

1991

## Green Law-Making: A Primer on the European Community's Environmental Legislative Process

Michael S. Feeley

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### Recommended Citation

Michael S. Feeley and Peter M. Gilhuly, Green Law-Making: A Primer on the European Community's Environmental Legislative Process, 24 *Vanderbilt Law Review* 653 (2021)  
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol24/iss4/2>

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# Green Law-Making: A Primer on the European Community's Environmental Legislative Process

Michael Scott Feeley\*  
Peter M. Gilhuly\*\*

## ABSTRACT

*The birth of the European Common Market marks a new era of multistate environmental regulation that will radically affect commercial activity. This Article examines the European Community's (EC) background, institutions, and legislative process to elucidate how this environmental regime is developing. Following a brief introduction, Part II sets forth the EC's background, presenting its history and the general framework in which its law applies. Part III describes the EC's major institutions. Part IV discusses forms of EC legislation, with an emphasis on the use of directives. Part V considers legislative processes by which the EC enacts laws, including the new cooperative procedure. Part VI discusses the historic and future bases for EC environmental law. Finally, Part VII considers outside parties' roles in the legislative process and the ways in which private parties can present their views and influence legislative outcomes.*

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## I. INTRODUCTION

As the twenty-first century rapidly approaches, economic affairs are becoming increasingly globalized. Capital markets are interconnected, and capital flow no longer recognizes international borders. Many businesses manufacture, buy, and sell products and assets in numerous nations.

As industry becomes globalized, United States companies find themselves conducting an increasing amount of business in foreign states. The legal and cultural backgrounds they encounter differ profoundly from those of the United States. Nowhere is an understanding of these legal and cultural differences more important to these companies than in the European Community (EC or the Community).<sup>1</sup> The EC contains 342 million consumers, compared to the 247 million in the United States and the 122 million in Japan.<sup>2</sup> These consumers drive the largest market in the world—approximately four trillion dollars—and the EC constitutes the largest trading partner of the United States.<sup>3</sup> As the target date in 1992 for complete integration of the EC's common market approaches, corporations and other parties doing business with the EC now realize the importance of understanding the EC institutions, the policies being implemented, and the means by which these policies might be influenced

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1. The European Community is variously referred to as the European Economic Community (EEC), the European Communities, and the Common Market.

2. JAMES N. GARDNER, *EFFECTIVE LOBBYING IN THE EUROPEAN COMMUNITY* xvi (1991).

3. See Eleanor R. Lewis & Mark A. Goldstein, *The Effect of EC 1992 On U.S. Companies: A U.S. Government Perspective*, 3 TEMP. INT'L & COMP. L.J. 153, 163, 177 (1989) (United States company sales now exceed \$550 billion).

effectively by outside parties.

A growing global "greening," or environmental awareness,<sup>4</sup> is occurring concurrently with the global economy's development and the EC's 1992 program. Large scale international economic activity increasingly creates potential risks to the environment and, therefore, to public health and safety.

This Article examines the EC's background, institutions, and legislative process with a focus on environmental law. Part II sets forth the EC's background, presenting its history and the general framework in which its law applies. Part III describes the EC's major institutions. Part IV discusses the forms of EC legislation, especially the use of directives. Part V considers the processes by which the EC legislates, including the new cooperative procedure. Part VI discusses the bases for EC environmental law, specifically examining at its history and the individual concerns in this area. Finally, Part VII considers outside parties' role in the legislative process, and the ways in which private parties can present their views and influence the legislative outcome.

## II. BACKGROUND OF EUROPEAN COMMUNITY LAW

The European Community is a supranational, treaty-based organization<sup>5</sup> that represents twelve Member States.<sup>6</sup> The EC's 1992 Project is

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4. See Robert W. Hahn & Kenneth R. Richards, *The Internationalization of Environmental Regulation*, 30 HARV. INT'L L.J. 421, 425-26 (1989).

5. The European Community is actually three communities, which operate under three separate treaties: the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] the TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY [EURATOM TREATY]; and the TREATY ESTABLISHING THE EUROPEAN COAL AND STEEL COMMUNITY [ECSC TREATY]. See EEC Treaty art. 232. Although each treaty represented a separate, autonomous grouping of states for a particular economic purpose, the EEC Treaty is by far the most important because it provides for the establishment of a general common market and the establishment of several common institutions. The major institutions of the EC created by the EEC Treaty are the Council of Ministers, the Commission, the European Parliament, and the European Court of Justice. EEC TREATY art. 4.

The memberships of these three treaty groups overlap. The adoption of the Merger Treaty in 1965, however, effectively combined the three separate communities created by these treaties. JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 3 (1988). Today, the EEC Treaty, which governs Community affairs generally and environmental policy specifically, is the most important treaty. Thomas H. Reynolds, *Introduction to the European Economic Community: Its History and Its Institutions*, 8 LEGAL REFERENCE SERVICES, Nos. 3/4 1988, at 7, 12-13.

6. The six original Member States were Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. Subsequently, six other states have joined the Community in

the product of the European Commission, established in January 1985 under the Presidency of Jacques Delors of France.<sup>7</sup> The Commission's White Paper embodies the project that sets forth the concept of one large, internal European market and establishes a comprehensive program to achieve that goal.<sup>8</sup> The Community's main purpose is to create an economic community by establishing a common market that allows goods, services, and capital to move with ease across national borders.<sup>9</sup> Completion of the final steps towards this integration should occur by the end of 1992. The Commission recently concluded that ninety percent of the directives that have reached their deadlines have been transposed into Member States' national law.<sup>10</sup>

EC law is "a peculiar mix of international and domestic law."<sup>11</sup> If The Treaty Establishing the European Economic Community (EEC Treaty) provides a legal basis, Community law reigns supreme over national law, and no Member State may enact any statute that deviates or derogates from EC law.<sup>12</sup> While this general rule resembles supremacy clauses of other federal systems, Member State law plays a more vital role in the framework of EC law than in other systems.<sup>13</sup> Individual

various years: Denmark, Ireland, and the United Kingdom in 1972; Greece in 1979; and Portugal and Spain in 1984. See EEC TREATY art. 227; Stefan A. Riesenfeld, *The Single European Act*, 13 HASTINGS INT'L & COMP. L. REV. 371, 371 (1990). On the prospects for enlargement of the EC, see John Redmond, *The Future Enlargement of the European Community*, 9 ST. LOUIS U. PUB. L. REV. 149 (1990).

7. See Claus-Dieter Ehlermann, *The "1992 Project": Stages, Structures, Results and Prospects*, 11 MICH. J. INT'L L. 1097, 1098 (1990).

8. The White Paper calls for the adoption of nearly 300 legislative measures by the end of 1992 aimed at achieving a common market. These measures have given rise to slogans like "Project 1992" and "EC 1992." Completing the Internal Market: White Paper from the Commission to the European Council, COM (85) final.

9. ECKARD REHBINDER & RICHARD STEWART, *Environmental Protection Policy* 15 (Mauro Cappelletti et al. eds., 1985). Essentially, this requires the creation of a customs union and the abolition of all restrictions on the movement of the factors of production. Mark L. Jones, *Symposium 1992: Doing Business in the European Internal Market, Putting "1992" in Perspective*, 9 NW. J. INT'L L. & BUS. 463, 466 (1989). These goals also appear in the four freedoms sought under the EEC Treaty: free movement of goods, persons, services, and capital. EEC TREATY art. 8a.

10. See 689 Common Market Rptr. 1 (Sept. 5, 1991).

11. Conor Quigley, *EC Law: Litigation and the Environment in THE EUROPEAN ECONOMIC COMMUNITY: PRODUCTS LIABILITY RULES AND ENVIRONMENTAL POLICY* 288 (Patrick E. Thieffry & G. Marc Whitehead eds., 1990).

12. See generally EEC TREATY art. 5; STEINER, *supra* note 5, at 30-39 (discussion of Member States adoption of principle of EC law supremacy); *Corta v. ENEL* Case 6/64 (July 15, 1964).

13. See generally Auke Haagsma, *The European Community's Environmental Pol-*

Member States may have their own national laws whenever the EC has not harmonized<sup>14</sup> this law at the Community level.<sup>15</sup> More importantly, even when the EC adopts Community standards, the preference for using directives<sup>16</sup> to establish these laws requires each Member State to enact legislation to implement these directives. As a result, the vast majority of EC law, including environmental law, will be found in the national law of individual Member States, and these states will have principal responsibility for implementing and enforcing Community environmental standards.

### III. MAJOR INSTITUTIONS OF THE EC

The EC legislative process involves the interplay of several political institutions throughout the drafting and amending processes. Although each actor plays a specific role, the treaties do not always define these roles strictly. Even the participants do not always understand the relative importance of each of these groups.<sup>17</sup> Each institution has its own role in the legislative structure, and each is important at various stages in the process.

The major institutions of the EC, which are set out in the EEC Treaty, are the European Commission (the Commission), the Council of the European Community (the Council), the European Parliament (the Parliament), and the European Court of Justice (the ECJ or the court). Because the EC legislative process involves a close interplay between these institutions, understanding the institutions and their interaction is crucial. The new European Environmental Agency (the Agency) additionally may become an important institution in the area of environmental legislation.<sup>18</sup>

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*icy: A Case Study in Federalism*, 12 *FORDHAM INT'L L.J.* 311 (1989) (discussion of distribution of powers and governmental functions between the EC and its Member States in the area of environmental policy).

14. The EC uses the term harmonization to describe the standardization of laws at the community level. In reality, however, total harmonization is rare under EC law. *See infra* note 175.

15. *See* Haagsma, *supra* note 13.

16. *See infra* text accompanying notes 119-26.

17. *See generally* Reynolds, *supra* note 5, at 17. Rather than creating separate legislative and executive branches, the EEC Treaty has interwoven these functions in the institutional framework of the European Commission, Council of Ministers, and the European Parliament. The judiciary, which is housed in the European Court of Justice, is the only independent branch. AUDREY WINTER ET AL., *EUROPE WITHOUT FRONTIERS: A LAWYER'S GUIDE* 25 (2d ed. 1989).

