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Determination of the Level of Environmental Protection and the Proportionality of Environmental Measures in Community Law

1. Formulation of problem

Under international law, every state has the freedom to choose such level of protection of its citizens and environment as is deemed appropriate. The desired level of protection may differ widely from country to country. This can also be clearly seen in the European Union, where, in respect of a high level of environmental measures, more environment-friendly member states have often had to overcome the opposition of those member states which care less about environmental protection. The latter have often been able to block or at least 'cushion' or postpone the adoption of such measures. While priorities regarding the environment are different even among European states, the situation is far more serious throughout the rest of the world, where the attention of developing countries often does not reach environmental problems at all because they have to focus their efforts too much on economic and social issues.*[1] Within the framework of the WTO, developing countries have continuously expressed their concern of being discriminated by the pressure to adopt the high level of environmental protection applied in the developed countries. In my opinion, Estonia, too, tends to belong to the group of those countries where economic and social considerations are clearly prioritised, at least in practice.

In many candidate states of the European Union, the pre-referendum debates have involved the question of to what extent the state would, as a member of the European Union, retain its right to determine the level of

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protection of its citizens and environment. In other words, there is the problem of whether a European Union member state can enact and apply environmental measures which are stricter or softer than those laid down in Community directives.

The research question of this article is to find out the extent of freedom of European Union member states in determining the level of protection. In connection with the above-mentioned principal question, I shall also explore what is a high level of environmental protection and how to evaluate the proportionality of environmental protection measures.

2. Determination of the level of protection

2.1. High level of protection

Article 2 of the Treaty establishing the European Community provides that the Community shall have as its task, to promote a high level of protection and of the quality of the environment.[*2] Almost the same formulation has been used in article 3 (3) of the Draft Treaty establishing a Constitution for Europe[*3]: the Union shall work for the sustainable development of Europe and aiming at a high level of protection and improvement of the quality of the environment. The same is also repeated in article 174 (2) of the Treaty establishing the European Community: Community policy on the environment shall aim at a high level of protection. Hence, the European Union has an aim of not only protecting the environment but achieving a high level of that.

This raises the question of whether and how the member states are and will be affected by the provisions of the EC Treaty and the future Constitution which regulate the high level of protection. L. Krämer states categorically that the high level of protection must be accomplished by the Community as a whole, and not through national measures.[*4] That statement cannot be agreed to. In order to resolve the problem, we must once more take a look at the provisions of the EC Treaty. Article 10 lays down the so-called principle of loyality: 'Member States shall [...] facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'[*5] Thus a member state must actively contribute to the achievement of a high level of environmental protection and select and apply the necessary and appropriate means to that end. In the author's opinion, that principle applies not only to the implementation of the European Union environmental harmonisation measures (directives) but also to that sector of environmental protection which is uninfluenced by European Union law.

It is not easy to answer the question of what is a high level of environmental protection. In literature, it has been stated that this probably means the level of the 'environment-friendly' member states like Sweden, Denmark, Finland, Austria and Germany.[*6] In general, the author agrees to that position and considers it necessary to add that under article 95 (7) of the EC Treaty, such member states can also contribute to improving the 'level' of harmonisation measures. Namely, article 95 of the EC Treaty provides for those derogations when a member state may introduce and apply environmental requirements which are higher than the harmonisation measures. The above-mentioned article 95 (7) provides that when 'pursuant to paragraph 6, a member state is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure'. In explanation, this means that the Commission must consider whether to raise the level of harmonisation measures and establish environmental requirements which are stricter than the existing ones.

The author is of the opinion that there are still even more indicators of a high level of environmental protection. I consider these to be primarily the application of the precautionary principle and the principle of integration.

The fact that a high level of protection requires the application of the precautionary principle has also been found by the Court of First Instance in *Artegodan v. Commission*.[*7] The company Artegodan had a licence to manufacture medicinal products containing amfepramone. On 9 March 2000, the European Commission

[2] High level is characteristic not only of environmental protection but also of other spheres of policies like health protection, food safety and consumer protection. See B. Harris. Food Safety in the United States and the European Union: Sequel to a Case Study. – Risk, Health, Safety & Environment 2000/11, Fall, pp. 334–335.

[3] Available at: http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf.

[4] L. Krämer. EC Environmental Law. London: Sweet and Maxwell 2003, p. 11.

