order to protect the environment. This should be proved by the reports on how these substances actually have damaged the ozone layer and still do.¹⁹⁰ When the reason for a national measure that constitutes an import restriction is to protect the environment the Rule of Reason exemption could be applied.

The Swedish Regulation could be seen as justifiable on the grounds of protection of the environment but there are still some things that have to be met before the national rules could be seen as allowed in accordance with the Treaty. It must be determined that the rules are **necessary** in order to

¹⁸⁸ This was described in *Chapter 5.2*.

¹⁸⁹ Krämer, Ludvig, *Environment Protection and Article 30 of the EEC Treaty*, Common Market Law Review 1993, at p. 118.

¹⁹⁰ This was described in *Chapter 3*, Environmental effects of ozone depleting substances

protect the environment, the measures have to be **proportionate** in order to attain the aim, the national rules **cannot have a discriminatory** character, that is, the measures cannot make any distinction between national and imported products. The purpose of the national measures has to be **non-economical** and there has to be a **causal connection** between measure and aim of the measure.

I have found that the Swedish Regulation should be viewed as **necessary** in order to protect the environment. I have shown the environmental effects of ozone depleting substances in *Chapter 3* and even if the scientific results there could be seen as disputed the precautionary principle lightens the burden of proof.¹⁹¹ When interpreting the Community's secondary legislation the principle of high level of protection should also be applied following Articles 2 and 174.2 in the Treaty. This principle is met by taking into account the different conditions within the Community's various regions. In *Chapter 3* it was described that the North West of Europe seems more affected by the ozone depleting substances than the rest of Europe. As described in *Chapter 6.1* it was stated in a common declaration made by Sweden and the Community that it is important for Sweden to keep certain environmental rules out of consideration to our cold climate. If Community Regulations should be interpreted according to this principle it might be justified for the countries in the North West of Europe to have stricter rules on this matter.

However, such measures can only be regarded as justified under the condition of being in conformity with the general principle of **proportionality**, that is the measures should not exceed what is suitable for the pursuit of the legitimate objective.¹⁹² In the *Safety Hi Tech* Case the Court noted that the Community Regulation's purpose is to protect the ozone layer. The measures chosen in the Regulation, that is prohibition of use and marketing of HCFCs, have been taken in order to fulfill the purpose of the Regulation. Hence the measures are to be viewed as proportional.¹⁹³ The same reasoning can be done with the Swedish Ozone Regulation that had the same purpose and used similar measures. The Court further stated that because there are substitutes for HCFCs the prohibition of HCFCs could not be seen as contrary to the proportionality principle.¹⁹⁴ According to my understanding the only way to stop the depletion of the ozone layer is to prohibit the use and marketing of ozone depleting substances so the Swedish measures should be viewed as suitable. In order to be proportionate there cannot be any other measure with less restrictive effect on the free

¹⁹¹ European Commission Decision 1999/834/EC on national provisions by the Kingdom of Sweden concerning the limitation of the placing on the market and use of creosote (notified under document number C (1999) 3426), at para 108.

¹⁹² European Commission Decision 1999/834/EC on national provisions by the Kingdom of Sweden concerning the limitation of the placing on the market and use of creosote (notified under document number C (1999) 3426), at para 109.

¹⁹³ Case C-341/95, *Safety Hi Tech*, at para 56.

¹⁹⁴ Case C-341/95, *Safety Hi Tech*, at para 58.

movement of goods that can be used in order to attain the goal of the measure. Since the goal of the measure is to stop the depletion of the ozone layer there should not be any other measure less restrictive to apply. The Swedish national rules should therefore be viewed as proportionate.

Further, the Swedish rules treat domestic and foreign products the same since the limitation on marketing and use of products is based on the containment of ozone depleting substances. This shows that there is **no distinction** being made between national goods and goods imported from other Member States. The **purpose** is to protect the environment and **not** to gain anything **economically**. There is a real interest to protect the environment and in the long term also the health of people because loss of ozone leads to higher UV radiation, which could cause cancer as shown in *Chapter 3*. There is a **causal connection** between the measure and the aim of the measure since it is shown that a decrease in the use of ozone depleting substances and products containing these substances improves the state of the ozone layer. This looks like the situation in European Commission Decision 1999/833, where the European Commission stated that the German rules were necessary and proportionate and in European Commission Decision 1999/834 regarding improvement of Swedish rules on creosote. In conclusion it can in my opinion be stated that the Swedish measures in the Regulation on ozone depleting substances meets the requirements for an exemption under the Rule of Reason.

There is a difference in the investigation of whether stricter and divergent rules can be allowed and that is, that there is one additional requirement for stricter rules to be allowed, the notification requirement. Member States have to notify the European Commission about its stricter rules in accordance with Article 176. Divergent rules do not have to be notified, so the divergent 'product regulation' should be viewed as allowed under the Rule of Reason. Since I have come to the conclusion that the Swedish Ozone Regulation compared to the old Community Ozone Regulation is both stricter and divergent it is of importance to see if notification has been made in order to analyze the relation between the Swedish Regulation and the old Community Regulation as a whole. The question about notification will be discussed in *Chapter 7.2.2*.