18. The Economic and Social Committee (ESC) is a minor Community institution.

### A. *The European Commission*

The European Commission, which is headquartered in Brussels, essentially acts as the executive branch of the EC.<sup>19</sup> It functions as "the guardian of the Treaties, [and] the executive arm of the European Communities, to initiate Community policy and to defend Community interest in the Council."<sup>20</sup> The Commission also has responsibility for ensuring "the proper functioning and development of the common market."<sup>21</sup> In addition, the Commission administers the finances of the EC and has the largest staff of all EC institutions.<sup>22</sup>

The Commission's principal powers and responsibilities include: (i) proposing legislation; (ii) implementing Community policies; (iii) enforcing the provisions of the EC Treaties; and (iv) drafting and submitting proposals for new EC rules to the Council. The Commission drafted the proposals for the Europe 1992 program.<sup>23</sup>

The Commission is composed of seventeen members, or commissioners,<sup>24</sup> appointed to four-year renewable terms by the unanimous consent of the twelve Member States.<sup>25</sup> These members, though nominated by

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It was established by article 193 of the EEC Treaty. The ESC is a 189 member institution "representing a broad range of professional and labor groups and the general public." Winter, *supra* note 17, at 39. Article 193 defines the ESC's role as a purely advisory one. Article 198 of the EEC Treaty provides that "[t]he Committee must be consulted by the Council or by the Commission where this Treaty so provides" and that the ESC may be consulted by these institutions when deemed appropriate. Because the ESC's powers are purely advisory in nature, it does not have great influence on EC policy. Gardner, *supra* note 2, at 21.

19. See generally T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 8-13 (1988).

20. JANET S. ZAGORIN, *EUROPE 1992: NAVIGATING NEW WATERS*, 4 (1990) (quoting 1988 Y.B. EUR. COMMUNITIES 157. See WINTER, *supra* note 17, at 27; see also EEC TREATY art. 155 ("The Commission shall . . . ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied.").

21. EEC TREATY art. 155.

22. See Reynolds, *supra* note 5, at 23. The Commission staff consists of approximately 15,000 "Eurocrats," most of whom are located in Brussels. GARDNER, *supra* note 2, at 15.

23. Lewis & Goldstein, *supra* note 3, at 156.

24. In practice, the composition of the Commission is two representatives from France, Germany, Italy, and Great Britain, and one each from the remaining states. See HARTLEY, *supra* note 17, at 8. The number of commissioners may be altered by the Council acting unanimously. Treaty Establishing a Single Council and a Single Commission of the European Communities, Apr. 8, 1965, art. 10(1), 1967 J.O. (152) 1, 5 [hereinafter *Merger Treaty*]; see GARDNER, *supra* note 2, at 137-39 (listing current Commissioners, their nationalities, and their current assignments).

25. *Merger Treaty*, *supra* note 24, art. 11, at 6.

each individual Member State, theoretically represent the interests of the Community as a whole, rather than the interests of individual Member States.<sup>26</sup> The Member States, by common accord, appoint a president and six vice presidents.<sup>27</sup> Each commissioner also receives specific areas of responsibility, or portfolios, and serves as Directorate General (DG) for at least one of the Commission's twenty-three major substantive subdivisions.<sup>28</sup> One commissioner, the Secretariat General,<sup>29</sup> has the responsibility for coordinating activities within the entire Commission and acts as a liaison in the Commission's work with the Council and Parliament.<sup>30</sup>

The Commission plays a key role in the legislative process. It is responsible for proposing virtually all new legislation to the Council of Ministers.<sup>31</sup> The DG staff responsible for the appropriate subject area generally drafts these proposals. The Commission staff typically consults interested parties, including government officials, private parties, and trade associations,<sup>32</sup> but no formal process governs this initial consultation.<sup>33</sup> Under the cooperative procedure,<sup>34</sup> the Commission also has the opportunity to re-examine proposals following review by the European Parliament. Finally, the Commission retains the ultimate discretion to amend or withdraw any proposal under consideration at any time during the legislative process prior to final passage.<sup>35</sup> Notwithstanding its powers of enforcement, the Commission, like the Council, has limited capac-

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26. *Id.* art. 10, at 5. Moreover, commissioners are not to receive instructions from national governments. See Martin E. Elling, *The Emerging European Community: A Framework for Institutional and Legal Analysis*, 13 HASTINGS INT'L & COMP. L. REV. 511, 519 (1990).

27. Merger Treaty, *supra* note 24, art. 14, at 6 (as amended by the Act Concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties, art. 16, 1985 O.J. (L302) 23, 26).

28. WINTER, *supra* note 17, at 26 (listing 22 of the 23 major substantive subdivisions). Currently, Carlo Ripa Di Meana of Italy is the Vice President in charge of the environmental portfolio. GARDNER, *supra* note 2, at 138.

29. Currently, Jacques Delors, the former French Finance Minister, is in his second term, which expires at the end of 1992, as the Secretariat General. Delors endorses reduced Member State autonomy to achieve adequate environmental protection. See GARDNER, *supra* note 2, at 24.

30. WINTER, *supra* note 17, at 27.

31. See EEC TREATY art. 155; WINTER, *supra* note 17, at 28. The Council, however, may request certain proposals that it deems desirable. EEC TREATY art. 152.

32. WINTER, *supra* note 17, at 42.

33. WINTER, *supra* note 17, at 44.

34. See discussion *infra* section (V)(A).

35. WINTER, *supra* note 17, at 45.

ity to require compliance with EC law.<sup>36</sup>

One of the Commission's main roles is to serve as a watchdog over the Member States to ensure their compliance with the EEC Treaty and Community law. It has the duty to investigate any complaints or suspected violations.<sup>37</sup> When the Commission determines that a violation has occurred, it will issue an initial ruling, informally discussing the violation with the offending nation and instructing the Member State on the corrective action required.<sup>38</sup> Should these discussions fail to resolve the problem, the Commission begins formal review of the situation and issues a reasoned opinion stating the problem, its conclusions, and the reasons behind these conclusions. It then sets a time period for compliance.<sup>39</sup> If the state still fails to comply with the Commission ruling, the Commission may bring a claim before the ECJ for final determination of treaty or Community law.<sup>40</sup> This entire process may take as long as eighteen months at the Commission stage and another eighteen to thirty-six months if brought before the ECJ.<sup>41</sup> Most cases, however, never reach the stage of reasoned opinions.<sup>42</sup>

### B. *The Council*

As the main decision-making body of the EC, the Council<sup>43</sup> has the final vote on all legislation. It adopts, revises, or rejects the Commission's proposals. The Council has the power both to conclude agreements with foreign states and, along with the Parliament, to determine the Commu-

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36. See HARTLEY, *supra* note 19, at 11.

37. EEC TREATY art. 169 (suspected violations) and art. 170 (complaints by other Member States).

38. ZAGORIN, *supra* note 20, at 5. The state usually has about two months to comply. *Id.*

39. EEC TREATY art. 169.

40. *Id.*

41. Charles M. Ludolph, *The European Community's 1992 Legislative and Regulatory Process: Rule-Making to Implementation*, in THE EUROPEAN ECONOMIC COMMUNITY: PRODUCTS LIABILITY RULES AND ENVIRONMENTAL POLICY, *supra* note 11, at 19, 26.

42. Ludolph notes that of the thousand or more infringement proceedings registered each year, only 40 to 50 result in reasoned opinions, and only a handful appear before the ECJ. *Id.* at 26.

43. This is the official name of the Council but it is often referred to as "the Council of Ministers" or simply as "the Council." See generally HARTLEY, *supra* note 19, at 11-15. The Council is not to be confused with the European Council, which consists of the EC Member States heads of state and the Commission's president. The European Council's main purpose is to provide policy guidance to other EC institutions. GARDNER, *supra* note 2, at 17.

nity budget.<sup>44</sup> The Council consists of one voting representative from each Member State.<sup>45</sup> Since no individual is designated as the voting representative, the voting member at any given meeting may vary, depending on the subject under consideration.<sup>46</sup> One representative serves as Council president.<sup>47</sup> The Council operates under its own rules of procedure,<sup>48</sup> conducts meetings closed to the public, and maintains confidential records.<sup>49</sup>

Since the Council representatives tend to be high-ranking state ministers or leaders, they only meet infrequently to discuss legislation and resolve differences. Therefore, the bulk of the work in the legislative process falls upon the Committee of Permanent Representatives (known by the French acronym, COREPER),<sup>50</sup> which represents the Council in Brussels. COREPER is composed of the twelve Member States permanent ambassadors to the EC.<sup>51</sup> This body and various committees consider most of the legislative proposals. Below the COREPER level are working groups of bureaucrats that are drawn from Member States' ministers. Because of many high ranking ministers' hectic schedules, these "Eurocrats" have a great deal of actual power.<sup>52</sup> Ministers and representatives generally establish broad policies and make tough compromises that can only be made at the highest levels.

The EEC Treaty authorizes the Council to act by simple majority, qualified majority, or by unanimous vote, depending on the nature of the

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44. See HARTLEY, *supra* note 19, at 13-14. On the reasons for, and the nature of, the joint power of Parliament and the Council over budgetary matters, see Peter Zangl, *The Interinstitutional Agreement on Budgetary Discipline and Improvement of the Budgetary Procedure*, 26 COMMON MKT. L. REV. 675, 675 (1989).

45. Merger Treaty, *supra* note 24, art. 2, at 4.

46. Each Member State usually has a representative on the Council, namely the national minister for the topic area under consideration, and for certain high level policy matters, the heads of state. STEINER, *supra* note 5, at 10.

47. The role of Council President rotates among the member states for six month terms. WINTER, *supra* note 17, at 29. The order of this control is Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom. Merger Treaty, *supra* note 24, art. 2, at 4 (as amended by the Act Concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties, art. 11, 1985 O.J. (L302) 23, 24-25). For the first six months of 1991, the President of the Council is a representative from Luxembourg. WINTER, *supra* note 17, at 29.

48. WINTER, *supra* note 17, at 29 (citing RULES OF PROCEDURE OF THE COUNCIL 79/868, 1979 O.J. (L 268) 1, modified by 1987 O.J.Eur.Comm. (L 291) 27).