[5] Article 5 (2) of the Draft Treaty establishing a Constitution for Europe repeats, almost word by word, the text of the Treaty establishing the European Community.

[6] L. Krämer (Note 4), p. 11.

[7] Artegodan GmbH v. Commission, Case T-74/00, paragraph 183. Available at: http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&nomusuel=Artegodan&resmax=100.

adopted three Decisions to prohibit that substance on the basis of the opinion of a number of scientists and doctors that under certain circumstances, medicinal products containing that substance could pose a potential risk to health. The company contested those Decisions, relying on the principle of proportionality. In this point, I would like to highlight the following sections of the court's judgment. First, the court pointed out that the precautionary principle should be applied not only to achieve a high level of environmental protection but also to ensure a high level of health and consumer safety. Thus the court pointed out that in order to achieve a high level of protection, the precautionary principle must be applied and, also, uncertain risks must be prevented.[*8]

The principle of integration has been laid down in article 6 of the Treaty establishing the European Community[*9]:

> 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities [...], in particular with a view to promoting sustainable development.'

Article 37[*10] of the Charter of Fundamental Rights of the European Union also contains the requirement that:

> 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'[*11]

The requirement to integrate environmental considerations has been regarded by many as the most important environmental provision in the EC Treaty.[*12] I cannot agree more and in my opinion, article 6 of the EC Treaty together with article 37 of the Charter of Fundamental Rights provide an absolutely new meaning to the protection of the environment in the European Union. This means that there are now no more spheres of politics (and, hence, law) where environmental requirements could be disregarded. For all such spheres, protection of the environment will become an essential goal, not as earlier, when caring for the environment was considered to be the duty of only the institutions directly responsible for environmental matters.[*13] By means of the principle of integration, environmental considerations are making their way into almost all fields of human activity. Such a tendency has been sometimes referred to as 'ecological modernisation', based on the idea that economic and social development must not and need not be a cause of environmental damage. Rather, economic and social development can, under certain circumstances, improve the quality of the environment.[*14]

Thus it can be stated in summary that a high level of environmental protection is indicated by the adoption of control measures against not only the well-determined risks but also against those concealed by uncertainty and that considerations of environmental protection are taken into account for all activities and decisions that may have a substantial impact on the environment.

2.2. Determination of the level of protection in the European Union

In several cases, the European Court of Justice has had to examine the level of protection chosen by member states. The so-called *Case of Danish Bottles*[*15] is probably the most important one in that field. In that case, there was the problem of whether environmental protection measures applied by Denmark were in accordance with the EC Treaty. Under Danish national law, soft drinks and beer could be sold only in reusable containers. There was also an additional requirement that the containers used must be approved by the Danish National Agency for the Protection of the Environment. Thirty types of containers were acceptable. Volume restrictions had been imposed on the sale of drinks in unapproved containers. The Court of Justice

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8 *Ibid.*

9 The principle of integration was introduced into the Treaty in 1987 by the Single European Act. See also L. Krämer. E.C. Treaty and Environmental Law. Sweet & Maxwell 1998, p. 71.

10 About that article, see also F. Ermacora. The Right to a Clean Environment in the Constitution of the European Union. – The European Convention and the Future of European Environmental Law. J. Jans (ed.). Groningen: Europa Law Publishing 2003, pp. 29–42.

11 Exactly the same formulation is repeated in article II-37 of the Draft Treaty establishing a Constitution for Europe.

12 See J. Jans. European Environmental Law. Kluwer Law International 1999, p. 25.

13 See M. Faure. The Harmonisation, Codification and Integration of Environmental Law: A Search for Definitions. – European Environmental Law Review, June 2000, p. 178.

14 See J. Hertin, F. Berkhout. Ecological Modernisation and EU Environmental Policy Integration. pp. 2–3. Available at: http://www.au.dk/da/sam/cesam/Ecolo.HertinBerkhout.pdf.

15 Case 302/86 Commission v. Denmark. – European Court Review 1988, 4607.

found that such regulation served, in all aspects, a legitimate aim — to ensure an efficient protection of the environment — but the excessive limiting of the permitted container types and volumes was disproportionate. The Court of Justice was of the opinion that the environment could be sufficiently protected without establishing such restrictions.

