

Environmental Principles

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I. Introduction

Since 1987, the EC Treaty contains different categories of “environmental principles” which have partly been modified in the course of the different Treaty modifications since 1987¹. The Constitution maintains the current version of these principles (cf. Arts III-4, III-65, III-129). Mainly the following sorts of principles can be distinguished²:

- the “integration clause”³, Art. 6 EC Treaty⁴;
- objectives and purposes of environmental protection, Art. 174(1);
- the principles mentioned in Art. 174(2)⁵;
- the conditions held in Art. 174(3) which the EC should take into account when elaborating an environmental policy⁶.

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¹ Cf., as far as the main modifications are concerned, Epiney, A./Furrer, A., *Umweltschutz nach Maastricht. Ein Europa der drei Geschwindigkeiten?*, EuR 27 (1992), p. 369 et seq. As to the actual version of the principles cf. Epiney, A., *Umweltrecht in der EU*, Köln u.a. (Heymanns Verlag) 2nd edn 2005, p. 95 et seq.

² In this paper the question of the competence of the EC to adopt environmental legislation as a separate problem is not covered. Cf. as to this issue the paper of Peter Pagh (in this volume).

³ Cf. as to this clause Calliess, C., *Die neue Querschnittsklausel des Art. 6 ex 3c EGV als Instrument zur Umsetzung des Grundsatzes der Nachhaltigen Entwicklung*, DVBl 113 (1998), p. 559 et seq.; Dhondt, N., *Integration of Environmental Protection into other EC Policies. Legal Theory and Practice*, Groningen (Europa Law Publ.) 2003, p. 15 et seq.

⁴ Articles without further specification cited in this paper are those of the EC Treaty.

⁵ High level of protection (cf. especially as to this clause Schroeder, W., *Die Sicherung eines hohen Schutzniveaus für Gesundheits-, Umwelt- und Verbraucherschutz im europäischen Binnenmarkt*, DVBl. 117 (2002), p. 213 et seq.), precautionary and prevention principle (cf. especially to this issue Icard, P., *Le principe de précaution: exception à l'application du droit communautaire?*, RTDE (2002), p. 471 et seq.; Lübke-Wolff, G., *IVU-Richtlinie und Europäisches Vorsorgeprinzip*, NVwZ 17 (1998), p. 777 et seq.; Stokes, E.R., *Precautionary steps: the development of the precautionary principle in EU jurisprudence*, *Environmental Law & Management* 40 (2003), p. 8 et seq.; Calliess, C., *Zur Maßstabswirkung des Vorsorgeprinzips im Recht – Dargestellt am Beispiel der geplanten Reform des europäischen Chemikalienrechts durch das Weißbuch der EU-Kommission zur zukünftigen Chemikalienpolitik*, *VerwArch* 94 (2003), p. 389 et seq.; Ladeur, K.-H., *The Introduction of the Precautionary Principle into EU Law: a Pyrrhic Victory for Environmental and Public Health Law? Decision Making under Conditions of Complexity in Multi-Level Political Systems*, *CMLRev* 40 (2003), p. 1455 et seq.), polluter pays principle (cf. as to this issue Krämer, L., *Das Verursacherprinzip im Gemeinschaftsrecht. Zur Auslegung von Artikel 130r EWG-Vertrag*, *EuGRZ* 16 (1989), p. 353 et seq.) and principle of rectification of damage at source (cf. as to this principle Burgi, M., *Das Schutz- und Ursprungsprinzip im europäischen Umweltrecht*, *NuR* 17 (1995), p. 11 et seq.).

⁶ As to these criterias with further references Epiney, A., *Umweltrecht (op.cit.)*, p. 113 et seq.

Since their introduction to the Treaty, the legal character of these principles have been discussed mainly in the legal doctrine⁷; the jurisprudence in this matter is relatively rare⁸. Also Ludwig Krämer has actively and intensively participated in this debate⁹. The main question in this context is: To which extent can which legal consequences be deduced from (which of) these principles?

The purpose of the following paper is thus not to discuss once more the content of each principle, but to try to develop a legal concept of environmental principles in Community law, as far as their “directive character” for Community institutions is concerned (III.). On this basis, it will be possible to specify the legal implications of environmental principles which by now are still not very clear. The starting point for the development of such a concept is necessarily that, in principle, environmental principles can deploy legal effects (II.). The paper will be concluded with some prospective reflections (IV.).

II. The legally binding character of environmental principles

The question if and to which extent environmental principles in European Community law can (and should) deploy legal effects has been discussed very controversially. On the one hand, the legal character of the principles is (apparently) denied, mainly because of their vagueness which leads to the conclusion that it is the democratic legislator who has to specify and define environmental principles¹⁰. Others plead for the legally binding character of the

⁷ Cf. for example Winter, G., *Environmental Principles in Community Law*, in: Jans, J.H. (ed.) *The European Convention and the Future of European Environmental Law*, Groningen (Europa Law Publ.) 2003, p. 1 et seq.; de Sadeleer, N., *Environmental Principles*, Oxford (Oxford University Press) 2002; Calliess, C., Art. 6, Art. 174, in: Calliess, C./Ruffert, M. (eds.), *Kommentar zu EU-Vertrag und EG-Vertrag*, Neuwied (Luchterhand) 2nd edn 2002; Kahl, W., Art. 174, in: Streinz, R., (ed.), *EUV/EGV. Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*, München (C.H. Beck) 2003; Schröder, M., § 9, *Umweltschutz als Gemeinschaftsziel und Grundsätze des Umweltschutzes*, in: Rengeling, H.-W. (ed.), *Handbuch zum europäischen und deutschen Umweltrecht Vol. 1*, Köln u.a. (Heymanns Verlag) 2nd edn 2003; Jans, J.H./von der Heide, A.K., *Europäisches Umweltrecht*, Groningen (Europa Law Publ.) 2003, p. 18 et seq. Q.v. the contributions in Macrory, R. (ed.), *Principles of European Environmental Law*, Groningen (Europa Law Publishing) 2004, referring mainly to the principles in the different national legal orders.

⁸ Cf. nevertheless ECJ, Case C-284/95 *Safety Hitech Srl* (1998) E.C.R I-4301; ECJ, Cases C-175, 177/87 *Lirussi* (1999) E.C.R I-6881; ECJ, Case C-318/98 *Fornasar* (2000) E.C.R I-4785; CFI, Case T-13/99 *Pfizer* (2002) E.C.R II-3305; CFI, Case T-70/99 *Alpharma* (2002) E.C.R II-3495; ECJ, Case C-157/96 *Ministry of Agriculture, Fisheries and Food* (1998) E.C.R I-2211; ECJ, Case C-180/96 *Great Britain/Commission, BSE* (1998) ECR I-2265.

