DIVISION OF COMPETENCES BETWEEN MEMBER STATES AND THE EC

Astrid Epiney

I. INTRODUCTION

The issue concerning the competence to legislate is one of the key issues of the European convention. In this context, the question is raised in general terms (how should the competences be divided? which methods shall be used for this purpose? should the actual system be thoroughly modified?)[1]. However, the present paper will focus more specifically on the field of environmental policy. This seems useful for at least four reasons: first, the methods of division of competences between Member States and EC/EU differ in the different areas of the treaty, so that the limitation to one domain is justified. Secondly, environmental matters present some particularities, above all the transversal aspect and the difficulties in implementation[2]. Thirdly, it seems rather difficult that the convention (and/or the Member States later on) will really find a general method for the delimitation of competences, so that the characteristics of the different areas will probably – in one way or another – still play a certain role. Finally it seems useful in any case to start from the existing situation which requires a particular view on each domain of competence.

Thus, the objective of the present paper can be resumed in the following points: to analyse the actual system of division of competences in Art. 174 ss. EC Treaty (II.), to illustrate these principles in applying them to the special question of the right of access to justice of environmental organizations (III.) and, in a last point, to show that the actual system of division of competences seems to be in principle well appropriated to environmental matters even if some clarifications could be useful (IV.).

II. DIVISION OF COMPETENCES IN ENVIRONMENTAL MATTERS: THE SYSTEM OF ART. 174 SS. EC TREATY

Like many provisions relative to the competences of the EC, Art. 175 EC Treaty – which is the relevant legal basis in the field of environmental policy – is based on the

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1 Cf. to this question for example *von Bogdandy/Bast*, Die vertikale Kompetenzordnung der EU. Rechtsdogmatischer Bestand und verfassungspolitische Reformperspektiven, EuGRZ 2001, 441 ff.; *Bungenberg*, Dynamische Integration, Art. 308 und die Forderung nach einem Kompetenzkatalog, EuR 2000, 879 ff.; *Bieber*, Abwegige und zielführende Vorschläge: zur Kompetenzabgrenzung der Europäischen Union, integration 2001, 308 ff.; *Pernice*, Kompetenzabgrenzung im europäischen Verfassungsverbund, JZ 2000, 866 ff.

2 Cf. to these particularities with further references *Jans*, European Environmental Law, second edition, 2000, 17 ss., 135 ss.; *Epiney*, Umweltrecht in der EU, 1997, 3 ss., 105 ss.; *Calliess*, in: Calliess/Ruffert (Hrsg.), Kommentar zu EU-Vertrag und EG-Vertrag, 2. Aufl., 2002, Art. 175, Rdnr. 28 ss.

principle that the achievement of certain aims / targets should be decisive for answering the question whether or not the EC has the competence to adopt a certain legislative act. Art. 175 EC Treaty confers – to the EC – the (general) competence to adopt all measures which are supposed to realize the objectives enumerated in Art. 174 EC Treaty. In other words: the range of Communities competence in environmental matters is determined by the targets formulated in Art. 174 EC Treaty.

The question which is raised by this system is whether the reference to Art. 174 EC Treaty means in one way or another a real limitation of competence of the EC. This question can be answered by the negative: the catalogue of targets in Art. 174 EC Treaty is very widespread. Thus, the environmental policy of the EC should contribute to conserve and protect the environment and to approve its quality, to protect human health, to use natural resources in a rational way and to promote international activities in this field. The formulation of these targets is so large that it is difficult to imagine that a Community measure does not fall within this catalogue. So, it seems that the reference to the objectives of Art. 174 EC Treaty does not really limit Communities competences in the field of environmental policy. It can also be added that the notion of environment in Community law is a very wide one, even if it does not enclose all conditions which can be important for the well-being of human beings: it includes the natural environment, if modified or not by human activities[3].

Nevertheless, the question which can be raised is whether the explicit mention, in Art. 174 EC Treaty, that EC policy should (only) contribute to realise the targets mentioned in this provision signifies that certain competences shall remain in the hands of Member States so that EC law acknowledges a sort of "domestic environmental legislation". This question must definitely be answered in the negative, for at least four reasons:

- first, as pointed out before, the extent of competence of the EC in the field of environmental policy is determined by the aim of the planned measures to realise the objectives mentioned in Art. 174 EC Treaty. As a consequence this criteria is the only relevant one for determining the limits of Communities competences.