There have been many comments on the Case of Danish Bottles, and there has been reference to its controversial aspects. G. van Calster has pointed out the court's position that in principle, the Court of Justice cannot evaluate the level of protection chosen by a member state.*[16] On the other hand, the same author refers to the position of Advocate-General Slynn with regard to the Case of Danish Bottles that a member state cannot choose an excessive and unreasonable level of protection.*[17] It seems that also the Court of Justice agreed to the Advocate-General's position. The author does not agree with J. Langer, who finds that the Court of Justice did not assess the level of protection but, rather, only the means applied to achieve that level.*[18] In my opinion, the European Court of Justice actually stated that the ambitious level of environmental protection (full avoidance of beverage container waste by means of reusing the containers) chosen by Denmark was excessive. It is still true that, in the author's opinion, the Court of Justice disguised such evaluation beneath an assessment of proportionality.

In the Case of Danish Bottles, there was a situation in which there were (at that time) no harmonisation measures on the Community level, and Danish law had to be evaluated on the basis of article 30 of the EC Treaty, which provides for derogations from the restrictions on exports and imports laid down in articles 28 and 29. According to article 30, '[t]he provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of [...] the protection of health and life of humans, animals or plants; [...]. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

Let me leave aside other conditions and restrictions regarding the application of article 30 and touch only on the aspects relating to the application of the precautionary principle, as this is one of the main characteristics of a high level of environmental protection. Since, in the opinion of the European Court of Justice, the precautionary principle has become a fundamental principle in the entire Community law, that principle must also be applied to the establishment of restrictions on trade under article 30 of the EC Treaty. If no harmonisation measures exist, a member state has the right to choose a higher level of protection and to rely on the precautionary principle in that respect. Reference to conclusive evidence is no longer required to prove that the measures are justified for the protection of health and life of humans, animals or plants. At the same time, certain evidence is still necessary to justify protective measures because the member state has the burden to prove the necessity of the measures.*[19]

At this point, I would like to mention two potential problems that may arise in this context.

First, in the Case of Danish Bottles, the Court of Justice pointed out that the level of protection applied by a member state may not be too high. The danger of that is still not a particularly serious one and may occur only if the level of protection chosen by a member state is drastically different from that used by the other member states. This is also alleviated by the fact that the importance of environmental protection among the objectives of the European Union has been increasing continuously and restrictions on free movement of goods, motivated by a high level of protection, can be justified more easily than before.

The other problem is related to the fact that the Court of Justice has provided a quite typical restrictive interpretation of the derogations laid down in article 30. This means that the measures must be aimed directly and immediately at the protection of health and life of humans, animals and plants.*[20] However, very many environmental protection measures provide indirect protection of humans, plants and animals. This includes economic means, various permission procedures, regulations relating to environmental impact assessment and many others. Those measures are aimed at protecting the environment in general and they have an indirect influence on humans, plants and animals. Such measures affecting the trade do hence not fit under article 30. Consequently, the application of article 30 is limited to the direct protection of the benefits specified, *expressis verbis*, in that article.*[21] However, it is important that such protection also covers the hazards concealed by scientific uncertainty.

Another event in which a member state maintains an option to determine the level of protection is related to the rule of reason. The birth of that doctrine was contributed to by the restrictions of the application of

[16] See G. van Calster. International and EU Trade Law. The Environmental Challenge. Cameron May 2001, p. 404.

[17] *Ibid.*

[18] See J. Langer. Danish Bottles and Austrian Animal Transport: The Continuing Story of Free Movement, Environmental Protection and Proportionality. – Review of EC and International Environmental Law 2000 (9) 2, p. 188.

[19] See J. Jans. European Environmental Law. – Europa Law Publishing 2000, p. 242.

[20] See L. Krämer. EC Environmental Law. Sweet & Maxwell 2000, p. 76.

[21] See also L. Coleman. The European Union: An Appropriate Model for a Precautionary Approach? – Seattle University Law Review 2002, pp. 621–622.

article 30. The doctrine in question means that a member state may impose restrictions on trade if this is necessary to implement certain obligatory requirements. Undoubtedly, protection of the environment is among such requirements. In that event, the measures need not be limited to the direct protection of humans, animals and plants but they may also be aimed at complex protection of the entire environment.

If harmonisation measures exist in the field of environmental protection, the situation of choosing a level of protection is different from that of applying article 30 of the EC Treaty and the rule of reason. Such situations are regulated by articles 176 and 95 of the Treaty.