⁹ Cf. already Krämer, L., *Das Verursacherprinzip im Gemeinschaftsrecht. Zur Auslegung von Artikel 130r EWG-Vertrag*, EuGRZ 16 (1989), p. 353 et seq.; q.v. Krämer, L., *Grundlagen (Grundfragen) der EU-Umweltverfassung, Ziele, Kompetenzen, Durchführung*, in: Reich, N./Heine-Mernik, R., (eds.), *Umweltverfassung und nachhaltige Entwicklung in der Europäischen Union*, Baden-Baden (Nomos) 1997, p. 11 et seq.; Krämer, L., *Das „hohe Schutzniveau“ für die Umwelt im EG-Vertrag - Industrielle Norm oder politische Vorgabe?*, ZUR 9 (1997), p. 303 et seq.; Krämer, L., *EC Environmental Law*, London (Sweet & Maxwell) 5th edn 2003, p. 7 et seq.

¹⁰ Cf. Krämer, L., *Europäisches Umweltrecht in der Rechtsprechung des EuGH*, Wien (Verlag Oesterreich) 2002, p. 137 et seq.; cf. also Jans J.H./von der Heide A.K., *Europäisches Umweltrecht* (op.cit.), p. 18 et seq.

principles¹¹. However, if the different positions are analysed, their differences are in reality hardly perceptible. Thus, authors who deny the legal character of the principles concede that they constitute a “Leitmotiv” for environmental policy and interpretation of secondary legislation. The function of a “Leitmotiv” and “rule of interpretation” implicates a certain legal effect. On the other side, authors who defend the legal character of the principles (also) stress the vagueness of the principles and therefore the large discretion of Community institutions.

Thus, the real question seems not to be whether environmental principles have a legally binding character, but rather focuses on their legal signification.

As a matter of fact, in my view different considerations lead to the conclusion that, in principle, the legally binding character of environmental principles cannot be denied: Firstly, the introduction into the Treaty itself, which contains legally binding articles, pleads in favour of the legally binding character of environmental principles. Secondly, the vagueness of some principles alone is not sufficient to deny their legal effect: In the theory of law, a lot of “principles” are known which – in contrast to “rules” – do not allow or do not demand in each single case to formulate a precise solution or action to be undertaken; they are often rather (but sometimes not only¹²) open and require only the balancing of different interests. But this balancing has a legally binding character as well¹³. Also the ECJ as well now admits the legally binding character at least of some of the environmental principles of the EC Treaty¹⁴.

In this view, the purpose of the present paper becomes even clearer: On the one hand, the legal impact of the principles should be specified (as to their legal effects, not to their content in detail), on the other hand, and on this basis, a conceptual framework for these principles and their different categories of legal effects should be developed.

III. Legal effects of environmental principles

Every precision of the legal effects of environmental principles has to depart from the formulation in the Treaty which differs considerably. In my view, these differences also reflect different legal effects¹⁵. This consideration shows as well that, as a matter of fact, the legal character of environmental principles can hardly be defined in a “global approach” for all principles together; the legal effects have rather to be analysed in different ways for the different principles. This is not only true as far as the legal meaning as such is concerned, but also as to the implications for the European Legislator and the Member States.

¹¹ Cf. Calliess, C., Art. 174 (op.cit.), para. 43, 44; Kahl, W., Art. 174 (op.cit.), para., 64 et seq., with further references.

¹² Cf. III.

¹³ Nevertheless, a certain minimal precision of the principles is necessary because only under this condition legal effects, even with a wide discretionary power, are imaginable, cf. Beyerlin U./Maruhn, T., *Rechtsetzung und Rechtsdurchsetzung im Umweltvölkerrecht nach der Rio-Konferenz 1992*, Berlin (E. Schmidt) 1997, p. 22 et seq. This condition seems to be fulfilled as to most of the environmental principles in Community Law. Cf. in detail with further references Epiney, A., *Umweltrecht* (op.cit.), p. 95 et seq. Cf. specifically under III.

¹⁴ Cf. especially ECJ, Case C-284/95 *Safety Hitech Srl* (1998) E.C.R I-4301.

¹⁵ Mainly for this reason, the categorisation below somehow differs from the systematics developed by Winter, G. in: *European Convention* (op.cit.), p. 1 et seq., even if I share most of his conclusions.

The starting point for the existence of legal implications for Member States is the principle that Treaty principles – like fundamental rights in Community law – can also have effects for Member States in the sense that they have to observe these principles when applying Community law or when restricting Community guarantees¹⁶.

The perspective taken in this paper is not primarily whether the Community can act¹⁷ - the question of competence is therefore not treated here -, but rather the question as to which extent environmental principles limit the discretion of the Community legislator and of the Member States, either in formulating standards to be respected when legislating or in obliging Community institutions (and the Member States) to legislate in a certain way.

If it is true (as pointed out before¹⁸) that Treaty provisions are binding already due to the fact that they are laid down in the Treaty, it has on the other hand also to be stressed that the legal significance of the different Treaty provisions differ, this mainly depending on two factors:

- Firstly, the provision itself can limit its binding effect, for instance if an article does not oblige Community institutions to realise an objective, but only contains an obligation to try to do so.
- Secondly, the content of the provision or the range of the legal obligation can be formulated in a very broad way, so that Community institutions and/or Member States have a more or less large discretion. This discretion can refer to the objective to be obtained, or to the means which are to be employed in order to obtain a certain result, or to both of them. The wider the discretion, the less possible it becomes to formulate precise legal obligations. This aspect also has consequences as to the judicial control: To the extent to which legal obligations can be formulated – which presupposes a minimum of normative precision – the ECJ has (in the framework of the procedures foreseen in the EC Treaty) the possibility to exercise a judicial control.

As an example, the ruling of the ECJ in the Case 13/83 (common transport policy)¹⁹ can be cited: The Court held in this case that the omission to pursue a common transport policy cannot be an omission that the Court can ascertain pursuant to Art. 232 - contrary to the obligation to realise the freedom of services, which is precise enough. However, one cannot deduce from this judgement of the Court that the ECJ refuses the legal obligation of Community institutions (here the Council) to realise a common transport policy; it rather (and only) states that the obligation contained in Art. 71 cannot be “translated” into a precise measure which the Council should undertake, so that the ECJ cannot formulate the positive obligation resulting from Art. 71 in a precise way. The ECJ does thus not deny the existence of the legal obligation, but only the possibility to act in virtue of Art. 232. In other words, it is not the material existence of the obligation which is denied, but (only) a procedural condition; in the opinion of the Court, Art. 232 presupposes that the necessary positive action can be specified²⁰.