7.2.2 Notification

According to the Swedish Environmental Court of Appeal no notification to the European Commission has been made and that means that it is unknown what the European Commission's point of view regarding the Regulation's compatibility with the Treaty is. This fact does not solely mean that the Swedish rules automatically are non-applicable according to the Swedish Court.

However, according to the European Commission and the Swedish Department of Environment notification to the European Commission has been made. The Department of Environment stated that the Community Ozone Regulation is a minimum regulation and the European Commission examined if the Swedish Regulation was compatible with the Treaty and our rules were accepted on the date of membership. Everytime Sweden changes the regulation we have to notify the European Commission and the European Commission examines if the new rules are compatible.¹⁹⁵

In accordance with Directive 98/34 on information procedure regarding technical standards and rules, the Swedish National Board of Trade notified the European Commission about the proposal of changes to the Swedish Ozone Regulation. The Swedish National Board of Trade got the task of notification from the Department of Environment in June 1999. In October 1999 the Swedish government decided to change the Swedish Ozone Regulation in accordance with the proposal that was notified to the European Commission. I have received documents from the Swedish National Board of Trade that confirms that the notification procedure was completed.¹⁹⁶

The documents I received from the Department of Environment and the Swedish National Board of Trade shows that notification of changes to the Swedish Ozone Regulation has been made to the European Commission. I have interpreted the documents as showing that it seems reasonable to conclude that notification has been made also for the original regulation in 1995. I have also posed the question "If Swedish Regulation was notified" to the European Commission. Phil Callaghan's answer was "Yes the European Commission was notified about the stricter rules. I understand that this matter is still under consideration. My colleague Peter Wessman is in the lead and might be able to give you more information should you require it."¹⁹⁷ Peter Wessman's reply will be discussed below.

What happens if the European Commission has not yet approved the national measures? If the Community Regulation was based on Article 95 the national measures would be approved if the European Commission has not made a decision within the prescribed period of six months according to Article 95.6. Before this provision was introduced Member States were not allowed to apply national rules under Article 100a.4 (now 95.4) until they had obtained a decision from the European Commission confirming them.¹⁹⁸ But this is applied when the Community legislation is based on Article 95

¹⁹⁵ Phone call 2001-10-09 with Nina Crommier at the Department of environment and natural resources.

¹⁹⁶ Document from Maria Bohm, National Board of Trade, forwarded by Joakim Munter, Environment Ministry 2000-04-05 to Stefan Rondahl, Environment Ministry regarding notification of ozone regulation.

¹⁹⁷ Email received the 14th November 2001 from Phil Callaghan at the Information Centre, Environment Directorate-General, European Commission.

¹⁹⁸ Case C-319/94 *Kortas*, at para 33-38.

and not Article 175. There is no similar provision attached to Article 176. Does this mean that an approval has to be given from the European Commission before the Member State can apply the measure in accordance with the 'old rules' in Kortas or does it mean that if the European Commission has not given an answer after six months the rules are approved?

I asked Peter Wessman at the Environment Directorate (European Commission) if the Commission has approved of the Swedish Ozone Regulation 1995:636 and if the Commission has not yet approved of a national regulation is it possible for the Member State to keep using its regulation until the Commission has made a decision? I received the following answer: "Member States may keep using its rules. If the Commission considers that any infringement exists of Community law due to national rules, it may initiate infringement procedures pursuant to Article 226 of the EC Treaty. This has not been the case in relation to the national rules you refer to."¹⁹⁹ Since the Swedish Ozone Regulation has been notified and no action from the Commission against the regulation has been taken it could according to my understanding be concluded that the Swedish rules are in conformity with the Community legislation and hence applicable.

7.2.3 Result of my analysis of the Court's statements

According to the Swedish Court the Swedish Ozone Regulation seems to be divergent and not stricter compared to the old Community Ozone Regulation and the Court noted the pros and cons of the divergent rules' compatibility with the Treaty but made no decision. –

In comparison with the old Community Ozone Regulation the Swedish Regulation is to my understanding both stricter and divergent. Divergent when it comes to the 'product regulation' and stricter when it comes to the phase-out of some of the substances. To find out if both the stricter and the divergent rules are allowed in this Case they have to comply with Article 28. I have come to the conclusion that the divergent and the stricter rules are in conformity with the Treaty because of the exemption possibility in the Rule of Reason.

The Swedish Court further stated that no notification to the Commission has been made – although the Court did not see this as deciding. –

According to the documents I have received from the European Commission and the Department of Environment and the Swedish National Board of Trade notification has been made.

¹⁹⁹ Email received the 7th of January 2001 from Peter Wessman, at the Information Centre, Environment Directorate-General, European Commission.

7.3 Analysis of the Swedish Court's statements about the Swedish Ozone Regulation's relation to the new Community Ozone Regulation

The Swedish Court argued that with reference to the statements of the European Court of Justice about Community Regulations' direct applicability and the contents in Article 10, the loyalty principle and the coming into being of the now applicable Regulation 2037/2000 predominant reasons speak in favour of that the Swedish Regulation no longer is applicable. Below I will analyze these statements.