Article 176 addresses the relation between Community law and national law in the case of the environmental quality directives, which are not aimed at determining the environmental parameters of products (and hence, ensuring their free movement) but, rather, at the establishment of harmonised objectives relating to the quality of the environment within the Community. Under that article, a member state may apply only more stringent measures in comparison with the harmonisation measures. Thus the nature of the measure must remain the same; only the extent of the measure can be changed with a view to achieving higher stringency.[*22] For example, this can result in a situation in which harmonisation measures are introduced to control the emission of certain substances and for that purpose, an emission limit is established permitting the emission of the substance only in small quantities. In such situation, a member state may fully prohibit the emission of that substance but it would not be possible to prohibit the use of such substance in industrial production. The latter would no longer be a more stringent but, rather, essentially another measure. I am of the opinion that as regards the environmental quality directives, member states are quite free to establish a high level of protection. At the same time it is obvious that the introduction of stricter measures must be in accordance with the provisions of the Treaty and, in particular, those concerning free movement of goods and undistorted competition. Stricter measures applied by a member state may not be disproportionate or discriminatory. Stricter measures must also be in accordance with the secondary legislation, *i.e*. directives and regulations, of the European Community. Hence, a member state may not apply more stringent measures if this is contrary to the objective and meaning of a directive, particularly if the harmonisation measures serve to fully harmonise the laws of the member states.

Article 95 provides for a member state's options to apply more stringent measures motivated by environmental protection in the case of harmonisation measures which ensure the functioning of the common market (*i.e*. the so-called environmental product directives). This problem is a very delicate one because those measures are primarily aimed at creating conditions for free movement of goods rather than protecting the environment. It is therefore natural that in this respect, a member state is significantly more restricted in its capacity to enact its own provisions. That article was substantially modified by the Treaty of Amsterdam, allowing the member states not only to maintain their national regulation but also to establish new provisions.

The following paragraphs are not focused on all conditions of maintaining or introducing national provisions but only on those relating to the application of the precautionary principle to ensure a high level of environmental protection.

As regards the maintenance of applicable national provisions, the basis is provided by article 95 (4) of the EC Treaty: '[i]f, after the adoption by the Council or by the Commission of a harmonisation measure, a member state deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.' For permitting the maintenance of national provisions, the member state's obligation to prove the necessity of maintaining such provisions is the most important criterion. I agree with L. Krämer, who finds that even in this point, we can only talk about stricter and not softer measures.[*23] As for this case, I find that the member state can successfully refer to the precautionary principle in order to maintain a level of protection higher than the harmonisation measures. Thus, in order to prove the above-mentioned necessity, the use of conclusive scientific evidence is not required. At the same time, account must be taken of the general obligations of the member states under the Treaty, which preclude any unreasonable, discriminatory and disproportionate measures.

The introduction of new national provisions is regulated by article 95 (5) of the EC Treaty: 'if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.'

It is important to note that the right to introduce national provisions after the adoption of harmonisation measures is applicable only in fields relating to the protection of the environment or the working environment. There was no such restriction in article 95 (4), which also referred to other major needs referred to in

[22] See L. Krämer (Note 4), pp. 117–118.

[23] *Ibid*., pp. 124–125.

article 30 which, in addition to the protection of health and life of humans, animals or plants, may also be related to the protection of morality, public order or security or even national treasures of artistic, historical or archaeological value or industrial or commercial property. A full range of problems arises with regard to interpretation of article 95 (5). For example, it would be logical to ask whether the protection of human health is included in the sphere of the protection of the environment within the meaning of article 95 (5). In article 174 (1), which provides the objectives of the environmental law of the European Community, reference has been made to protecting human health. Unfortunately, an explicit position of Community institutions (including the Court of Justice) in this matter has not yet been expressed. The author of this article is, anyhow, in favour of the interpretation whereby health protection is included in the sphere of environmental protection under article 95 (5).

In addition to the above, the following principles are also relevant to the application of article 95 (5). New national provisions must be based on new scientific information. Thus theories or facts proving the existence of a previously unknown risk must be demonstrated. At the same time, presentation of conclusive evidence about the existence of a certain hazard and its source mechanisms is not required pursuant to the precautionary principle. In my opinion, observance of the precautionary principle means in this case that controversial and incomplete information referring to the possibility of a substantial risk does not preclude but — on the contrary — serves as a basis for the adoption of additional measures.