Consequently, it becomes clear that the legal implications of environmental principles cannot be discussed in an overall view treating all environmental principles in the same way. It rather makes sense to distinguish – depending on the range of their binding character and the open discretion – the different principles which can, however, be classified into three categories: “global objectives” (1.), obligations to “take into account” (2.) and obligations referring to the result (3.).

1. „Global objectives”

¹⁶ Cf. for this issue for instance Astrid Epiney, *Umgekehrte Diskriminierungen*, Köln u.a. (Heymanns Verlag) 1995, p. 125 et seq.

¹⁷ Winter speaks of the (important) „enabling function” of environmental principles in contrary to “directive functions”. Cf. Winter, G., in: *European Convention* (op.cit.), p. 1 et seq., at 5, 7.

¹⁸ II.

¹⁹ ECJ, Case 13/83 *Parliament/Council* (1985) E.C.R., 1513.

²⁰ Cf. to the issue of judicial control also the remarks under IV.

The first category of environmental principles („global objectives“) contain principles which define “real” obligations for Community institutions, but which are formulated in a rather imprecise way, so that the discretion of the institutions is very wide. In other words: “Global objectives” contain legal obligations, but the discretion is so wide that it is hardly and only in absolutely exceptional cases imaginable that a violation of those obligations really could be proven (by the ECJ). The following principles fall into this category:

a) Art. 174(1)

First of all, Art. 174(1) has to be cited: The main significance of this provision is surely that it determines - via Art. 175 - the range of Community competences, because Art. 175 enables the Community to act in order to contribute to the achievement of the objectives enumerated in Art. 174(1)²¹. However, this article also determines the exercise of Community action by giving it a certain orientation, so that it can be seen as a principle (or several principles)²². By taking a closer look at this provision, however, one can observe that it is hardly imaginable to show that this provision has not been respected:

- As far as the Community or/and its institutions are concerned, one has, firstly, to point out that – in respect of Community measures which are adopted – it is not really imaginable that a measure does not at all at least contribute to one of the objectives mentioned in Art. 174(1). If this exceptional case really would occur, the measure would not be in conformity with Community law already in virtue of Art. 5(3), which requires the proportionality of Community measures. Nevertheless, Art. 174(1) contains the principle that Community measures have to contribute to these objectives, even if its legal significance is very low (and in addition to this it barely has an autonomous meaning).

Secondly, one can deduce from Art. 174(1), in relation to Art. 3 lit. 1), that the Community and the institutions participating in the legislative procedure have an obligation to develop an environmental policy in the framework of the European Union and thus to adopt an entirety of legislative measures aiming at a coherent environmental policy within the European Union. But also this obligation is too undetermined: Based on this provision it is certainly not possible to deduce the obligation to adopt a certain measure. Furthermore, the legal significance of this obligation is limited to the principle of developing an environmental policy and adopting some legal measures, without

²¹ Cf. to this aspect Epiney, A., Division of Competences between Member States and the EC, in: Jans, J.H. (ed.) *The European Convention and the Future of European Environmental Law*, Groningen (Europa Law Publ.) 2003, p. 43 et seq.

²² Cf. as this aspect is concerned Winter, G., in: *European Convention* (op.cit.), p. 1 et seq., at 3.

further precision. It does not constitute an obligation which can be put forward in the procedure of Art. 232.

Thirdly, Art. 174(1) contains an obligation for the Community and the institutions participating in the legislative process to take the measures which are absolutely necessary to fulfil one of the tasks mentioned in Art. 174(1). Thus, if one of the goals listed in Art. 174(1) can, on Community level, only be achieved in a satisfactory way by an according Community action, an obligation arises for the organs participating in the legislative procedure to take the necessary measures; they are thus not free anymore whether to take action or not. However, these conditions must be given in the individual case and in connection with a particular goal cited in Art. 174(1)²³.

It is only on the basis of this interpretation that Art. 174(1) can virtually exercise its utmost effectiveness (effet utile): The outline of the goals and the tasks respectively of Community environmental law in the Treaty is surely based on – in addition to the mentioned limitation of the respective Community activities – the idea that their realisation is to be aimed at categorically, so that the desired goals which form the basis of the Community environmental law are to be drawn from the Treaty itself. Consequently, if the goals cited in Art. 174(1) are of a binding character, it can precisely not be left to the discretion of the Community or its organs respectively whether they want to realise these goals or not. The binding character of the goals of this rule thus implies an according obligation to act of the Community, which has to be put into effect with the measures at the Community's disposal²⁴.

However, Community institutions dispose of a wide range of discretion with respect to this obligation. Only in cases in which one of the tasks can undoubtedly not at all be attained without Community action, a violation seems to be possible.

It is interesting that also the ECJ seems to admit the principle that obligations for Community institutions can be deduced from Art. 174(1): In Case C-284/95²⁵, it stresses that Art. 174(1) does not always oblige the Community legislator also to protect the Environment in its entirety. Therefore, it is also possible to take (only) isolated measures in order to combat a specific problem. It appears to be sufficient if a certain measure contributes to the preservation and protection of the environment as well as the improvement of its quality. This presupposes that Art. 174(1) contains a legal obligation, even if the Court did not conclude a violation in the specific case.

- As far as the obligations of Member States are concerned, one cannot deduce from Art. 174(1) that they are obliged to develop and to carry out an own national policy in the field of environment. Member States only have the obligation to take the measures which are necessary in order to transpose and/or to make sure that Community law is effectively applied. There is no basis in Art. 174(1) which would allow the deduction that this provision is also addressed to Member States and obliges them to carry out

²³ Cf. in the same sense Winter, G., *Neuere Entwicklungen des Umweltrechts der EU*, AnwBl (2002), p. 57 et seq, at 78; Jans J.H./von der Heide A.K., *Europäisches Umweltrecht* (op.cit.), p. 26; Kahl, W., *Umweltprinzip und Gemeinschaftsrecht*, Heidelberg (C.F. Müller) 1993, p. 94; of another opinion Frenz, W., *Europäisches Umweltrecht*, München (C.H. Beck) 1997, para. 53.

²⁴ However, this obligation exists only under the mentioned strict conditions.