49. *Id.*

50. STEINER, *supra* note 5, at 11.

51. GARDNER, *supra* note 2, at 17.

52. *Id.*

matter under consideration.<sup>53</sup> Prior to the enactment of the Single European Act (SEA),<sup>54</sup> most substantial Council decisions required unanimity. The SEA, however, specifies that only a qualified majority<sup>55</sup> is necessary to legislate in certain vital areas, on issues pertaining to the completion of the internal market, which can include measures aimed at the preservation and protection of the environment.<sup>56</sup>

Despite its power to vote on all EC legislation, the EEC Treaty somewhat limits the powers of the Council. Generally, the Council may only act on legislative proposals submitted to it by the Commission, although it has some power to suggest proposals to the Commission.<sup>57</sup> The EEC Treaty requires the Council to consult the European Parliament on all proposals.<sup>58</sup> This requirement has taken on new importance under the recent cooperative procedure.<sup>59</sup> Under the old consultation procedure,<sup>60</sup> the Council could virtually ignore Parliament's comments. Parliament now has significant opportunities to delay passage of legislation through the Council simply by ignoring it. Furthermore, the the Council's ability to pass controversial legislation, including environmental legislation, is limited because many Treaty articles—and all matters of "extreme importance" to any Member State<sup>61</sup>—require unanimity to pass. Therefore, the actual Council vote tends to require cooperation and a series of political compromises. In recent years, however, this limitation has eased somewhat with the increased use of qualified majority voting and the increasing dominance of progressive states such as Germany, Denmark, and the Netherlands on environmental legislation.<sup>62</sup> The ECJ ultimately

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53. See WINTER, *supra* note 17, at 30-31.

54. 1987 O.J. (L 169) 1 [hereinafter SEA]. Nine Member States signed the SEA in Luxembourg on February 17, 1986, and the remaining three signed at the Hague on February 28, 1986. It became effective on July 1, 1987. The SEA's major goal is to complete the EC's internal market by December 31, 1992. George A. Bermann, *The Single European Act: A New Constitution for the Community?*, 27 COLUM. J. TRANSNAT'L L. 529, 529-38 (1989); see also *infra* section VI(B).

55. "Qualified majority" voting is weighted by state so that the larger states do not represent a controlling voting block. WINTER, *supra* note 17, at 30.

56. See SEA art. 100(a); Commission v. Council, Case 300/89 (June 11, 1991).

57. Reynolds, *supra* note 5, at 22. But see WINTER, *supra* note 17, at 30 (stating that the Council "can act only on those proposals that the Commission refers to it").

58. WINTER, *supra* note 17, at 30.

59. See *infra* section V(A).

60. See *infra* section V(A).

61. See *infra* section V(B).

62. David P. Hackett & Elizabeth E. Lewis, *European Economic Community: Environmental Requirements in The European Economic Community: Products Liability Rules and Environmental Policy*, *supra* note 11, at 253, 256.

has judicial review over all Council's actions.<sup>63</sup>

### C. *European Parliament*

The European Parliament<sup>64</sup> is the only EC institution composed of directly-elected members.<sup>65</sup> These Members of the European Parliament (MEPs) are elected roughly in proportion to the size, importance, and economic power of the Member States.<sup>66</sup> The MEPs elect the head of Parliament, its President, by secret ballot.<sup>67</sup> Rather than directly representing the interests of any particular nation, MEPs are independent members, representing one of the nine EC political parties. As representatives of their home district, however, they do represent indirectly the national interests of their constituencies.<sup>68</sup> Each MEP serves on one or more of the eighteen standing committees with portfolios corresponding to the major EC policy-making areas.<sup>69</sup> Parliamentary activity occurs in three separate locations: the plenary session meets in Strasbourg, France, the committees meet in Brussels, and the Secretariat sits in Luxembourg.<sup>70</sup>

The European Parliament is not a parliamentary body in the traditional sense.<sup>71</sup> Rather, it serves an advisory and supervisory function, participating in the legislative process at several different points.<sup>72</sup> Vari-

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63. See HARTLEY, *supra* note 19, at 58.

64. The European Parliament originally was known as the European Assembly. See R. Beiber et al., *Implications of the Single Act for the European Parliament*, 23 COMMON MKT. L. REV. 767, 770 (1986)

65. Direct elections occurred first in 1979, and these elections increased Parliament's legitimacy, powers, and influence. STEINER, *supra* note 5, at 8. The term for each MEP is five years. WINTER, *supra* note 17, at 31.

66. Reynolds, *supra* note 5, at 18. The breakdown of votes per state is as follows: France, Germany, Great Britain and Italy have 81 representatives each; Spain has 60; the Netherlands 25; Belgium, Greece, and Portugal have 24 each; Denmark has 16; Ireland has 16; and Luxembourg has 6. STEINER, *supra* note 5, at 9.

67. EEC TREATY art. 140.

68. STEINER, *supra* note 5, at 9; Reynolds, *supra* note 5, at 18. Instead, they represent political groups. At present, ten groups of Parliament exist, with the largest being the Socialists, but since agreement requires 260 of the 518 votes, forming political alliances is generally necessary. See ZAGORIN, *supra* note 20, at 14; see GARDNER, *supra* note 2, at 18.

69. WINTER, *supra* note 17, at 32. The Committee on the Environment, Public Health and Consumer Protection considers environmental matters. *Id.* app. H.

70. This structure has been criticized as highly inefficient. See GARDNER, *supra* note 2, at 80-81; Elling, *supra* note 26, at 521.

71. See GARDNER, *supra* note 2, at 18-19.

72. STEINER, *supra* note 5, at 8; Reynolds, *supra* note 5, at 18-19; see EEC TREATY art. 137.

ous EEC Treaty provisions require Parliament to be consulted on any legislation proposed in certain areas before enactment by the Council.<sup>73</sup> When proposed legislation is submitted for Parliament's opinion, it is referred to the appropriate committee for consideration. That committee considers the proposal and drafts a report to be presented to the entire Parliament through the committee *rapporteur*.<sup>74</sup> Parliament then establishes its position on the draft legislation.

The importance of Parliament's comments in the legislative process has increased substantially since the implementation of the cooperation procedure for certain legislative proposals.<sup>75</sup> In contrast to the past, when the Council could virtually ignore Parliament's comments, Parliament now has greater power to block or delay legislation that it opposes.<sup>76</sup> Under the new procedure, Parliament gets a second reading of certain draft proposals and may reject proposals, thereby requiring unanimous Council vote for their passage. It even can submit amendments that, if supported by the Commission, can be defeated only by a unanimous Council vote.<sup>77</sup>

Parliament also possesses other powers that enable it indirectly to influence EC policy. Since the European Commission is accountable directly to Parliament,<sup>78</sup> Parliament has the right to submit written questions to which the Commission must respond.<sup>79</sup> Parliament also has the power to dismiss the Commission in its entirety and may reject—which it has done—any annual EC budget proposed by the Commission.<sup>80</sup> Parliament's growing strength can be seen in its initiative and recommendations that led to the drafting of the Single European Act<sup>81</sup> and several of the Commission's proposals for 1992.<sup>82</sup> Despite Parliament's influence and increased participation in decision-making, its exercise of powers

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73. Reynolds, *supra* note 5, at 19.

74. WINTER, *supra* note 17, at 32.

75. See *infra* section V(A).

76. Although the Council must consider these opinions, still no obligation exists follow them. STEINER, *supra* note 5, at 8. To pass legislation opposed by Parliament, the Council must reach unanimous approval. See Reynolds, *supra* note 5, at 19; *infra* section V(A).

77. For a detailed description of the new procedure, see WINTER, *supra* note 17, at 33; Beiber, *supra* note 64, at 779-86.

78. ZAGORIN, *supra* note 20, at 4.

79. EEC TREATY art. 140. Parliament also may submit questions to the European Council, but the Council has no obligation to respond. WINTER, *supra* note 17, at 33.

80. GARDNER, *supra* note 2, at 19; Elling, *supra* note 26, at 521.

81. See Bieber, *supra* note 63, at 768-69.

82. ZAGORIN, *supra* note 20, at 4; see also GARDNER, *supra* note 2, at 81.

still depends largely on the actions of the Council and the Commission.<sup>83</sup>

#### D. *The European Court of Justice*

The fourth EC institution created by the EEC Treaty is the ECJ, which sits in Luxembourg.<sup>84</sup> This court is comprised of thirteen judges, one appointed from each Member State and one in rotation from among the five largest states,<sup>85</sup> who must possess independence of an undisputed nature.<sup>86</sup> The judges are appointed for six year renewable terms.<sup>87</sup> Six advocates general also are appointed, one from each of the four largest states and two in rotation among the smaller states.<sup>88</sup> The advocate's role is to submit nonbinding, reasoned opinions on matters before the ECJ to assist the court in interpreting and applying EC law.<sup>89</sup> The ECJ is divided into six chambers that hear specific types of cases, with major cases heard in plenary session by the entire court.<sup>90</sup>

The ECJ has primary jurisdiction over all questions relating to Community law and acts to interpret this law and settle any disputes regarding its interpretation.<sup>91</sup> Claims may be brought before the court by the Commission,<sup>92</sup> by any Member State,<sup>93</sup> or by individuals or firms directly affected by EC laws or rulings.<sup>94</sup> While most claims are brought by the Commission against alleged Member State treaty violators, in recent years claims brought by Member States and individual parties have increased. These claims have challenged the legitimacy of various acts or rulings of the Commission or of other EC institutions.<sup>95</sup> The court also

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83. See Bieber, *supra* note 64, at 791.

84. The formal name of the court is the Court of Justice for the European Communities, but it is commonly referred to as the European Court of Justice. See generally HARTLEY, *supra* note 19, at 26-63; Carl O. Lenz, *The Court of Justice of the European Communities*, 14 EUR. L. REV. 127 (1989).

85. WINTER, *supra* note 17, at 33.

86. EEC TREATY art. 167.

87. *Id.*

88. WINTER, *supra* note 17, at 33.

89. EEC TREATY art. 166; WINTER, *supra* note 17, at 33.

90. EEC TREATY art. 165.

91. GARDNER, *supra* note 2, at 20-21.

92. *Id.* art. 169.

93. *Id.* art. 170.

94. *Id.* art. 173. The effect must be direct on the individual claimant and cannot merely affect the claimant as a member of a class or group. REHBINDER & STEWART, *supra* note 9, at 147; Quigley, *supra* note 11, at 294. These individual claims may even be brought by foreign, or non-member, firms if they feel unfairly penalized by an act of a Member State or business. ZAGORIN, *supra* note 20, at 6.