However, choosing a higher level of protection under article 95 (5) of the EC Treaty will not be as simple as it may seem at first sight. Namely, in order to introduce new national provisions (which are more stringent than the harmonisation measures), this must result from a problem specific to that member state. Such criterion is quite incomprehensible: how can one product (and this is specifically a case of product regulation) or technology cause problems specific to one member state and not to others. This could probably mean a situation in which the level of pollution is already high in one member state, or a certain peculiarity in natural or climatic conditions. As a matter of fact, this is just a mistake in the Estonian translation of the Treaty establishing the European Community. The Estonian translation uses the word *ainuomane* (literally meaning 'exclusive to', 'specific only to' — translator's note) while the word 'specific' is used in the English text. The question is whether this should really involve a problem occurring exclusively in one member state. In view of the cross-border impacts accompanying environmental pollution and the global nature of the environment, such interpretation would obviously be unjustified. That opinion is supported by the aspect that it would not be correct to equalise the English word 'specific' with the word exclusive and then translate it to the Estonian language as *ainuomane.* The position that this is not the case of a problem exclusive to but, rather, particularly specific to one state is also held by J. Jans.[*24]

The palliation achieved by reference to a translation mistake will still not resolve the entire problem. In the author's opinion, even the fulfilment of the criterion 'specific' will remain problematic in the case of the product directives.

In summary, it has to be stated that a member state can seek a higher level of environmental protection by reference to the precautionary principle even if harmonisation measures exist. At the same time, that option is restricted by the general principles of EC law, which do not permit any unreasonable, disproportionate and discriminatory environmental measures even if such measures are justified by the possibility of potentially substantial damage concealed beneath scientific uncertainty. There are also more specific restrictions like that of 'specific to' with regard to the introduction of new national provisions if environmental product directives exist.

3. Proportionality of environmental measures

3.1. General

The proportionality of measures is one of the major problems as regards environmental and health risks. According to K. von Moltke, the main dispute in the discussion held in Germany with regard to the precautionary principle is also related specifically to the proportionality of measures.[*25]

In Community law, the principle of proportionality has become a fundamental principle which cannot be disregarded even in the choice of precautionary measures.[*26] In this point, the logic of applying the principle

[24] See J. Jans. European Environmental Law. Groningen: Europa Law Publishing 2000, p. 125.

[25] See K. von Moltke. The Relationship Between Policy, Science, Technology and Law in the Implementation of the Precautionary Principle. – The Precautionary Principle and International Law. The Challenge of Implementation. D. Freestone, E. Hey (eds.). Kluwer Law International 1996, p. 102.

[26] For more about the principle of proportionality in EC law, see T. Tridimas. The General Principles of EC Law. Oxford University Press 1999, pp. 89–162.

of proportionality, which is of European origin, must be taken into consideration. Indeed, the author of this article has noticed that the European Court of Justice has imbibed the principle of proportionality mainly from German law. That opinion is shared by other authors.*[27]

According to the interpretation of both the European Court of Justice and the Estonian Supreme Court, a three-stage test must be passed in assessing the proportionality of a measure:

– the measure must be suitable for achieving the objective;
– the measure must be necessary in the sense that no other, less burdensome measures exist;
– the measure may not be disproportionate in the narrower sense.*[28]

The application of the above-described tests is problematic in environment-related cases, which are framed by uncertainty. The assessment of proportionality is always connected with weighing. But how can one weigh such potential (although not clearly predictable) damage to human health or environment which is disguised by a larger or smaller degree of uncertainty? The following paragraphs are focused on the analysis of specifically those problems.

3.2. Approach to the proportionality of precautionary environmental protection measures in the European Union

It has been stated in the Communication from the European Commission on the precautionary principle that 'measures based on the precautionary principle must not be disproportionate to the desired level of protection and must not aim at zero risk'.*[29]

In the author's opinion, one of the most important messages of that Communication is that the proportionality of precautionary environmental measures means a comparison with the desired level of protection. Measures cannot be used to accomplish anything more or less than is necessary to achieve such a level.*[30]

It has also been pointed out in the Commission's Communication that the cost-benefit analysis related to the adoption of precautionary measures cannot be reduced to only an economic analysis; non-economic considerations must also be taken into account. One of those considerations is the reaction of the society. The Communication points out that the society may be ready to pay a disproportionately high cost to protect such prioritised values like the environment and human health.*[31]