²⁵ ECJ, Case C-284/95 *Safety Hitech* (1998) E.C.R I-4301, para. 43 et seq.

their “own” national environmental policy²⁶. However, one can deduce from Art. 10 that the lack of national environmental policy may not have as a consequence that Community policy in the field of environment or some Community measures cannot be carried out in an effective manner.

b) Sustainable development

The principle of sustainable development does not figure as such as an autonomous environmental principle in the Treaty. It is, however, mentioned in Arts 2 and 6²⁷; in the latter in relation with the integration principle. One can deduce from this embodiment in the Treaty that sustainability has a legal significance within the framework of the Treaty²⁸, however mainly in the context of Art. 6, which will be treated below²⁹.

In this connection, however, some remarks in terms of the legal concept should be made, in stressing that it is not the purpose of this paper to enter into the complex debate on the legal meaning of sustainable development. But it has – once more³⁰ – to be emphasized that the objective to attain sustainable development can only have a legal significance if one limits the concept to environmental aspects, in the sense that it means that natural resources have to be protected and maintained in a long term perspective; and especially economic development has to respect this long term perspective by avoiding the destruction of natural resources with the effect that future generations can no longer benefit from these resources. If the concept is extended towards a three pillar concept including ecologic, economic and social development as autonomous goals under the “umbrella” of sustainability, the concept necessarily loses any legal signification since it becomes far too imprecise and thus unrecognisable; it is not

²⁶ Cf. also ECJ, Case C-379/92 *Peralta* (1994) E.C.R I-3453, para. 57, where the ECJ stresses that national law cannot be considered as contrary to Community law obligations only because it is not in conformity with the objectives formulated in Art. 174(1); this provision is limited to the definition of the general objectives of Community environmental policy.

²⁷ Cf. for this principle in Community Law Epiney, A., *Zum Konzept der Nachhaltigen Entwicklung in der Europäischen Union*, in: Lang, W./Hohmann, H./Epiney, A., *Das Konzept der Nachhaltigen Entwicklung. Völker- und europarechtliche Aspekte*, Bern/Zürich (Stämpfli/Schulthess) 1999, p. 43 et seq.; Frenz, W., *Nachhaltige Entwicklung im Europarecht. Theoretische Grundlagen und rechtliche Ausformung*, Baden-Baden (Nomos) 1999; Winter, G., in: *The European Convention* (op.cit.), p. 1 et seq., at 21 et seq.; especially referring to the practice of the institutions in the EU: Chaltiel, F., *L'Union Européenne et le développement durable*, RMCUE (2003), p. 24 et seq.

²⁸ Cf. also Winter, G., in: *European Convention* (op.cit.), p. 1 et seq., at 21.

²⁹ Cf. III.3.

³⁰ Cf. already Epiney, A., in: *Konzept der Nachhaltigen Entwicklung* (op.cit.), p. 43 et seq., at 52, 53; in detail Epiney A./Scheyli, M., *Strukturprinzipien des Umweltvölkerrechts*, Baden-Baden (Nomos) 1998, p. 76 et seq.; in the same sense Kahl, W., *Der Nachhaltigkeitsgrundsatz im System der Prinzipien des Umweltrechts*, in: Bauer, H./Czybulka, D./Kahl, W./Vosskuhle, A. (eds.), *Umwelt, Wirtschaft und Recht*, Tübingen (Mohr Siebeck) 2002, p. 111 et seq.; Caspar, J., *Klimaschutz und Verfassungsrecht*, in: Koch, H.-J./Caspar, J. (eds.), *Klimaschutz im Recht*, Baden-Baden (Nomos) 1997, p. 367 et seq., p. 381; Murswiek, D., „Nachhaltigkeit“ – Probleme der rechtlichen Umsetzung eines umweltpolitischen Leitbildes, NuR (2002), p. 641 et seq.; Winter, G., in: *European Convention* (op.cit.), p. 1 et seq., at 23; of another opinion (sustainability should fully include economic and social factors as separate goals) for instance Sibert, P., *Was bedeutet Nachhaltigkeit als Rechtsbegriff?*, NVwZ (2003), p. 1173 et seq.

possible to unite different goals, which are at least partly conflicting, into one single concept. This does, however, not mean that economic and social goals are not important; what is rejected here is just their uniting into one legal concept.

Even if one restricts the legal signification of the concept of sustainable development in that sense, it still remains very difficult if not impossible to clearly specify, in reference to concrete problems (for instance nuclear waste, contamination of ground water, disappearance of fauna and flora), under which circumstances the conditions of life of future generations will be attained in a way which is contradictory to the principle of sustainability. Legal practice does not allow the conclusion that certain concrete actions – because of their irremediable effects – are unlawful according to the application of the principle of sustainability. Therefore, the concept can – even if legally binding – only procure a guideline, a “principle”³¹ in the sense that the effects of actions or measures in the long term, and therefore for future generations, have to be avoided or at least reduced whenever possible.

As to the legal implications of Art. 2, this article is of course a legally binding one (as all the articles of the Treaty); however, no precise obligation for Community institutions (or Member States) can be deduced on the basis of this article³²: Therefore, the different tasks of the Community are formulated in a too broad manner, so that one cannot see exactly which obligations the Community has to fulfil; the discretion is even larger than in the framework of Art. 174(1). Thus, the legal implications of Art. 2 are mainly situated in its effects while interpreting other Treaty provisions.

c) Art. 174(2.1)

Finally, Art. 174(2.1) has to be mentioned in this context. This rule³³ provides that environmental policy has to be defined in a way that aims at a “high level” of environmental protection. However, a “high level” is not to be confused with “highest level”, which allows to take economic and political aspects into account. While assessing the importance of the different interests, the remaining general principles of Community environmental law are (also) to be considered.

If the obligation to a high level of protection is not to be rendered completely inefficient – which would be contradictory to the legally binding character of this commitment and also incompatible with the *effet utile* of this rule – it suggests itself to conclude from this obligation that the respective Community rules have to be put into relation with the protection level of national environment rules in states with a acknowledged high protection level (inside

³¹ Cf. also Krämer, L., *EC Environmental Law* (op.cit.), p. 8 et seq.

³² Cf. Streinz, R., Art. 2, para. 7 et seq., in: Streinz, R. (ed.), *EUV/EGV. Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*, München (C.H. Beck) 2003.

³³ See also Art. 95(3).

as well as outside the EU)³⁴: If the Community standard is clearly below the therewith set protection level, it is likely that a violation of this obligation can be affirmed. Furthermore, one could recur to the standards developed in international environmental law, which in general, however, do not go as far as the standard in most of the EU Member States. But also on the basis of this approach the Community legislator still has a large scope of discretion, also taking into account the different conditions in the various regions which also have to be considered³⁵, so that only in exceptional situations³⁶ it is imaginable that the disregard of the high protection standard could judicially be ascertained³⁶.