95. ZAGORIN, *supra* note 20, at 6. For example, claims have been brought on

has the power to decide interlocutory requests from national courts regarding EC law and may advise other EC institutions in certain areas.<sup>96</sup>

Reflecting the varied background of the court itself, arguments before the ECJ generally involve a mix of Community and national law and consider both civil law and common law precedents.<sup>97</sup> Although the ECJ has established a substantial body of case law,<sup>98</sup> it is not formally bound by precedent, but it tends to rely heavily on it.<sup>99</sup> The court's decisions must be unanimous and, once issued, are final and not subject to appeal.<sup>100</sup>

While the ECJ originally was expected to play only a minor role in shaping EC law, it has played a very activist role in legal interpretation and has influenced greatly EC law through the judicial review process.<sup>101</sup> Despite its power to decide cases and interpret Community law, the lack of formal mechanisms to enforce compliance with the ECJ's rulings greatly limits its influence.<sup>102</sup> Additionally, the court only has limited resources with which to hear an increasing backlog of cases.<sup>103</sup> As an attempt to mitigate the latter problem, a new court, the Tribunal of First Instance (the Tribunal), was established to hear certain cases dealing with specific areas of Community law. Decisions of the Tribunal are appealable to the ECJ.<sup>104</sup> The Tribunal may be a harbinger of fu-

grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EEC Treaty, or misuse of powers. Quigley, *supra* note 11, at 294 n.5 (citing EEC TREATY art. 173).

96. EEC TREATY art. 177.

97. ZAGORIN, *supra* note 20, at 6.

98. *Id.*

99. HARTLEY, *supra* note 19, at 75.

100. ZAGORIN, *supra* note 20, at 6.

101. See WINTER, *supra* note 17, at 34; Reynolds, *supra* note 5, at 24-25. The court has been described by one commentator as a "secret ally of integration and . . . pro-environment." *Panel Discussions in, UNDERSTANDING US AND EUROPEAN ENVIRONMENTAL LAW: A PRACTITIONER'S GUIDE* 59, 65 (Turner T. Smith, Jr. & Pascale Kromarek eds., 1989) (statement of Ludwig Kramer).

102. Instead, the court must rely on Community politics and pressure from other Member States to force compliance. See REHBINDER & STEWART, *supra* note 9, at 145; Reynolds, *supra* note 5, at 26.

103. See Ami Barav, *The Court of First Instance of the European Communities*, 139 *NEW L.J.* 1298, 1298 (1989); Jean P. Jacqu e & Joseph H.H. Weiler, *On the Road to European Union—A New Judicial Architecture: An Agenda For the Intergovernmental Conference*, 27 *COMMON MKT. L. REV.* 185, 188 (1990).

104. EEC TREATY art. 168a (as amended 1987). Claims may be brought before this court in the areas of unfair competition, steel quotas, employment, and staff disputes. WINTER, *supra* note 17, at 34; see generally Sir Gordon Slynn, *The Court of First Instance of the European Community*, 9 *NW. J. INT'L L. & BUS.* 542, 544-46 (1989).

ture specialized courts geared toward relieving the ECJ of its burdensome docket.

### E. *European Environmental Agency*

The most recent entrant in the area of EC environmental law is the European Environmental Agency (the Agency), which the EC Environment Ministers approved on November 28, 1989.<sup>105</sup> This agency, expected to begin operations in 1991, is responsible for "collect[ing] environmental data from EEC Member States and disseminat[ing] that information to interested parties, including governments and private entities."<sup>106</sup> Eventually, the Community may expand the Agency's clearing-house role to include "enforcement activities and development of environmental policies and legislation."<sup>107</sup> The Agency also may expand to include non-Member States throughout Europe, including the Eastern bloc.<sup>108</sup> Details regarding the location and operations of the Agency have yet to be determined.<sup>109</sup> One commentator has suggested that the formation of this "European-style EPA" indicates that the EC "intends to play an increasingly active role in the development of environmental policy."<sup>110</sup> The creation of the EEA, combined with the effect of the Freedom of Access to Information Directive,<sup>111</sup> is likely to enhance information flow and environmental enforcement.

## IV. THE FORM OF EC LEGISLATION

### A. *Mechanisms for Legislative Action*

The EEC Treaty provides several mechanisms for implementing Community action. EC legislative actions generally take one of three forms: general rulings, regulations, or directives.<sup>112</sup> The legal basis for a

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105. Hackett & Lewis, *supra* note 63, at 257.

106. *Id.*

107. *Id.*

108. *Id.* Paul S. Luiki & Dale E. Stephenson, *Environmental Laws and Stricter in 'Green'-Influenced Europe*, NATIONAL L.J. 45-47 (Sept. 30, 1991).

109. *Id.* The Council was expected to discuss these issues at their July 1990 meeting, but it did not.

110. WINTER, *supra* note 17, at 135.

111. This directive will allow private parties to acquire vast amounts of previously inaccessible environmental information from public authorities. See Luiki & Stephenson, *supra* note 108, at 46. The directive was adopted by the Council in June 1990 and is required to be implemented by Member States by December 31, 1992.

112. EEC TREATY art. 189. Article 189 also provides for the issuance of recommendations and opinions that have no binding force and are not classified properly as legisla-

given action and the circumstances surrounding the particular case dictate which means will be utilized.<sup>113</sup>

General rulings, or decisions, apply to a particular Member State or individual and only bind the party at which they are aimed.<sup>114</sup> Generally, the European Commission issues these rulings upon discovery of a violation of the EEC Treaty or a Community law. The Commission also often uses these rulings to enforce other EC laws.<sup>115</sup>

Regulations, on the other hand, are broad, general statements of Community law. They operate essentially like national laws, except that they apply directly to every Member State and citizen of the EC.<sup>116</sup> As direct law, regulations are legally self-sufficient, and compliance may be enforced through actions brought directly before the ECJ. The EC, however, does not favor the use of regulations. The EC usually issues regulations in areas directly governed by Community policies, like agriculture, antitrust, or antidumping law.<sup>117</sup> While the EEC Treaty permits the use of regulations in environmental law, they have rarely been used to address environmental concerns.<sup>118</sup>

The EC uses the directive as its principal legislative form in its matters of substance.<sup>119</sup> A directive mandates the achievement of a result to bind each Member State at which it is addressed.<sup>120</sup> A directive, however, leaves the choice of form and methods of altering the objective to the national authorities.<sup>121</sup> A directive essentially serves as an order for Member States to enact laws making the directive operative, but leaves the form of this implementation to the Member States.<sup>122</sup> This policy allows flexibility in enacting Community policies to account for the vari-

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tion. See Nigel Haigh, *Impact of the EEC Environmental Programme: The British Example*, 4 CONN. J. INT'L L. 453, 456 (1989).

113. Winter, *supra* note 17, at 41.

114. EEC TREATY article 189 states: "A decision shall be binding in its entirety upon those to whom it is addressed."

115. See STEINER, *supra* note 5, at 12.

116. EEC TREATY article 189 states: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

117. Quigley, *supra* note 11, at 292.

118. Haigh, *supra* note 112, at 456. One notable use of a regulation, however, was a ban on the import of whale products. *Id.*

119. On the differences between directives and regulations, see Yves Quintin, *Certain Institutional Aspects of "Europe 1992" and Their Effect on American Companies*, 3 TEMP. INT'L & COMP. L.J. 143, 147-48 (1989).

120. EEC TREATY art. 189.

121. *Id.*

122. Quigley, *supra* note 11, at 293.

ous situations in each Member State.<sup>123</sup> While EC directives will be useful for interpreting these national laws,<sup>124</sup> the actual standards applied by each Member State will be determined directly from that nation's own particular law.<sup>125</sup> Furthermore, as a general rule, EC directives merely set minimum standards, and Member States are free to adopt more stringent standards, as long as these standards comply with the EEC Treaty.<sup>126</sup>

This dual nature of directives often causes enforcement problems in

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123. Haigh, *supra* note 112, at 456.

124. Quigley, *supra* note 11, at 295.

125. One major exception to this rule is the direct effect doctrine for EC directives. Under this doctrine, individuals have the right to challenge, before a national court, a Member State's failure to implement Community directives fully or properly. See Ludoph, *supra* note 39, at 26. In this case, often after referring the matter to the ECJ for an interlocutory interpretation of Community law, national courts may enforce EC directives directly, as if they had been implemented properly under national law. See REHBINDER & STEWART, *supra* note 9, at 37.

Estoppel principles underlie this doctrine. It prevents states from relying on their own failure to implement EC directives to avoid liability for the violation of individual rights granted by the directive. Quigley, *supra* note 11, at 297. See *Becker v. Finazamt Münster Innerstadt*, Case 8/81 (Jan. 19, 1982).

The direct effect doctrine applies only when the directive at issue is: (1) sufficiently clear and precise; (2) unconditional; (3) leaves no room for discretion in its implementation; and (4) of a nature capable of conferring rights on individuals. REHBINDER & STEWART, *supra* note 9, at 38; see also John Usher, *European Communities, Direct Effect of Directives: Dotting the i's . . .*, 5 EUR. L. REV. 470, 472-73 (1980). Furthermore, courts may only give direct effect to directives after the time limit for their implementation has passed. STEINER, *supra* note 5, at 23.

The direct effect doctrine applies only to claims brought against the Member State, which is also known as vertical direct effect, since directives only bind Member States and not private individuals. Thus, when directives have not been implemented into national law, injured parties have no recourse for the breach of an EC directive against another private party, which is also known as horizontal direct effect. REHBINDER & STEWART, *supra* note 9, at 38; STEINER, *supra* note 5, at 26. In actions against private individuals, directives may only be used indirectly, as a tool for interpreting national law that implements these policies. See HARTLEY, *supra* note 19, at 213-14; Jane D.N. Bates, *The Impact of Directives on Statutory Interpretations: Using the Euro-Meaning?*, 1986 STATUTE L. REV. 174, 176.

126. See, e.g., EEC TREATY art. 130t (Member States may introduce more stringent environmental measures than those provided by EC law); *id.* art. 100a(4) (providing special Commission procedure to authorize deviation from EC law on the grounds of "major [state] needs . . . relating to protection of the environment"). In no case, however, may these stricter requirements "constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." *Id.* arts. 36, 100a(4). Thus, overly strict environmental standards may be challenged before the Commission as contrary to the EEC treaty. See Hackett & Lewis, *supra* note 62, at 256.

EC law because implementation gaps sometimes occur between the passage of EC directives and their enactment into state laws. This gap may be either temporal or substantive. Often, a gap will occur naturally as the result of procedural limitations and the time required to enact legislation at the national level. A gap, however, may occur intentionally when a Member State dislikes the directive. The Member State consciously may delay or enact national law inconsistent with the directive's intent. The effect of such a gap is commonly non-uniform implementation of EC law, general stalling, and blockage of the directive's effect.<sup>127</sup> Thus, the problems that the Community sought to avoid through Community legislation often reappear as nonstandard implementation of Community directives.