- second, the reference to the realisation of the objectives of Art. 174 EC Treaty implies that in principle no policy area can be excluded a priori from the competence of the EC. In fact, measures in a very huge range of areas can contribute, in principle, to the targets mentioned in Art. 174 EC Treaty.

- third, Art. 174, 175 EC Treaty do not contain any criteria which would permit to define, in one way or in another, the "domestic competences" of Member States.

- fourth, Art. 175 II EC Treaty confirms the point of view defended in this paper: this provision mentions policies which are certainly in principle in the competence of Member States, so that it makes sense only if you assume that

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3 Cf. with further references *Epiney,* Umweltrecht in der EU, 1997, 3 ss.

the competence of the Community cannot be limited to certain areas but, in the contrary, extents in principle to all material domains, provided that the measure envisaged contributes to the realization of one of the objectives enounced in Art. 174 EC Treaty.

Finally, I would like to remind the principle of subsidiarity (Art. 5 II EC Treaty) which determines under which conditions an existing competence can be used[4] so that I renounce to evoke this principle in general terms[5].

III. A PROPOS THE COMPETENCE OF THE EC TO INTRODUCE DISPOSITIONS DEALING WITH ACCESS TO JUSTICE, ESPECIALLY FOR ENVIRONMENTAL ORGANIZATIONS

The purpose of the following chapter is to show that on the basis of the actual system as described above[6], the Community has the competence to introduce, in a general way, an obligation for Member States to implement a right of access to justice in favour of certain persons, especially for environmental organizations.

According to the principle that Art. 175 EC Treaty includes all measures which contribute to realise the objectives mentioned in Art. 174 EC Treaty, the Community has the competence to introduce also measures tending to improve the implementation of environmental law. In other words, Art. 174, 175 EC Treaty are not limited to material dispositions but also include procedural instruments which contribute to a better application of environmental law and as a result to a better protection of the pursued targets. So, it is rather undisputed that the Community can – in a certain environmental act – also settle instruments aimed at improving implementation, as disposition guarantying access to justice[7]. This point of view is also convincing because aspects of implementation – access to justice included - are very often decisive for the effectiveness of a legislative act. This issue is also often narrowly related to material aspects. Finally, the principle which says that the implementation of Community law generally falls within the competence of Member States who can decide freely about the modalities ("autonomy concerning the implementation instruments") is not conflicting with the point of view presented above: Member States are only autonomous to the extent that they are not bound by Community legislation, so that the mentioned principle cannot alter Communities competence. No material area can be as such a priori excluded from Communities

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4 Cf. only *Jans*, European Environmental Law, second edition, 2000, 11ss.; *Epiney*, Umweltrecht in der EU, 1997, 84 ss.

5 Cf. III. in relation with the special question of an introduction of a general right to access to justice of environmental organizations.

6 II.

7 Cf. *Ludwig Krämer*, Zur innerstaatlichen Wirkung von Umwelt-Richtlinien der EWG, WiVerw 1990, 138 (156 f.); *Jane Holder/Susan Elworthy*, Annotation to Case C-237/90, CMLRev 1994, 123 (132 f.); *Wolfgang Kahl*, Umweltprinzip und Gemeinschaftsrecht, 1993, 144 ff.; *Bernhard Wegener*, Rechte des Einzelnen, 1998, 85 ff.; *Matthias Ruffert*, Subjektive Rechte im Umweltrecht der EG, 1996, 320 ff.; *Manfred Zuleeg*, VVDStRL 53, 190 ff. Cf. in general to this question (competence of the Community to rule on aspects related to implementation) *Armin Hatje*, Die gemeinschaftsrechtliche Steuerung der Wirtschaftsverwaltung, 1998, 95 ff.

competences since they are – at least, but not only, in the field of environmental policy – defined according to the realisation of specific objectives. In the environmental legislation of the EC many dispositions can be found which touch questions of implementation, aspects of access to justice included[8]. Another aspect concerns the various dispositions in environmental directives relative to questions of public participation[9].