This large range of discretion explains why the ECJ has not (yet) stated that a Community measure is not in conformity with this exigence. But in Case C-284/95³⁷, the Court examines whether the Community legislator has not been in conformity with the exigence to aim at a high level of protection, what the Court, however, denies; amongst other things because the Community measure still goes beyond the international obligations. This latter argument is not really convincing because the high level of protection is a Community law notion; thus, the international standard is not necessarily a “high level” from the point of view of Community law. Still, in this ruling the ECJ admits the legally binding character of the obligation to aim at a high level of protection.

The wording of the Court seems to induce that the obligation to reach a high level of protection means not only that one has to aim at such a high level, but that one has to prove that, in fact, a high level has virtually been attained in the Community measure. Furthermore, the Court seems to admit that every measure should contain such a high level. Both aspects of interpretation are not evident, given the wording of Art. 174(2.1)³⁸. But considerations as to the effet utile and the wording of Art. 95(3) seem to confirm the approach of the Court: In Art. 95(3) every single measure is mentioned, and it does not seem coherent to interpret Art. 174(2.1) in another way. Furthermore, the expression “aiming at” (Art. 174(2.1)) should in my view be interpreted in the sense that it contains an obligation to formulate Community measures in a way that the high level of protection may be attained or approached. Thus, it is necessary that the final version of Community measures at least partly enables the identification of this high level. If one interprets this provision only in the sense that it does not necessarily have to find its reflection in the measure itself, it would have no effet utile at all.

34 Cf. Krämer, L., ZUR 9 (1997) (op.cit.), p. 303 et seq., at 305.

35 Cf. as regards this aspect, Epiney, A., Umweltrecht (op.cit.), p. 99 et seq.

36 Cf. also Krämer, L., ZUR 9 (1997) (op.cit.), p. 303 et seq., at 308, who in spite of the admitted legally binding character of the commitment to a high protection level assumes that this is “judicially de facto not controllable”. In the same sense Schroeder, W., Die Sicherung eines hohen Schutzniveaus für Gesundheits-, Umwelt- und Verbraucherschutz im europäischen Binnenmarkt, DVBl. 117 (2002), p. 213 et seq., at 220 et seq., who demands a densification of the judicial control by the ECJ.

37 ECJ, Case C-284/95 *Safety Hitech* (1998) E.C.R I-4301, para. 38 et seq.

38 Cit. Art. 174(2.1). Cf. also the doubts of Krämer, L., EC Environmental Law (op.cit.), p. 11.

However, it has to be admitted that, given the wide range of discretion, the exigence of a high level of protection can only provide a very broad framework for the Community's environmental Law.

In order to be complete, it may furthermore be said that one cannot deduce obligations for Member States from Art. 174(2.1) that go beyond their obligations to fulfil their commitment to transpose and effectively apply Community law.

d) Conclusion

Against this background, one can resume the legal significance of "global objectives" in the sense that they are on the one hand legally binding, but that they on the other hand open a wide range of discretion to Community institutions. Thus, it is theoretically imaginable that in an exceptional case the action or omission of Community institutions is not in conformity with these obligations, since situated even beyond the wide discretion. Practically, it is utmost improbable that this case will occur, so that the legal implications of these "global objectives" in fact approach non-binding guidelines. The most concrete of these "global objectives" is certainly the obligation to attain a high level of protection. Furthermore, one cannot – beyond the general obligation to fulfil Community law in transposing and applying it effectively³⁹ – deduce obligations for Member States from these principles.

2. *Obligations to „take into account“*

The next category of principles includes those which oblige Community institutions to elaborate Community environmental policy in a certain way, without including an obligation tending to the content of the measure itself. Such obligations figure in Art. 174(3): This provision obliges Community institutions to take into account, while elaborating its environmental policy, a certain number of factors (available scientific data, regional conditions, potential benefits and charges and economic and social development)⁴⁰. It does not contain preconditions for Community actions and/or their content, but refers merely to the basis serving to elaborate the different measures. This point of view is confirmed by the fact that the different factors mentioned in Art. 174(3) are not specified as to their level or exact signification, and as the relationship between at least some of these factors is concerned. Thus, the legal implications of these "obligations to take into account" are limited: They oblige Community institutions to consider these factors in the legislative procedure and also

³⁹ In this context, the principles may serve when interpreting Community law obligations.

⁴⁰ Cf. as to the content of these parameters Krämer, L., EC Environmental Law (op.cit.), p. 27 et seq.; Calliess, C., Art. 174 (op.cit.), para. 38 et seq.; Schröder, M., EUDUR (op.cit.), § 9, para. 51 et seq.; Kahl, W., Art. 174 (op.cit.), para. 98 et seq.

to take them into account in the finally adopted act, but the way of this taking into account is not specified, so that also in this context Community institutions dispose of a very large range of discretion.

This approach is also taken by the ECJ in Case C-284/95⁴¹, where the Court affirms the legally binding character of Art. 174(3), but on the other hand stresses that only very evident mistakes in the evaluation and the taking into account of the different factors can be acknowledged. A violation of the conditions contained in Art. 174(3) can thus only be considered if the criteria cited in this provision are either not taken into account at all, or if they – as a result - were left unconsidered in an unjustifiable way during the elaboration of environmental policy, so that it is already possible to speak of a incorrect, respectively arbitrary appreciation of values.

3. *Obligations referring to the result*

Arts 174(2.2) and 6 contain provisions which refer to the content and result of Community policy measures, but also deploy certain effects on Member States' environmental policy. The characteristics of these principles can be resumed in the sense that they are relatively – also in comparison with the “global objectives” – precise, so that it seems possible to formulate their content (a). Secondly, they refer to the content of Community measures (b). Against this background, the legal obligations resultant from the principles will be followed up in detail (c).

a) As to the degree of precision of Arts 174(2.2) and 6 EC Treaty

As already mentioned initially, the purpose of this contribution is not to discuss the contents of the environmental principles of Community law. Still, it can be held that the action principles in Art. 174(2.2) and the integration clause of Art. 6 are by far more accessible to precisions in their contents than the principles discussed under 1. and 2., so that they are a priori more suitable as action requirements especially for the Community organs, even though a certain, quite considerable scope of discretion remains. The importance of the contents of the “operational” aspects of the principles can be specified in the following hypothesis⁴²:

- The prevention and precautionary principle⁴³ particularly demand – besides the lowering of the threshold for the admissibility of Community action, an aspect which

⁴¹ ECJ, Case C-284/95 *Safety Hitech Srl* (1998) E.C.R I-4301, para. 43 et seq.