Despite continued problems with implementation gaps in the enactment of EC directives, the situation improves as the Community becomes more sophisticated in legislative drafting and enforcement.<sup>128</sup> As a result of this trend, the EC has begun drafting directives with very explicit requirements for Member State implementation. The new directives leave Member States so little room for variation in implementation that they have an effect similar to formal regulations.<sup>129</sup> Furthermore, amendments to the EEC Treaty have opened the possibility, in certain cases, of passing EC regulations directly in cases when Member States have failed to implement directives within the prescribed timetables.<sup>130</sup> As these techniques improve, the problems of directive implementation gaps should decrease.

### B. *Enforcement of EC Directives*

Under the EC system, the main role of implementing and enforcing the vast majority of EC legislation falls upon the Member States.<sup>131</sup> The Member States are responsible for passing the implementing statutes and for providing the necessary staff, equipment, and funding to monitor

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127. See Ludwig Kramer, *The European Economic Community, in UNDERSTANDING US AND EUROPEAN ENVIRONMENTAL LAW: A PRACTITIONERS GUIDE*, *supra* note 101, at 4, 5. A recent statement of the Commission complained that many Council directives had not been implemented into national law. Quigley, *supra* note 11, at 297. One commentator has noted that of 90 internal market directives due to be transposed into national laws in 1989, only 14 had been adopted by all 12 states. Ludolph, *supra* note 41, at 25.

128. Ludolph, *supra* note 41, at 25.

129. See REHBINDER & STEWART, *supra* note 9, at 35-36.

130. WINTER, *supra* note 17, at 19 (applying EEC TREATY art. 100a).

131. REHBINDER & STEWART, *supra* note 9, at 137; see Koenraad Lenaerts, *The Application of Community Law in Belgium*, 23 COMMON MKT. L. REV. 253 (1986).

compliance and to enforce these provisions.<sup>132</sup> Generally, the EC's role in this process is to formulate Community policy and to oversee Member State compliance with, and enforcement of, these directives.

If a Member State fails to implement a Community directive or otherwise violates the EEC Treaty or laws, the Commission may bring an action against the Member State to force compliance.<sup>133</sup> If this administrative act of intercession fails to correct the violation, the matter may be brought before the ECJ for a final ruling. Despite the lack of formal enforcement mechanisms,<sup>134</sup> the EC generally can incorporate directives into Member States' law.

The EC has been relatively unsuccessful, however, in monitoring Member State enforcement of these directives once enacted into national law. Under the dual system of directive legislation, implementing statutes vary considerably from state to state, and each individual state is responsible to enforce its own law. While the EC has some legal authority to oversee Community law enforcement, it generally lacks the resources and the powers to effect actual enforcement at the national level.<sup>135</sup> Despite the goal of harmonizing EC law across the entire Community, in reality, Member States largely remain free to enforce EC law in any manner they see fit.

## V. DEVELOPMENT OF EC LEGISLATION

The EEC Treaty establishes the process by which the EC enacts legislation. The exact procedure used and the roles of various actors in this procedure depend upon which Treaty article provides the basis for the legislation. The general procedure, however, is the same for all legislation, environmental or otherwise, and varies only in the specific committees, working groups, and directorates assigned to draft and comment

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132. See REHBINDER & STEWART, *supra* note 9, at 137.

133. For a description of the process involved in bringing this compliance action, see *supra* section III(A).

134. The EC is dependent upon public disgrace, political pressure, and the willingness of the states to comply voluntarily with its decisions and rulings. "There are no federal marshalls in the European Community." Crisp, *Current Environmental Issues in the European Community*, 2 (appendix A to McMahon, *Europe: 1992 is Almost Here—Implications for Environmental Aspects of Corporate and Real Estate Transactions*, Speech at the American Bar Association Section of Natural Resources, Energy and Environmental Law, seminar on Practical Implications of International Environmental Law (Apr. 25-26, 1990)).

135. Of all the infringement proceedings brought by the EC, none have ever been targeted at Member State enforcement of Community directives. REHBINDER & STEWART, *supra* note 9, at 144.

upon the particular proposal.

Unlike traditional legislative systems, the EC has established a separate process for each type of legislation, including environmental legislation. This process involves the interplay of the Commission, the Council, and the Parliament.<sup>136</sup> It begins with a proposed draft from the Commission, which is then critiqued and amended based upon comments from the Parliament before the Council votes finally upon it. This process generally requires a unanimous vote of all Council representatives to adopt the legislation. Since the adoption of the SEA, the initial procedure has changed somewhat, providing increased access to the process for certain Community institutions and permitting the passage of certain legislation under a qualified majority vote.<sup>137</sup>

#### A. *Cooperative and Consultation Procedures*

Originally, the EC enacted legislation under a process known as the consultation procedure.<sup>138</sup> Pursuant to this procedure, the Commission formulated and submitted proposed regulations or directives for consideration. Commission staff experts generally drafted the proposals after consulting interested governments and private parties.<sup>139</sup> This proposed legislation generally would be published in the Official Journal of the European Communities as an official Commission document and then sent to the Council.<sup>140</sup>

The Council then had to request an opinion on the proposed legislation from the Parliament.<sup>141</sup> Parliament may have solicited the views of interested parties in writing or in testimony before the appropriate committee.<sup>142</sup> The *rapporteur* of the appropriate committee then drafted an opinion for the full Parliament to consider. The full Parliament voted to adopt the final approved opinion or the resolution. Parliament's proposed amendments then could be submitted to the Commission for incorporation. If the Commission refuses to incorporate these amendments, Parliament had some power to delay consideration of the legislation.<sup>143</sup>

Finally, under the consultation procedure, the Commission submitted

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136. WINTER, *supra* note 17, at 41.

137. *See infra* section V(B).

138. The consultation procedure still is used today for legislation not covered by the SEA.

139. *See supra* section II(A).

140. WINTER, *supra* note 17, at 42.

141. *Id.* If required, the Council also could seek the opinion of the ESC. *Id.*

142. *Id.* at 43.

143. *Id.* The ESC's procedure is very similar to Parliament's. *Id.*

the bill to the Council, which in turn referred it to a working party composed of Council representatives and staffed by experts from the various Member States. If the working party approved the proposed legislation, the Council passed it on a fast-track basis, without further debate. Otherwise, the bill went to the Council as a whole for further debate.<sup>144</sup> The Commission could have amended or withdrawn any proposal at any time during the process. As soon as the Council adopted a proposal, it became law and, if the proposal was a decision or a directive, may have to have been enacted into national law by Member States.<sup>145</sup>

The new cooperative procedure,<sup>146</sup> instituted by the SEA,<sup>147</sup> differs substantially in cases that permit a vote by a qualified majority. In these cases, Parliament and the Council each have two opportunities, rather than one, to review Commission proposals. This significantly strengthens Parliament's role in the legislative process<sup>148</sup> and has made all parties more aware of the importance of close cooperation during the entire process.<sup>149</sup> Furthermore, the addition of time limits forces compromises to keep the process moving.<sup>150</sup>

The cooperation procedure begins exactly like the original consultation process. The Commission submits a proposal to the Council, which then refers it to Parliament for its opinion.<sup>151</sup> Parliament makes a first reading of the proposal, holds hearings, and formulates its opinion and comments to send to the Council. The lack of a time limit on the first reading gives Parliament great freedom to delay the legislative process at this point.<sup>152</sup> After review of Parliament's comments, the Council adopts a common position by a qualified majority vote.<sup>153</sup> Furthermore, no time limit exists for the Council to issue its common position.<sup>154</sup>

The Council subsequently transmits back to Parliament the common position, along with an explanation of the reasoning behind this common

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144. *See id.*

145. *Id.*

146. *See* EEC TREATY art. 149.

147. SEA, *supra* note 54, art. 7, at 5.

148. *See* Jones, *supra* note 9, at 473.

149. *See* WINTER, *supra* note 17, at 43.

150. *Id.*

151. EEC TREATY art. 149(2)(a).

152. WINTER, *supra* note 17, at 44.

153. EEC TREATY art. 149(2)(a). If this common position requires amending the Commission proposal, then article 149(1) of the EEC Treaty requires unanimity. This requirement, however, may be avoided if the Commission adopts these amendments itself, thus taking advantage of its right to amend proposals at any point in the process.

154. WINTER, *supra* note 17, at 44.

position and the Commission's position, for a second reading.<sup>155</sup> Parliament has three months to consider this common position.<sup>156</sup> If Parliament approves or fails to act on the common position proposal the Council must adopt it into law.<sup>157</sup> Otherwise, Parliament has the power to amend or reject the common position<sup>158</sup> by an absolute majority vote of its members.<sup>159</sup>

If Parliament amends or rejects the common position, it returns the bill to the Commission, along with any proposed amendments for re-examination.<sup>160</sup> The Commission then has one month to consider any revisions and submit to the Council its re-examined proposal. This re-examined proposal must be accompanied by any Parliamentary amendments not incorporated therein and the reasons for their omission.<sup>161</sup>

Finally, the Council has three months<sup>162</sup> to consider the Commission's re-examined proposal. During this period, the Council may: 1) adopt this re-examined proposal by a qualified majority vote;<sup>163</sup> 2) adopt an amended version by unanimous approval;<sup>164</sup> or 3) fail to act within the allotted time, in which case the proposal lapses.<sup>165</sup> During the cooperation process, as well as the consultation process, the Commission retains the right to alter, amend, or remove any proposal from consideration prior to its final adoption by the Council.<sup>166</sup>

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155. EEC TREATY art. 149(2)(b).

156. *Id.*

157. *Id.*

158. Parliamentary rejection of the common position has the added effect of requiring unanimous consent for Council approval of any subsequent proposal from the Commission. EEC TREATY art. 149(2)(c).

159. The two-thirds majority of votes would be 260 if everyone voted. In practice, 260 votes can represent about two-thirds of the votes actually cast. WINTER, *supra* note 17, at 45.

160. *Id.*

161. *Id.* art. 149(2)(d). Under the one month time limit, the Commission has difficulty discovering the Council's opinion of the proposed amendments and thus their inclusion in the re-examined proposal is unlikely. WINTER, *supra* note 17, at 45-46.

162. This period may be extended for one month by common accord between the Council and the Parliament. EEC TREATY art. 149(2)(g).

163. *Id.* art. 149(2)(e).

164. *Id.* art. 149(2)(d) (for amendments proposed by Parliament) & (e) (for all other Council amendments).

165. *Id.* art. 149(2)(f).