The real question in this context is whether Art. 175 EC Treaty also allows to legislate on issues of implementation (access to justice included) independently of a concrete legislative act. In other words: can the Community – on the basis of Article 175 EC Treaty – adopt a general directive[10] which contains the obligation for Member States to introduce certain implementation measures, among others the guarantee of a defined access to justice? There could be doubts in this regard because there would be no more link to a specific legislative act. The Community has definitively the competence to adopt such a general directive: If it is undoubted that the Community legislator can introduce in each material legislative act such dispositions, there is no reason to assume that it could not settle such implementation issues in a general act. As a result, the general settlement of issues of implementation does not raise other questions – as far as the competence of the Community is concerned – than their introduction in each material legislative act. Furthermore, Art. 175 EC Treaty also allows to introduce in a general way measures which improve implementation of environmental law, since a better implementation of environmental law contributes to the objectives of Art. 174 EC Treaty. This includes also the extension of access to justice, one of the classical instruments in order to improve implementation[11].

The obligation of Member States to introduce implementation instruments, especially in the field of access to justice, can also include Community legislation which is not based on Art. 175 EC Treaty but on other dispositions of the Treaty. Art. 6 EC Treaty makes it clear that environmental matters can also be pursued in other policy areas. Therefore, the competence of the Community to introduce implementation measures must also be extended to these acts. In this perspective, Art. 175 EC Treaty allows the settlement of general measures obliging Member States to take special implementation measures and can therefore be regarded as an independent legal basis for the settlement of acts containing dispositions whose objective is to improve implementation of environment related obligations.

These considerations show also that the competence of the EC to introduce a right of access to justice for environmental organizations is limited to matters which concern the implementation of Community legislation. In other words: the EC can only stipulate an obligation for Member States to introduce a right of access of environmental associations to urge the violation of EC law or national law founded on EC law (as transposed directives). So, the national legislator cannot be obliged to

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8 For ex. Art. 4 Directive 90/313, access to information about environment.

9 For example Art. 6 II Directive 85/337, environmental impact assessment, Art. 15 I Directive 96/61.

10 Probably a directive would in any case be more suitable than a regulation.

11 See also *Ruffert*, Subjektive Rechte im Umweltrecht, 1996, 320 ff.

introduce a general access to justice for environmental organizations also for urging the violation of "pure" national environmental legislation[12]. The national environmental legislation is adopted by the national legislator on the basis of a pure national decision; so if the Member States can decide of the adoption of material rules, they also must have the competence to decide how they want to assure the implementation of the national legislation and whether or not they want to introduce a right of access for certain persons, especially for environmental associations. The competence of Art. 175 EC Treaty (in relation with Art. 174 EC Treaty) refers only to Community legislation and its implementation; Art. 175 EC Treaty does not stipulate a sort of general clause to adopt measures which assure a better implementation of environmental legislation, even national ones. So, the Community competence to adopt measures related to implementation has an annex character. On the other hand. these principles do not mean that national legislation can never been the object of a Community obligation to introduce a right of access to justice for environmental associations: provided that the national legislation transposes or implements Community law, the right of access to justice can be founded, since in this case the object of the implementation is at least indirectly Community legislation[13].

In principle, the introduction of a right of access to justice for environmental organizations in the sense mentioned above, would also satisfy the requirements of the principle of subsidiarity (Art. 5 II EC Treaty)[14]: Since the implementation deficit of Community environmental law is recurrent, the aim of such a measure cannot be achieved – in a sufficient manner – on a national level. It is sufficient that the aim of the measure cannot be, de facto, efficiently realized on the level of Member States; a real impossibility is not required. If a right to access of environmental associations is introduced, experiences in different States[15] show that this instrument improves the implementation of environmental legislation in general so that the aim pursued can be better achieved on the level of the Community[16].

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12 The opposite view is defended by *Führ/Gerbers/Ormond/Roller*, elni Newsletter 1994, 3 (6, 8 s.).

13 The problem is parallel to the question under which conditions fundamental rights of the European legal order are also binding for Member States. Cf. on this problem with further references *Epiney*, Umgekehrte Diskriminierungen, 1995, 125 ss.

14 Cf. to this principle with special reference to environmental policy *Jans*, European Environmental Law, second edition, 2000, 11 ss., who concludes that "an examination of Community environmental legislation in the light of the above guidelines would reveal that probably not one environmental directive or regulation would fail to pass the test." (p. 14).

15 See the overview by *Epiney*, Gemeinschaftsrecht und Verbandsklage, NVwZ 1999, 485 (486); see also in relation to the situation in different Member States *Epiney/Sollberger*, Zugang zu Gerichten und gerichtliche Kontrolle im Umweltrecht. Rechtsvergleich, völker- und europarechtliche Vorgaben und Perspektiven für das deutsche Recht, 2001, 29 ff.