⁴² Cf. the references in the notes 3, 5.

⁴³ As to the question whether the two principles should be distinguished, with further references Epiney, A., *Umweltrecht* (op.cit.), p. 101, 102.

shall herewith not be dealt with in detail⁴⁴ – that (environmental) dangers are averted and (environmental) risks avoided or reduced.

- According to the principle of rectification of damage at source, environmental measures have to be applied - from a temporal and local point of view - as closely as possible to the source of environmental damage.
- The polluter-pays principle is a cost allocation principle which is applied in connection with “legal” as well as “illegal” environmental damages and also refers to the takeover of costs for the avoidance of possible or probable future environmental pollution.
- The integration clause (Art. 6) establishes an obligation to include environmental concerns while defining and executing other policies. Environmental concerns are particularly to be understood as the action principles cited in Art. 174(2.2), but also in Art. 174(1), (3). Furthermore, the consideration of environmental issues should lead to “the promotion of sustainable development”; by this means, the concept of sustainable development also receives a legal significance. Even though Art. 6 does not exactly define the manner of including environmental concerns – which surely results in a very broad scope of discretion – it must still be mentioned that the complete lack of such a consideration can by all means also be legally relevant.

b) Point of reference: definition of the contents of environmental measures

These observations also make clear that the named action principles do not primarily refer to the manner of establishing environmental measures, but to the content itself of such measures. In other words: They determine the “how” and partly also the “whether” of environmental measures, since they form their basis.

At this point, it may be questioned whether the principles – as far as the obligations of the Community are concerned – must be put into effect in connection with every single measure enacted or to be enacted by the Community, or whether the environmental policy or policies in other areas respectively are to be considered as points of reference in the sense that the entirety of Community measures should meet the requirements of the action principles from a global point of view. The wording of the relevant provisions is not completely clear as to this question and is anyhow not coherent: While Art. 174(2.2) states that the environmental policy of the Community is based on the action principles (which could speak in favour of a more comprehensive reference to “the” environmental policy), Art. 6 points out that the requirements of environmental protection are to be taken into account in connection with the “Community policies and measures” (which speaks in favour of the consideration of the integration clause, and therewith the environmental principles, for every single measure).

⁴⁴ Since this aspect refers to the „enabling function” of the action principles which shall be left aside in this context.

Anyhow, it would seem contradictory and hardly coherent to apply the integration clause within the frame of other Community policies while assuming that the environmental action principles have to be considered for every single measure, whereas within the scope of genuine environmental policy “only” environmental policy as a whole has to be consistent with the action principles. As a result, against the background of the whole purpose of the action principles, a differentiated view seems to be appropriate: The purpose of the action principles is to secure that - while solving different problems or pursuing different political aims, respectively – a set of precisely defined principles is respected and that the contents of the taken measures align with them. The realisation of this objective, however, would be endangered if the reference point of the action principles would just generally be “environmental policy”: Because the observance of the environmental principles can in each case only be ascertained for specific partial areas, so that the normatively comprehensible outlines of a reference point “environmental policy” would entirely disappear. Therewith, however, the action principles would not and could not be able to deploy any effective impact whatsoever. Against this background, it seems appropriate to categorically consider the single measures as reference points of the action principles. However, these are – where required – to be seen in connection with other measures, so that it seems absolutely possible to “compensate” the non-observance of one of the action principles in a certain Community legal act with rules in another legal act, whereas in this case the temporal aspect also plays an important role: Such a “compensation” is definitely only possible if the respective legal act becomes effective at the same time or if its coming into force is imminent; the action principles would hardly allow a “promise” as to uncertain occurrences.

Also the ECJ basically proceeds from this approach: In Case C-293/97⁴⁵, the ECJ examined the compatibility of the Directive 91/676⁴⁶ with the polluter-pays principle and the principle of rectification of damage at source (Art. 174(2) EC Treaty). Here the Court indeed applies a very generous examination standard, but is still likely to proceed from the assumption that the compatibility of the Directive - thus a single communitarian measure - with the named principles is concerned. In its judgment, the Court pointed out that the Directive didn't oppose to a national implementation in accordance with the named principles, so that no breach of the primary legal rules could be stated⁴⁷.

c) Legal implications /obligations

45 ECJ, Case C-293/97 *The Queen/ Secretary of State for the Environment et al.* (1999) E.C.R I-2603. Q.v. ECJ, Case C-180/96 *Great Britain/Commission* (1998) E.C.R I-2265, para. 90.

46 Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ 1991 L 375, p.1.

⁴⁷ As to this consideration cf. below c).

Both of the discussed aspects show that the action principles treated in this section deploy an obligatory effect. In the following, this effect shall be specified more closely; in doing so, it must be emphasized again⁴⁸ that this paper will be limited to the aspect whether and to which extent these principles determine Community action, whereas the aspect of the enabling of Community action will be omitted.

In this connection, the focus is primarily set on the obligations of the Community; however, as far as the obligations of the Member States are concerned, they must also always pay regard to the environmental principles when they implement or execute Community law. Arts 174 and 6 are indeed only addressed to the Community; but while implementing and executing Community law, the environmental action principles are – from a dogmatic point of view similar to the basic rights⁴⁹ - to be seen as a part of the Community law that is to be enforced. Thus, e.g. an implementation of a Directive which didn't respect one of the action principles would constitute a breach of the Community obligations⁵⁰. The jurisprudence of the ECJ also follows this approach, e.g. when it – while examining the compatibility of a national measure with secondary law – points out that in the respective national rules an objective is expressed which is consistent with the Community principle of rectification of damage at source⁵¹.

As to the obligatory effect for the Community or its organs respectively, two aspects can be distinguished:

- First of all, the question arises whether and to which extent the herewith discussed environmental action principles (can) result in genuine obligations to act in the sense that the Community or its organs respectively would be obliged to actively take certain measures. The question as to the existence of such a “genuine obligation to act” – which exists independently of already taken measures – of course depends on the issue concerning the content scope of the action principles in particular, which in this case could only be adumbrated. Nevertheless, it can be stated that such a genuine obligation to act would generally constitute an exceptional case: From a normative point of view, the action principles are still too undetermined in order to be able to deduce precise justiciable and definable obligations to act from them. This is absolutely valid for the principle of rectification of damage at source. As to the other action principles, an obligation to act can exceptionally be admitted, namely always when the essence of the respective principle would be affected in the case of inactivity. This would assumably be the case if a high danger of considerable damage or even destruction would threaten a significant environmental good (e.g. climate protection or landscape protection), and finally only unionwide measures would be able to provide relief, but none would be taken (precautionary principle)⁵². Or, however, in a certain policy area practically no measures are taken which are able to secure the comprehension of environmental issues, and this although a substantial environmental impact can be detected in the respective

⁴⁸ Cf. above I., III., in the beginning.