166. *Id.* art. 149(3). See generally Bieber, *supra* note 64, at 779-86 (discussing the steps under the cooperative procedure).

## B. *Unanimity and Qualified Majority Voting*

In addition to changing the process for development of EC legislation, the SEA permits easier passage of legislation enacted under several articles. A great deal of current EC legislation can be passed now by a qualified majority vote of the Council.<sup>167</sup>

Under the qualified majority voting system, each Member State receives a number of votes based upon its relative size, importance, and economic power. England, France, Italy, and Germany each have ten votes; Spain has eight votes; Belgium, Greece, Portugal, and the Netherlands each have five votes; Denmark and Ireland each have three votes; and Luxembourg has two votes.<sup>168</sup> For approval, a qualified majority of at least fifty-four of the available seventy-six votes must be cast in favor of a proposal.<sup>169</sup> This procedure allows the passage of legislation even when one or more Member States object.<sup>170</sup> The procedure also has the potential effect of allowing larger, more industrialized states to outvote smaller ones because the larger ones have more votes. This problem has led some environmental organizations to fear potential dilution of environmental policies.<sup>171</sup>

Even when the Treaty permits the passage of legislation by a qualified majority vote, special circumstances may lead the Council to impose a unanimity requirement on its deliberations. The Luxembourg Accord of 1966 serves as precedent for this voluntary constraint. In 1966, to alleviate the domestic concerns of some Member States about being overrun by Community legislation,<sup>172</sup> the EC agreed that on issues of "very important interest" to any Member State, every attempt will be made to

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167. Whether the EC uses the qualified voting procedure depends upon the Treaty article cited as a legal basis for the proposed legislation. See Section VI *infra*.

168. EEC TREATY art. 148(2).

169. *Id.*

170. Originally, the numbers were set up to assure that not more than one major state—a state with ten votes—could be outvoted under the qualified majority requirements. Now, however, as many as two major states can be outvoted because additional states have joined the Common Market. See J.A. Usher, *The Institutions of the European Communities After the Single European Act*, 19 BRACKTON L.J. 64, 64-65 (1987).

171. See Christian R. Meltzer, Note, *The Environmental Policy of the European Economic Community to Control Transnational Pollution—Time to Make Critical Choices*, 12 LOY. L.A. INT'L & COMP. L.J. 579, 593 (1990).

172. The EC reached this accord in response to the "empty chair crisis" in the 1960s when France refused to send a representative to the EC, thus blocking all action requiring unanimous approval, which was essentially everything at that time. In return for this accord, France agree to send a representative to the European Council. WINTER, *supra* note 17, at 7; Reynolds, *supra* note 5, at 14.

resolve these interests and reach a unanimous position within a reasonable time.<sup>173</sup> Although this agreement has not been ratified officially or endorsed, it nonetheless has been understood since that time to require unanimity on these issues. Whether this accord will remain intact is uncertain as Member States become more accustomed to the use of qualified majority voting in passing Community legislation.<sup>174</sup>

Whether legislation must be passed by qualified majority or unanimous consent is critical because achieving support for any proposal from all twelve Member States, with their various concerns and situations, is extremely difficult. Therefore, EC legislation passed by unanimous consent tends to require a great deal of compromises, which may considerably dilute the content of the resulting directive.<sup>175</sup> This system makes passing progressive or controversial legislation extremely difficult. While this problem has been alleviated somewhat with the passage of the SEA, it is still a significant impediment to progress in the environmental area and other EC fields.

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173. The agreement never explicitly required unanimous approval or explained what would happen if approval were not reached, but the French delegate issued a statement at the time that his state understood unanimity to be required. Since that time, this has been the actual effect of the accord. See WINTER, *supra* note 17, at 7; Reynolds, *supra* note 5, at 14.

174. One commentator has suggested that the SEA provisions permitting qualified majority voting effectively limited the use of the vital interests unanimity exception. Ludolph, *supra* note 41, at 21. Little other indication exists that the Luxembourg Accords have been eliminated in cases of Member States' vital interests. But see Bermann, *supra* note 54, at 584-85 (arguing that the SEA does not provide a "hospitable climate for the Luxembourg Accords").

175. One result of these compromises has been the adoption of various harmonization techniques to permit some flexibility in the standards applied by different Member States. Some EEC environmental policy measures may require total harmonization, under which identical rules will apply throughout all Member States, although this is rare. Generally, Community environmental law requires optional harmonization, under which all products meeting community standards must be permitted access to the market of each Member State, although a nation may set separate—generally more liberal—standards for its own domestic market. Another strategy is alternative harmonization, by which more than one strategy for environmental protection is established, and each Member State may choose the one that best suits its environmental needs. See generally REHBINDER & STEWART, *supra* note 9, at 207-12 (discussing the various types of harmonization techniques).

## VI. THE HISTORY OF THE LEGAL GROUNDING FOR ENVIRONMENTAL LEGISLATION IN THE EC

Although the EC's main goals are economic, environmental protection has taken on great importance at the Community level in recent years. This trend reflects a growing recognition that environmental problems are of a transnational nature and that certain environmental issues can best be dealt with on a multinational level by organizations like the EC.<sup>176</sup> On these premises, the EC has enacted a substantial body of environmental law in areas such as air, water, waste, toxic substances, and noise pollution,<sup>177</sup> which solidifies the EC's role in formulating and implementing environmental policy.<sup>178</sup>

### A. *Early Environmental Legislation*

The EC first began to formulate an environmental policy in 1973 when the European Council approved the EC's First Environmental Action Program (EAP).<sup>179</sup> This program expressed the need for a Community-based environmental policy to "improve the setting and quality of life, and the surroundings and living conditions of the peoples of the Community" and proposed a number of remedial actions and directives.<sup>180</sup> The First EAP expired in 1978, but has since been followed by the Second, Third, and Fourth EAPs.<sup>181</sup> Each succeeding program has been more developed and complex than its predecessors, as the emphasis of Community environmental policy has shifted from remedying existing environmental problems to preventing future problems actively. Under each successive program, the EC has assumed a more important role in environmental protection.<sup>182</sup>

Although few challenged the EC's capacity to legislate on environmental matters,<sup>183</sup> the actual legal basis for environmental legislation re-

176. See Hahn & Richards, *supra* note 4, at 421; Bryan Harris, *EEC Laws on Environmental Protection*, 137 *NEW L.J.* 1058, 1059 (1987).

177. See Diana Good, *1992 and the U.S. Manufacturing Industry: Harmonization of Product Standards, Product Liability and Environmental Law in 1992 THE CHANGING LEGAL LANDSCAPE FOR DOING BUSINESS IN EUROPE* 11, 49-62 (Walter W. Oberret ed., 1989); Hackett & Lewis, *supra* note 62, at 256.

178. See *infra* Sections VI(A) & (B).

179. 1973 O.J. (C 112) 1, 3.

180. *Id.* at 5.

181. The Second EAP was effective from 1978 to 1982, the Third EAP covered 1983 to 1987, and the Fourth EAP, currently in effect, extends from 1987 to 1992.

182. See Good, *supra* note 177, at 43-48; Meltzer, *supra* note 171, at 588-90.

183. The only real debate existed at the academic level. In practice, the capacity of the EC to legislate on environmental matters has been continuously supported by the

mained uncertain until the passage of the SEA in 1986.<sup>184</sup> The original EEC Treaty contains no references to the environment and presents no explicit basis for the formulation of environmental law.<sup>185</sup> Therefore, early environmental law had to be linked indirectly to the generally-worded economic bases set forth in articles 100 and 235 of the EEC Treaty.<sup>186</sup>

Article 100 permits the European Council to issue any directive required for the harmonization of Member State law to permit the proper functioning of the Common Market.<sup>187</sup> Pursuant to this article, the EC passed environmental statutes passed to harmonize Member States environmental laws, on the theory that divergent environmental standards might create trade barriers, stifle competition, and thus impair the functioning of the Common Market.<sup>188</sup> Some commentators originally viewed environmental law as a means to create a level playing field across Member States with only secondary benefits for environmental protection. This solely economic rationale behind article 100 limited its usefulness as a basis for environmental legislation.<sup>189</sup>

Even when environmental legislation could not be justified on economic or harmonization grounds, a catch-all provision in article 235 allowed the passage of certain environmental directives. Article 235 grants the Council broad powers to enact any measure "necessary to attain, in

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ECJ's decisions and by the statements and practices of the various Community institutions. Since all early environmental legislation was passed by the unanimous consent of all Member States, these laws have rarely been challenged by any state or party. See Dirk Vandermeersch, *The Single European Act and the Environmental Policy of the European Economic Community*, 12 *EURO. L. REV.* 407, 409-10 (1987).

184. The Single European Act ended this legal basis debate in 1987 by adding a new title to the EEC Treaty explicitly providing for environmental legislation under the Treaty. See *infra* Section VI(B).

185. REHBINDER & STEWART, *supra* note 9, at 15.

186. See Haagsma, *supra* note 12, at 319-23; REHBINDER & STEWART, *supra* note 9, at 16; Vandermeersch, *supra* note 183, at 409-12.

187. In relevant part, article 100 provides: "The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market." EEC TREATY art. 100.

188. See WINTER, *supra* note 17, at 136; Harris, *supra* note 177, at 1059. Originally, the article 100 requirement of harmonization based on existing law in the Member States was a limiting factor, preventing the EC from initiating legislation not previously existing at a national level. Over time, however, the EC adopted numerous environmental standards that did not previously exist in local Member State law.

189. REHBINDER & STEWART, *supra* note 9, at 21. At times, the official economic basis for these measures was tenuous at best. See Vandermeersch, *supra* note 183, at 410-11.

the course of the operation of the common market, one of the objectives of the Community," whenever the EEC Treaty fails to provide the necessary powers.<sup>190</sup> Still, this required some link with the common market, and the Community found it difficult to justify environmental policy devoid of any economic or market effect.<sup>191</sup> Thus, practical application of article 235 as the sole basis for environmental directives was uncommon.<sup>192</sup>

Despite the debate over the legitimacy of environmental directives under articles 100 and 235 and the need to link early environmental legislation with economic policy, the barriers to EC environmental policy collapsed over time. By the mid-1980s, the Council had virtually unlimited power to implement any environmental directive that it approved.<sup>193</sup> The passage of the SEA eliminated remaining doubts regarding the EC's authority to pass environmental legislation.