7.3.1 The coming into being of the new Community Regulation

The Swedish Environmental Court of Appeal argued that already the fact that the old Community Ozone Regulation no longer exists and has been replaced by a new Regulation makes it difficult to apply the Swedish Ozone Regulation. The reason for this being that the Swedish Ozone Regulation was supposed to complement the old Community Ozone Regulation.²⁰⁰

I have tried to find out whether a national regulation that complements a Community regulation that ceases to exist and is replaced by a new regulation instead complements the new one or if the national regulation after this is difficult to apply as the Swedish Environmental Court of Appeal argues. Does the Member State have to change its national regulation so that it expressly states that it complements the new regulation or can this be read in automatically? I have not found any legal discussion on this subject therefore I will try to give my point of view.

The new Community Ozone Regulation looks more like the Swedish Ozone Regulation than the old Community Regulation did. The reason for this is that the new Regulation as well as the Swedish Regulation covers both substances and products containing those substances. But the Swedish Ozone Regulation is still stricter than the Community Regulation on some areas.

I think that the reference in the Swedish Ozone Regulation stating that it is a complement to the old Community Ozone Regulation might be interpreted as a reference to the Community Regulation that regulates ozone depleting substances in general and not specifically to the old Community Regulation even though that is what is stated. The main reference ought in my opinion be to Community rules regarding the subject and if the Community rules changes and are replaced this reference can still be valid if the aim of the rules are the same; that is to regulate ozone depleting substances. The reason

²⁰⁰ Case M 2541-00 from Swedish Environmental Court of Appeal, at p. 6-7.

for the replacement of the old regulation as a whole was to follow international agreements through and for the sake of clarity and openness but the aim is still the same.²⁰¹ As I interpret this, the reference in the Swedish Ozone Regulation could be to Community Regulation on the subject not just to the old Community Ozone Regulation. According to my opinion the reference in the Swedish Regulation does not make it difficult to apply. But the Swedish Regulation should be changed so that there could be no confusion about this.

7.3.2 The direct applicability of Regulations, Article 249

Regulations are generally used when there is a demand for standardized regulation within the whole of the Community. The Member States are obliged not to hinder the direct applicability of the Regulation.²⁰² But if the Regulation is based on Article 175 it follows from Article 176 that stricter national measures can be allowed if they comply with the Treaty and are notified to the European Commission, that is called Minimum harmonization. This was also noted in the Fornasar Case where the European Court said that Community law in the field of environmental protection does not strive for total harmonization. The right given to the Member States in Article 176 cannot be regulated away in secondary legislation because the Articles in the Treaty is of a higher dignity than the secondary legislation. A Regulation based on Article 175 cannot be totally harmonizing as this would go against the Treaty. From this can be concluded that the direct applicability of a Regulation based on Article 175 cannot be a hinder for Member States to apply another right given to them in the Treaty.

7.3.3 Contents of Article 10, Loyalty Principle

According to Article 10 the Member States shall take all appropriate measures both general and particular to make sure that the obligations following this Treaty or other measures taken by the Community's institutions are met. The same reasoning as above can be used. Having stricter measures compared to Community Regulation based on Article 175 cannot be seen as obstructing the Treaty because there is a right to have them under certain conditions in Article 176 of the Treaty. To make the internal market work is not the sole objective of the Community but also the protection of the environment. When the Community base legislation on Article 175 the primary objective is to protect the environment. In the Nederhoff Case²⁰³ the Court stated that for stricter national measures to be allowed they have to be consistent with the aim of the directive/regulation.

²⁰¹ Preamble to Community Regulation 2037/2000 on ozone depleting substances, at para 3-10.

²⁰² Pålsson, Sten & Quitzow, Carl Michael, *EG-rätten – ny rättskälla i Sverige*, (Stockholm 1993), at p. 49-50.

²⁰³ Case C-232/97, *Nederhoff*, at para. 58.

The Swedish Regulation's aim is the same as the aim of the Community Regulation and applying an Article in the Treaty cannot be viewed as being illoyal.

7.3.4 Result of my analysis of the Court's statements

According to my understanding the Swedish Ozone Regulation is still applicable. It now contains measures that are stricter in some aspects compared to the new Community Ozone Regulation. I argue that these stricter measures are compatible with the Treaty and have been notified to the European Commission²⁰⁴ and therefore according to Article 176 should be viewed as allowed and applicable. If the Commission considers that any infringements exist of Community law due to national rules, it may initiate infringement procedures pursuant to Article 226 of the EC Treaty. This has not been the case with the Swedish Ozone Regulation.

The arguments of the Swedish Court that the Swedish Regulation is a complement to the old Community Ozone Regulation does not make it difficult to apply because the aim is still the same, the only difference is that the new one looks more like the Swedish Regulation than the old Community Regulation did.

Further the direct applicability of a Community Regulation based on Article 175 and the meaning of the loyalty principle in Article 10 does not render the Swedish Regulation difficult to apply. This is because there is an expressed right in the same Treaty for Member States to have stricter measures, of course under certain conditions but still. To apply an Article in the Treaty cannot be seen as a violation of the same.

²⁰⁴ This was described in Chapter 7.2.2.

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