⁴⁹ Cf. ECJ, Case 5/88 *Wachauf* (1989) E.C.R 2609.

⁵⁰ Similar Winter, G., in: European Convention (op.cit.), p. 1 et seq., at 17; of another opinion Schröder, M., EUDUR (op.cit.), § 31, para. 12 et seq.

⁵¹ ECJ, Case C-422/92 *Commissioin v Germany* (1995) E.C.R I-1097, para. 43.

⁵² In this sense also Winter, G., AnWBl 2002 (op.cit.), p. 75 et seq., at 78.

policy. Within the Union, these prerequisites are likely to be fulfilled in the area of traffic policy; at least as far as road (freight) traffic is concerned⁵³.

However, in this connection it must be taken into account that under the named conditions a legal obligation is indeed violated; but inactivity statable by the ECJ (Art. 232) is regularly not likely to be given since the action which is to be taken is not sufficiently determined⁵⁴.

- Secondly, the action principles are in any case to be respected when the Community becomes active in legislating. In other words: If the Community decides to act, it has to respect the environmental action principles in doing so; consequently, within secondary law, the observance of the principles must be secured and their contents must be reflected. It is understood that also in this connection the Union organs have a considerable scope of discretion, so that a violation of this obligation can only be stated in the case of obvious disrespect of the environmental principles, if necessary with the additional consultation of other Community principles, especially such as the requirement of equality or the principle of proportionality.

The manner of violation of action principles can occur in different ways; essentially two categories are imaginable: On the one hand, a breach of the principles themselves by the positive definition of contents of the legal act; on the other hand, the incompleteness of the provision, thus the omission of certain aspects. Furthermore, the decisiveness of the action principles – in connection with the principle of proportionality – presupposes a prohibition of compromising environmental issues in a disproportionate manner by Community measures (in other policy areas).

Consequently, and in spite of the remaining margin of discretion, the named action principles – also in connection with other principles – are still supposedly open to a certain concretion. However, the jurisprudence of the ECJ seems to apply far too generous examination standards:

First of all, the repeatedly cited decision in Case C-284/95⁵⁵ can be pointed out: At this occasion, the ECJ stated among other things that the prohibition only of HCFC⁵⁶ in the Reg. 3093/94 – which serves to protect the ozone layer – did not violate the comprehensive protection targets contained in Art. 174(1) EC Treaty only because the halons – which threaten the ozone layer at least to the same extent – were not prohibited at the same time. Because, while treating a particular protection problem, the Community legislator is not obliged to at the same time always enact all further measures which serve to the protection of the environment in its entirety; thus, particular aspects may be regulated. However, these considerations may be - as to the

⁵³ Cf. in detail Epiney A./Gruber R., *Verkehrspolitik und Umweltschutz in der Europäischen Union*, Fribourg (Universitätsverl.) 1997.

⁵⁴ Cf. also the remarks below IV.

⁵⁵ ECJ, Case C-284/95 *Safety Hitech Srl* (1998) E.C.R I-4301.

⁵⁶ Chlorofluorocarbons.

reasoning in this generality – subject to doubt, e.g. when the ECJ assumes that only one from two substances, which are at least equal in their harmfulness for the ozone layer, may be forbidden: In this case one would at least have had to examine whether the targeted protection can still effectively be guaranteed at all. This aspect is namely absolutely relevant within the scope of the objective of Art. 174 EC Treaty. Furthermore – and this is of particular importance within this context – the question could have been raised whether the precautionary principle did not play a role in this connection: Namely, provided that halons constitute a threat to the ozone layer, one could at least wonder whether the precautionary principle in connection with the principles of equality and proportionality does not also demand a restriction of use of this substance. Because, if only one of two substances, which are both comparably harmful to the protected good, is forbidden, a precautionary obligation to act – and therewith the enactment of a prohibition – ought to be sufficiently determinable in concreto for the substance so far exempted from the prohibition, taking the precautionary principle and the principle of proportionality and equality into account (except if there are important differences between the two substances).

Furthermore, Case C-293/97⁵⁷ must be pointed out: this case concerned among other things the compatibility of the Directive 91/676⁵⁸ with the principle of rectification of damage at source and the polluter-pays principle (Art. 174(2) EC Treaty). The ECJ applied a very generous examination standard also in this judgment: It contented itself – as already briefly mentioned – with the consideration that the Directive did not oppose to a national implementation in accordance with the named principles; thus, a breach of the primary legislation requirements could not be stated. Obviously, the Treaty requirements are considered to be fulfilled if an implementation conformable to primary Community legislation is possible, so that the Community legislator is not obliged to itself actively work towards the realisation of the mentioned principles. But in such a generality this is not convincing, already against the background that the action principles ought to form the basis of Community measures; for this purpose it can hardly be sufficient that the formulation of the Community regulations does not (actively) render the realisation of the action principles impossible. It would have rather seemed well-grounded to consult the equality principle – this with regard to the equal treatment of all sources of nitrate (which were concerned in this case). Anyhow, this approach is at least likely to imply - in the sense of the effective realisation of the Treaty requirements – an obligation of the Member States to protect the named Treaty principles while implementing.

57 ECJ, Case C-293/97 *The Queen v Secretary of State for the Environment et al.* (1999) E.C.R I-2603. Q.v. ECJ, Case C-180/96 *Great Britain v Commission* (1998) E.C.R I-2265, para. 90.

58 Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ 1991 L 375, p.1.

For both kinds of obligations the question arises as to how it can be determined from a methodical point of view whether the essence of the action principles is affected or infringed, respectively. It should be appropriate to proceed in two steps:

- In a first step, the (legal) field in which the respective principle is to be put into effect must be defined. In other words, this regards the point of reference of the examination as to the question whether the respective principle is infringed. This point of reference can turn out to be diverse depending on the particular field, especially as far as the obligatory effect is concerned.
- In a second step, the question must be asked whether the essence of the principles (which was just adumbrated above) – whereas this, as already mentioned, basically comes into consideration for the precautionary and the polluter-pays principle as well as for the integration clause – is actually affected, which must be answered in relation to the respective concrete problem.