### B. *Effects of the Single European Act*

The SEA, passed in 1986 as an amendment to the EEC Treaty,<sup>194</sup> enlarged the Treaty's scope and introduced a number of changes

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190. Article 235 of the EEC Treaty reads in whole:

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

EEC TREATY art. 235.

191. Vandermeersch, *supra* note 183, at 411. Also, legislation under this article meant that environmental issues would have to be an objective of the EC, which was difficult to justify originally when no economic link existed. Owen Lomas, *Environmental Protection, Economic Conflict and the European Community*, 33 MCGILL L.J. 506, 511 (1988).

192. REHBINDER & STEWART, *supra* note 9, at 28.

193. Vandermeersch, *supra* note 183, at 408. This was especially true since all environmental legislation under these articles had to be passed by unanimous vote. While this unanimity requirement effectively made it unnecessary for any Member State to challenge any approved measure, Donald L. Morgan, *EEC Environmental Policy and the Free Movement of Goods: The Significance of the Legal Basis for Environmental Measures in THE EUROPEAN ECONOMIC COMMUNITY: PRODUCTS LIABILITY RULES AND ENVIRONMENTAL POLICY*, *supra* note 11, at 299, 302, it also effectively blocked the passage of any controversial or progressive environmental policy.

194. 1987 O.J. (L 169) 1. The SEA is the first and only amendment ever made to the EEC Treaty. It became effective on July 1, 1987. See generally Nicholas Forwood & Mark Clough, *The Single European Act and Free Market*, 11 EUR. L. REV. 38 (1986) (discussing the impact of the SEA on the EEC).

“designed to further the cause of European integration.”<sup>195</sup> Of particular importance in the environmental area was the addition of Title VII to the EEC Treaty,<sup>196</sup> which explicitly articulates and defines the goals of the Community to include protection of the environment and improvement of the quality of life for the people of the Community.<sup>197</sup> Additionally, the SEA amended the legislative process for environmental laws to permit easier passage in certain cases.<sup>198</sup> Some commentators, however, have noted that while the SEA opens the door to EC legislation specifically directed at protecting the environment, it may have a limiting effect on environmental legislation over time because it defines otherwise undefined boundaries and provides additional bases for procedural challenges to environmental legislation.<sup>199</sup>

Article 130r of Title VII begins by broadly defining the environmental objectives of the Community. These objectives include: 1) the preservation, protection, and improvement of the quality of the environment; 2) the protection of human health; and 3) the prudent and rational utilization of natural resources.<sup>200</sup> Article 130r(4) also directly authorizes the Community to take environmental action whenever these goals can be better attained at the Community level than at the level of the individual Member States.<sup>201</sup> Furthermore, article 130r defines the basic principles on which Community environmental action should be based: 1) “that preventive action should be taken”; 2) “that environmental damage should as a priority be rectified at the source”; and 3) “that the polluter should pay.”<sup>202</sup> Finally, article 130l lists the factors which the Commu-

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195. STEINER, *supra* note 5, at 4.

196. SEA Article 25 added Title VII.

197. WINTER, *supra* note 17, at 136-37. For a view that this expansion should not come as a surprise, see Michel Waelbroeck, *The Role of the Court of Justice in the Implementation of the European Act*, 11 MICH. J. INT'L L. 671, 687 (1990).

198. This easier process, which involves qualified majority voting on certain directives, see *supra* section V(A), actually is found outside of article VII in section 100a of the EEC Treaty.

199. See *infra* notes 208-10 and accompanying text.

200. EEC TREATY art. 130r(1). As to the scope of these objectives, see Vandermeersch, *supra* note 183, at 413-14.

201. EEC TREATY, art. 130r(4). This is known as the Subsidiarity Principle. See Vandermeersch, *supra* note 183, at 422-23; Meltzer, *supra* note 171, at 595-96. For a more general discussion of the subsidiary principle in EC debate, see Editorial Comment, *The Subsidiary Principle*, 27 COMMON MKT. L. REV. 181 (1990).

202. EEC TREATY art. 130r(2). This third principle, “that the polluter should pay,” differs significantly from the United States practice that all parties related to the environmental problem, including third party purchasers, facility operators, and landowners on toxic waste sites, may be held responsible. WINTER, *supra* note 17, at 136 n.5.

nity must consider in developing environmental policy including: (1) "available scientific and technical data;" (2) "environmental conditions in the various regions of the Community;" (3) "the potential benefits and costs of action or lack of action;" and (4) "the economic and social development of the Community as a whole and the balanced development of its regions."<sup>203</sup>

The other two articles that make up Title VII, articles 130s and 130t, set forth the explicit legislative basis for Community environmental law<sup>204</sup> and establish the Member States' freedom to maintain or introduce more stringent environmental measures than those adopted by the Community as a whole, as long as they remain compatible with the EEC Treaty.<sup>205</sup>

Article 130r(2), which requires that environmental considerations be made a component of all Community legislation, regardless of the area involved, may be even more important than the articles providing an explicit legal basis for environmental legislation.<sup>206</sup> This integration principle broadens the scope of environmental policy by making it a pervasive factor in all Community legislation.

The SEA also allows the Community to pass environmental legislation by a qualified majority vote,<sup>207</sup> using the cooperation procedure<sup>208</sup> set forth in article 100a. This article pertains to measures designed for approximation of Member State laws, regulations, and administrative actions that have the object of establishing or affecting the functioning of

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203. EEC TREATY art. 130r(3).

204. Article 130s of the EEC Treaty provides:

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide what action is to be taken by the Community.

The Council shall, under the conditions laid down in the preceding subparagraph, define those matters on which decisions are to be taken by a qualified majority.

*Id.* art. 130s.

Unless the Council explicitly finds that a decision in this area is to be passed by qualified majority vote, this article establishes the traditional consultation procedure, see *supra*, section V(A), and requires unanimous consent for any environmental legislation passed.

205. Article 130t of the EEC Treaty states "[t]he protective measures adopted in common pursuant to Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty." EEC TREATY art. 130t.

206. *Id.* art. 130r(2).

207. See *supra* section V(A).

208. See *supra* section V(A).

the internal market.<sup>209</sup> While the main goal of article 100a is to promote legislation that enhances "the establishment and functioning of the internal market," subparagraph 3 explicitly notes that environmental legislation may be based upon this article as well.<sup>210</sup> This section not only suggests this possibility, but specifically provides that the EC must "take as its base a high level of protection."<sup>211</sup> The extent to which environmental legislation may be based on article 100a, as opposed to the more direct basis found in article 130s, however, remains unclear.<sup>212</sup> If the ECJ approves the use of article 100a for environmental legislation, many commentators predict a vast increase in the use of qualified majority voting in this area appears likely.<sup>213</sup>

The ECJ's ruling is especially significant in that despite the obvious advantage of providing explicit justification for the EC's environmental policy, the SEA may have actually limited the Community's capacity to legislate in this area. The guidelines and procedural requirements prescribed in article 130r(3) may open the door for legal challenges to Community environmental legislation for failure to follow these procedural requirements and policy principles.<sup>214</sup> Furthermore, although the subsidiarity principle of article 130r(4) grants the EC authority to legislate when environmental objectives "can be attained better at the Community level," it expressly reserves residual jurisdiction to the Member States.<sup>215</sup>

209. Article 100a(1) provides:

By way of derogation from Article 100 and save where otherwise provided in this Treaty, . . . [t]he Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament . . . adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

210. This section states "[t]he Commission, in its proposals envisaged [under this article] concerning health, safety, environmental protection and consumer protection, will take as its base level a high level of protection." EEC TREATY art. 100a(3).

211. EEC TREATY art. 100a(3). Nowhere does the Treaty define the term "a high level of protection." See Vandermeersch, *supra* note 183, at 417.

212. See Leigh Hancher, *Energy and the Environment: Striking A Balance*, 26 COMMON MKT. L. REV. 475, 498-02 (1989).

213. See Morgan, *supra* note 193, at 316. This ruling makes the passage of these directives easier and may effectively end the use of article 130s. *Id.*

214. Under article 130r(3), the EC must, in preparing action relating to the environment, take account of available scientific and technical data, environmental conditions in various regions of the Community, the potential benefits or costs of action or lack of action, the economic and social development of the Community as a whole, and the balanced development of its regions. EEC TREATY art. 130r(3).

215. Meltzer, *supra* note 171, at 592. At least one author has declared that this residual jurisdiction is a step back compared to prior environmental policy. See

While prior legislative acts could be justified as required to enforce trade standards among Member States, new legislation based on article 130(5) must comply with the policies and processes set out therein. In certain cases, this means that those seeking to challenge the drafting procedure of this legislation will have stronger grounds for attack of environmental legislation under article 130(5).<sup>216</sup>

## VII. POINTS OF INFLUENCE

As the foregoing description of the EC legislative process indicates, interested parties have numerous opportunities to influence the legislative process and create favorable legislation. In accordance with the cooperative procedure established by the SEA, legislative proposals generally receive a great deal of discussion. Therefore, to "keep an eye on proposals as they work their way back and forth in the institutions often being discussed at different levels, by different individuals and different degrees of detail at the same time" becomes important<sup>217</sup> Because legislative meetings are often closed to the public and working drafts can be difficult to obtain, one of the most effective ways to keep up to speed is to befriend an appropriate "Eurocrat."<sup>218</sup>

Since the EC legislative process is dynamic, a proposal may be under simultaneous consideration by two or more institutions at any given time. Thus, interested parties may have to work with two separate proposals: (1) the official text proposed by the Commission and subject to the formal process set forth in the EEC Treaty; and (2) the unofficial text under consideration by the Council that, although lacking official status, has a strong impact on the Council's ultimate decisions.<sup>219</sup> Therefore, simultaneously coordinating lobbying efforts and considering the relevant institutions to approach is important.<sup>220</sup>

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Vandermeersch, *supra* note 183, at 422.

216. In the past, challenges to environmental legislation were limited basically to challenging the legal basis for Community action. In contrast, under the SEA, injured parties may challenge legislation as: (1) violating the principle of subsidiarity of article 130r(4); (2) failing to make the assessments required by article 130r(3); and (3) not abiding by the basic principles of article 130r(2). Steiner, *supra* note 5, at 7; Vandermeersch, *supra* note 183, at 428.

217. GARDNER, *supra* note 2, at 101 (quoting Paul Adamson, an EC parliamentary consultant); Ludolph, *supra* note 41, at 22. John Gardner's book, *Effective Lobbying in the European Community* (cited *supra* note 2) is an excellent recent book on lobbying in the EC.