16 If there is a competence of the EC to introduce an obligation for Member States to introduce an access to justice for environmental organizations, it has to be decided in a second step in which form such an obligation should be introduced. This would leave the subject of this paper, see on this subject *Epiney*, Gemeinschaftsrecht und Verbandsklage, NVwZ 1999, 485 (493 ff.).

IV. CONCLUSION: EVALUATION OF THE ACTUAL SYSTEM AND PERSPECTIVES FOR THE DIVISION OF COMPETENCES IN THE FIELD OF ENVIRONMENTAL POLICY

The actual system in which the range of EC's competences in the field of environmental policy is defined in relation to the targets of environmental policy, themselves defined in a large manner, should be maintained. This system allows to react to the relevant and important problems in the field of environment and to take the necessary measures in order to achieve the targeted aims. Furthermore, in order to enable the Community to take all measures for a coherent environmental policy it is a necessary condition. This system takes also in account the interdependence which characterizes environmental tasks: very often, the lack of measures in one area results in important consequences for other areas so that an orientation on the aims of environmental policy seems to be the best solution for defining Communities competences. This means that in the field of environment there should be no division of competences in relation to a narrowly and finally defined field ("sachgegenständlich") but there should be – also in the future – a clear reference to the aim of environmental policy in relation with a large notion of environment. Thus, as in numerous other areas of EC's competence, the competence in the field of environment is on the one side defined in relation to a (wide) area (environment), and on the other side determined by the utility of such measure to realize the aims defined in the Treaty[17].

Above all, the maintenance of the actual system has the following consequences:

- From the perspective of the EC, there will / should be no limitative list of areas which can be the object of Community legislation.

- From the point of view of the Member States, there will / should not exist a list of "reserved domains" in which the Community can in no case take legislative measures. If the competence of the EC is defined in relation with the contribution of a measure to the realization of aims, no substantial field can be excluded from the very beginning. In other words, the competence of the EC will / should be defined by the contribution to an aim and not by its belonging to a domain, so that from a material point of view no domain can be a priori excluded from EC legislation.

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[17] By the way: almost all competences in the Treaty are defined in principle in that way. They distiniguish essentially by the reference to a certain domain (environment, transport etc.) or by the lacking of such reference (as Art. 94 s. EC Treaty). So, it would be a fundamental change to alter this system in favour of a sort of enumeration of areas ("sachgegenständlich") for which the EC should be competent. Cf. in relation to the actual discussion *von Bogdandy/Bast*, Die vertikale Kompetenzordnung der EU. Rechtsdogmatischer Bestand und verfassungspolitische Reformperspektiven, EuGRZ 2001, 441 ff.; *Bungenberg*, Dynamische Integration, Art. 308 und die Forderung nach einem Kompetenzkatalog, EuR 2000, 879 ff.; *Bieber*, Abwegige und zielführende Vorschläge: zur Kompetenzabgrenzung der Europäischen Union, integration 2001, 308 ff.; *Pernice*, Kompetenzabgrenzung im europäischen Verfassungsverbund, JZ 2000, 866 ff.

- Community action does not necessarily require a link to another Member State; the aims actually defined in Art. 174 can be dealt with even if there is no link to another Member State.

- Community measures related to implementation fall within the competence of the EC. Over and above the arguments already mentioned above, it can be pointed out that the limits between material measures and measures only related to implementation are blurred and in any case difficult to define.

- The division of competences itself should not be determined by the principle of subsidiarity. It does not seem possible to define precisely domains which – on the basis of an application of the principle of subsidiarity should be in the competence of the EC and others (only) in the competence of Member States. Such a system would, as a consequence, endanger the realization of the aims of environmental policy in the EU. Furthermore, it does not seem possible to find the "right" solution as the division of competences is concerned on the basis of a scientific analysis of the principle of subsidiarity.

This plea for the maintenance of the actual system does not mean that there is no need at all to reform the division of competences between EU and Member States. However, in my opinion – and this affirmation is not limited to the domain of environmental policy – the need of reform is merely an affair of clearer presentation and formulation of the system of division of competences; the substance – in particular the orientation of EC competences at the realization of aims – should not be changed. Over and above, especially in the field of environment policy, the question of the legislative procedure can be raised. So, there is no reason (except the merely "egoistic" interests of certain Member States) why Art. 175 II EC Treaty reserves for the domains mentioned in this provision unanimity and does not set down the codecision procedure.