However, the normative significance of the action principles is likely to be overestimated if one generally wanted to deduce from them some sort of “more than ever-conclusion”, in the sense that one departs from the enabling function of the action principles and then defines a respectively milder variant as the essence of the action principles, for instance in the sense that if the improvement of the environment is possible, it is in any case obligatory to avoid its deterioration, so that according measures would have to be taken⁵⁹. Because, on the one hand, even just the result of such a conclusion can hardly really be predicted, and a certain randomness would be inherent. On the other hand, and above all, the normative significance and denseness of the “obligations to act” ascertained due to this approach is supposedly vague, so that they are only effectively applicable in exceptional cases (as e.g. the precaution against danger). Against this background, while defining the content of the essence of the action principles, it seems more convincing to depart from their declarative content outlined above and to determine it in reference to the concrete question in each individual case. This would also imply that the essence is variable depending on the point of reference applied in the examination.

- d) *Résumé*: some general principles as to the legal implications of “obligations referring to the result”

If one, against this background, tries to specify the directive effect of the action principles for the Community legislator, basically – i.e. independently of the concrete declarative content of the principles which, however, of course play a role in the examination of the individual case – the following principles can be formulated in the form of hypothesis:

⁵⁹ In this sense Winter G., *Constitutionalizing Environmental Protection in the European Union*, YEEL, Oxford (Oxford University Press) 2nd vol. 2002, p. 67 et seq., at 76.

- From the action principles one can gather obligations to a positive action as well as obligations to observe their requirements as regards content while enacting secondary legal acts, whereas the granted scope of discretion turns out to be quite wide indeed.
- The action principles are basically to be taken into account for individual measures or in connection with particular problems, respectively, whereas the context can be included where appropriate.
- As far as contents are concerned, the exact obligatory effect of course depends on the precise content scope of the principles. But from a general point of view, the following can be stated:

A certain essence is to be extracted from the action principles, which limits the scope of discretion of the Community legislator. Hereby, the following ought to be included: the defence against danger within the frame of the precautionary principle, the principle of a comprehension in one way or another of environmental issues in the frame of other policies relevant to the environment (e.g. traffic) within the scope of the integration clause, or the prohibition of imposing the costs of environmental burdens on non-polluters within the framework of the polluter-pays principle.

The action principles do not prevent the Community legislator from gradually and isolatedly approaching particular environmental problems and subjecting them to a regulation. Thus, individual aspects can be subjected “isolatedly” to a regulation.

However, the principles of proportionality and equality are to be respected by all means. Therefore, the effects of such isolated protective measures on other environmental goods must be taken into account; for instance, it would most likely not be in accordance with the principle of proportionality if a certain measure lead to noticeable disturbances of other environmental subjects of protection. In this respect, the interactions and consequences of environmental measures are, in this case, very well to be considered in a larger context. The principle of equality can especially become relevant as to the question which aspects are subjected to a regulation.

The question, whether and to which extent these requirements have to be observed for individual measures, can of course only be answered on the basis of an in-depth analysis of every particular field of law or the different pertinent provisions, respectively. Anyhow, even just at a superficial glance the impression arises that in this regard deficits can indeed be noted in several areas: Thus, in any case an exhaustive investigation would be required as to the question whether and to which extent the protection of soil, air and waters from plant emissions can in fact effectively be secured by the approach chosen in the so-called IPPC-Directive⁶⁰, and whether and to which extent the Directive therewith takes the precautionary

⁶⁰ Council Directive 96/61/EC concerning integrated pollution prevention and control, OJ 1996 L 257, p. 26.

principle into account⁶¹. Furthermore, at least in the area of road traffic, the requirements of the integration clause are most likely not met⁶².

IV. Summary conclusion

Altogether, the observations have therefore shown that the environmental principles – in spite of their obligatory character given in any case – cannot be lumped together as far as their exact legal effect is concerned. Against the background of their content scope and precision one must rather distinguish between different categories of principles, which allows to formulate their legal implications more precisely. Finally, a legally relevant character can primarily be attributed to the environmental action principles of Art. 174(2.2), as well as to the integration clause. Even though – as pointed out – here a considerable scope of discretion is accorded to the Community institutions, it must still be stated that a sort of minimum standard can be drawn from these principles, which must be taken into account on the level of the obligation to a positive action as well as on the level of the manner of shaping secondary legislation.

The legal practice of the ECJ is still very scarce in this area, and has the tendency to grant the Community legislator a too wide scope of discretion.

For the rest, it remains to be said that the manner in which the legal protection provided for by the Treaty renders the effective implementation of these principles possible, is only insufficient:

- The application for annulment (Art. 230) is only available against enacted Community law, whereas it must be proven that the chosen shaping of secondary legislation infringes the environmental principles. Thus, as far as the observance of the principles in the framework of the already enacted legislation is put into question, this instrument becomes applicable, even though – as mentioned – the ECJ could apply somewhat stricter criteria in terms of the discretion of the legislator; and especially the interactions between the action principles and other principles – in particular such as the principles of equality and proportionality – could be taken into account to a larger extent. Anyhow, it remains to be considered that the application for annulment is always insufficient when – a frequent case – the environmental principles do not permit the conclusion of nullity of a concrete act, but rather the incompleteness of the provisions is questioned.
- However, at least on the basis of current jurisprudence, there is no adequate procedure to assert the (mere) inactivity of the Community legislator: Art. 232 (action for failure to act) is not applicable, due to the mere fact that such a judgement presupposes that the measures which ought to be taken can be sufficiently specified, which, however, is

⁶¹ In the affirmative for instance Lütke-Wolff, NVwZ 1998 (op.cit.), p. 777 et seq.

⁶² In detail Epiney A./Gruber R., Verkehrspolitik und Umweltschutz in der Europäischen Union (op.cit.).

regularly not given in the case of violation of environmental principles due to inactivity. In this respect, the current interpretation of Art. 232 by the ECJ leads to a gap in the system of legal protection, since Community legislator obligations formulated in a rather general manner cannot be invoked in court. Against this background, a modification of jurisprudence would be desirable: It would be possible, for example, to distinguish between two manners of identification of inactivity on the part of the Union organs: Those, for which the contents of the necessary measure are already relatively specified, and on the other hand such which rather concern the determination of the breach of general provisions, whereas the manner of complying with them is left to the Community legislator's scope of discretion (within the frame of the provisions set by the Treaty). The fact that this would not be incompatible with the Community system of legal protection is proven by Art. 226: Within the framework of the infringement procedure, the ECJ can also ascertain an infringement of Community obligations formulated in a rather general manner; the Member States would then have to find a remedy, whereas they can be granted a certain scope of discretion. In other words, one could imagine an interpretation of Art. 232 which is rather directed towards an instrument for the assertion of the breach of treaty obligations due to the Union organs' inactivity.