218. See GARDNER, *supra* note 2, at 64.

219. Ludolph, *supra* note 41, at 24.

220. GARDNER, *supra* note 2, at 100; WINTER, *supra* note 17, at 52.

The Commission, with its power to draft legislation and to endorse Parliament's amendments for Council approval, has been described by several commentators as the main branch to target in order to track and influence EC legislation.<sup>221</sup> Primary responsibility for legislative proposals generally is assigned to the particular directorate for that subject area.<sup>222</sup> Interested parties should determine which DG of the Commission has jurisdiction over a given piece of legislation and become acquainted with the responsible commissioner and the *chef de cabinet*, or chief of staff.<sup>223</sup> Although appointments can be made to speak with the officials in person, letters or briefs addressed to the *chef de cabinet* may represent a more effective method of introducing a particular concern.<sup>224</sup> Also, the civil servant administrative staff might serve as a useful source of information and advice.<sup>225</sup> If the Commission has formed a working group on a particular proposal, determining its membership and targeting the members from states with sympathetic interests will be useful.<sup>226</sup> Furthermore, all commissioners have the power to veto proposals, regardless of their area of specialty.<sup>227</sup>

To influence the legislative process, interested parties should get an early input into the Commission to ensure that the text of the initial proposed draft legislation reflects their position favorably.<sup>228</sup> At the initial stage, the Commission actively seeks the views of parties likely to be affected.<sup>229</sup> Contact with the Commission also enables interested parties to influence the Commission's willingness to incorporate amendments proposed by Parliament.<sup>230</sup> Finally, interested parties may be able to assess the willingness of the Commission to accept text changes proposed by Member States. If the Commission endorses these changes, a proposal stands a better chance of adoption under the qualified majority voting

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221. See, e.g., GARDNER, *supra* note 2, at 69; Ludolph, *supra* note 41, at 22-24; Quintin, *supra* note 119, at 149.

222. In the case of environmental policy, this DG is Directorate XI, who covers the areas of the environment, nuclear safety, and civil protection.

223. GARDNER, *supra* note 2, at 70; WINTER, *supra* note 17, at 52.

224. WINTER, *supra* note 16, at 52-53. Making appointments with key Commission officials can be very difficult due to their heavy workloads. See GARDNER, *supra* note 2, at xix.

225. WINTER, *supra* note 17, at 53.

226. *Id.*

227. *Id.* This may be useful if a veto is a party's ultimate goal, and the party can convince one commissioner of the strength of its position. *Id.*

228. Ludolph, *supra* note 41, at 22; GARDNER, *supra* note 2, at 65-66.

229. WINTER, *supra* note 17, at 53.

230. See Ludolph, *supra* note 41, at 24.

procedure.<sup>231</sup>

Maintaining contact with the Council, which has the final say on all legislation also is important for interested parties. Parties must monitor the progress of legislation through the working groups.<sup>232</sup> The confidential nature of the Council's proceedings, however, may make it the most difficult institution to influence directly.<sup>233</sup> A less direct alternative may involve approaching selected Member State governments or authorities and trying to persuade them to adopt a particular position at some or all levels of Council consideration.<sup>234</sup> This indirect contact may occur in Brussels or in the Member States' capitals.<sup>235</sup> The contact may be effective if a Member State can be convinced that a proposed EC action will adversely affect one or more of its constituents.<sup>236</sup>

Although the Parliament lacks the Commission's or Council's influence over legislation, it represents a pertinent point of access to the legislative process. Parliament must be consulted during the drafting process of all new legislation, and it has the power to delay or impose other restraints on the legislative body.<sup>237</sup> Parliament's overall influence, however, will be determined by the Commission's and the Council's willingness to accept its proposals. Thus, interested parties must work to influence Parliament's efforts in a manner that considers the deliberations of the Council. This will ensure that Parliament's views will be acceptable to, and incorporated by, the Council.<sup>238</sup> In addition, if Parliament achieves a broad Community consensus through its committees and their respective *rapporteurs*, the Council and Commission will be reluctant to ignore this position.<sup>239</sup> Furthermore, Parliament may be persuaded to use its budgetary power to advance or block legislative proposals.<sup>240</sup>

The current Parliament may be more receptive to environmentalist causes than its predecessors. In the 1989 elections, the Green Party won

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231. *Id.*

232. *Id.* Extensive informal consideration of legislative proposals often occurs prior to the Commission's official unveiling of them. GARDNER, *supra* note 2, at 76.

233. WINTER, *supra* note 17, at 53.

234. GARDNER, *supra* note 2, at 75; WINTER, *supra* note 17, at 53. This could include the working group, COREPER, or the Council itself. WINTER, *supra* note 17, at 53.

235. WINTER, *supra* note 16, at 53.

236. *Id.*

237. *See supra* section III(C).

238. *See* Ludolph, *supra* note 41, at 24. Influencing Parliament can be difficult because many of its important meetings are closed to the public. Here, as elsewhere, reliable inside sources are crucial to successful lobbying. *See* GARDNER, *supra* note 2, at 64.

239. WINTER, *supra* note 17, at 53-54.

240. *Id.* at 54.

significant victories.<sup>241</sup> The Green momentum is causing the more mainstream parties, such as the Socialists, to align themselves with Green causes.<sup>242</sup>

Maintaining contact with the quasi-official bodies of the EC such as the European Environmental Bureau, which represents environmental quality interests and private-sector environmental groups, may also be useful for an interested party.<sup>243</sup> The Commission publishes a register that lists Community-wide interest groups consulted by the Commission on a regular basis.<sup>244</sup> Working with these groups represents an effective way to track EC developments and to influence proposals.<sup>245</sup>

Finally, the United States government might be a useful contact. Concerned that EC developments will create an economic "Fortress Europe," the United States government has taken an active role in monitoring and attempting to influence Community developments.<sup>246</sup> Congressional committees and other groups with direct interests in Community developments are particularly useful resources.<sup>247</sup>

If all else fails, influencing the implementation and enforcement of environmental directives at the Member States level may be possible once the directives have been adopted.<sup>248</sup> Although the Commission has significant power to require the implementation of directives by each

241. GARDNER, *supra* note 2, at 82, 88.

242. The Socialist Party has reportedly "placed environmental protection on its 'short' list of priority issues." *Id.* at 88.

243. WINTER, *supra* note 17, at 52, 54.

244. *Id.* at 54. This publication, *The Directory of Professional Organizations Before the European Community*, is available at the EEC offices in the United States and elsewhere or may be purchased from the EC sales agent Unipub at (301) 459-7666. The following is a brief list of important groups and the interests that they represent: Union of Industrial and Employers' Confederations of Europe (UNICE) (labor interests); the European Trade Union Confederation (ETUC) (labor interests); the European Bureau of Consumers Union (BEUC) (consumer interests); the European Round Table of Industrialists (ERT) (business interests) and the Conseil Européen des Fédérations de L'Industrie Chimique (CEFIC) (European chemical industry interests). See GARDNER, *supra* note 2, at 39-57.

245. WINTER, *supra* note 17, at 55.

246. *Id.*

247. *Id.* at 56 (listing congressional committees and agencies with a direct interest in the Communities 1992 program). These entities include the White House Economic Policy Committee, the Trade Policy Subcommittee of the United States Trade Representative 1992 Taskforce—of which one working group deals specifically with health and environmental issues—the Department of Commerce Office of European Community Affairs, the Department of State and its official United States Mission to the EC in Brussels, and the House Ways and Means and Senate Finance Committees. *Id.* at 57-58.

248. See GARDNER, *supra* note 2, at 101-02; Quintin, *supra* note 119, at 150-51.

Member State, leeway still exists to influence the content of the implementing regulations adopted by each Member State. Therefore, in areas that remain ambiguous after the adoption of a directive, Member States will have latitude to choose how best to implement the directive. Moreover, a point of access in the enforcement area might exist because some Member States are less concerned about the strict enforcement of certain regulations. In a given case, the limitation of a directive's impact on an individual corporation operating in a particular Member State may be possible. This level of last resort remains largely free from oversight by the Commission, which lacks both the resources and the authority necessary to attack lax enforcement of environmental directives.<sup>249</sup>

Finally, when seeking to affect the legislative process at any point, United States enterprises should not expect to be given the same reception accorded to their European counterparts.<sup>250</sup> Seeking alliances with similarly interested EC companies, Community-based trade groups, and industry federations can help avoid this problem.<sup>251</sup> A company also can seek to have its views presented through the United States government.<sup>252</sup> The more European the view presented, however, the more acceptable it will be to the parties listening.<sup>253</sup> Whenever possible, comments should emphasize existing national or Community policies expressing similar concerns or should stress the consonance of the views presented with the objectives of the internal market program.<sup>254</sup> This is especially true when going before the Commission, which functions to represent the interests of the Community as a whole.<sup>255</sup>

Foreign companies must recognize that lobbying is a relatively new feature of the EC legislative process and only now is becoming accepted.<sup>256</sup> The lobbying process undoubtedly will evolve and become more standardized as the Community begins to function as a whole.

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249. Possibly, the Commission can force compliance with a directive under the direct effect concept, as opposed to requiring implementation at the national level. This, however, is not common. See *supra* note 114.

250. WINTER, *supra* note 17, at 51.

251. *Id.* at 53.

252. *Id.* at 51.

253. Ludolph, *supra* note 41, at 22.

254. *Id.*

255. See WINTER, *supra* note 17, at 53.

256. Many Europeans will deny, however, that lobbying of the EC takes place in Brussels or the Member State capitals. GARDNER, *supra* note 2, at xv. The reason for the more recent recognition of lobbying is that, as new legislation is adopted, firms, and corporations throughout the community are affected by the sweeping changes being instituted. *Id.*

## VIII. CONCLUSION

Prerequisite to working with the environmental regulatory structure of the European Community is a knowledge of the process, players, and practical political realities that make up the legislative and enforcement apparatus. As in any political system, the legislation process for environmental laws involves myriad parties with different, overlapping, and conflicting agendas. The peculiar blend of federalism and national sovereignty in the EC renders the Community legislative process even more challenging. As the Community attempts to weave a uniform body of environmental laws and regulations for disparate peoples with unique situations, circumstances, and philosophies, the political process will grow in importance. Learning the Community legal structure is the first step toward securing a platform from which to participate in the legislative process as it shapes the environmental face of Europe. Becoming an effective participant in the EC regulatory arena requires familiarity with the anatomy of the rulemaking system before mastering the political subtleties and gaining access to the organs of power within the EC legislative establishment.