Thus, in order to assess the proportionality of precautionary measures, not only the benefits and costs but also values must be weighed. The Commission's Communication refers to appropriate case law of the European Court of Justice and affirms that in all those cases when human health is at stake, health is of undoubtedly greater weight than economic considerations.*[32] It is very significant that health has been prioritised so clearly and categorically. In environmental protection, this means that in all those spheres related to the protection of health, the same hierarchy of priorities will apply. Most spheres of environmental protection — protection of ambient air, protection of water environment, control of dangerous chemicals, nuclear safety, control of risks relating to waste (and, in particular, hazardous waste), noise regulation, etc. — are directly or indirectly related to the protection of human health. Therefore, rather radical application of environmental measures should be expected in those spheres. Even the strictest measure — the prohibition of a substance or an activity — should not be precluded.

As regards the proportionality of environmental measures, there have been two important interrelated cases: *Alpharma* (T-70/99)*[33] and *Pfizer* (T-13/99).*[34] Both were about the prohibition of certain antibiotics in

[27] See R. Thomas. Legitimate Expectations and Proportionality in Administrative Law. Hart Publishing 2000, p. 78.

[28] In Judgment on Case No. III-4/1-1/02 of the Constitutional Review Chamber of the Estonian Supreme Court, the court has held that: 'Conformity with the principle of proportionality is examined by the Review Chamber in three stages: first the suitability of the measure, then the necessity of the measure and, if necessary, proportionality in the narrower sense, *i.e*. the reasonableness.' – RT III 2002, 8, 74 (in Estonian).

[29] Communication from the Commission on the precautionary principle. – COM (2000) 1 final, p. 4. Available at: http://europa.eu.int/comm/dgs/health_consumer/library/pub/pub07_en.pdf.

[30] See also N. McNelis. EU Communication on the Precautionary Principle. – Journal of International Economic Law 2000, p. 547.

[31] See the Communication from the Commission on the precautionary principle (Note 29), pp. 19–20.

[32] *Ibid.*, p. 20.

[33] Case T-70/99 Alpharma Inc. v. Council. Available at: http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&nomusuel=Alpharma&resmax=100.

[34] Case T-13/99 Pfizer Animal Health SA v. Council, paragraph 471. Available at: http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&nomusuel=Pfizer&resmax=100.

treatment of animals.*[35] In resolving the application of Alpharma, a manufacturer of antibiotics, Alpharma's assertions about the disproportionateness of the regulation prohibiting the antibiotics were dismissed by the Court of First Instance specifically on the basis of the argument that the protection of health is an overwhelmingly important objective and value. The court was of the position that 'the protection of human health, may justify adverse consequences, and even substantial adverse consequences, for certain traders [...]. The protection of public health, which the contested regulation is intended to guarantee, must take precedence over economic considerations'.*[36]

The same was repeated by the court in the case of another pharmaceutical manufacturer, Pfizer.*[37] In addition to those cases, the court has held to the same hierarchy of priorities in *Artegodan v. Commission.*[38] In that case, the court noted that:

> 'It follows that the precautionary principle can be defined as a general principle of Community law [*sic!*] requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving **precedence** to the requirements related to the protection of those interests over economic interests [*sic!*].'*[39]

That cannot be said any more explicitly. The court considers precaution to be a fundamental principle of EC law, and the application of this principle is not an option but an obligation of the competent authorities. The application of that principle means clear preference for the environment, health and safety over economic considerations. At the same time, it should be kept in mind that competent authorities will retain their right to choose appropriate precautionary measures. The greater are the potential risk and the related uncertainty and concern of the population, the more radical measures should be expected from the competent authorities.

On the basis of all discussed above, I am making the conclusion that the priority of the protection of health and life over economic considerations applies not only to obvious hazards but also to risks disguised by scientific uncertainty. At the same time it must be kept in mind that the precautionary principle is not absolutely extrascientific. In the event of risks concealed by uncertainty, believable (although not conclusive) evidence about the possibility of damage must also be available. This evidence will not have to be specific; usually (at least in cases relating to human health), general scientific theories referring to the possibility of damage will be sufficient.

The following paragraphs are focused on the so-called pure environmental protection, which is not directly related to human health or life. As a rule, that sector refers to the classic nature protection or, in modern terms, the protection of biological diversity. In the rule of law, nature protection is carried out by means of restrictions on the 'holiest' — the real property. The protection of biological diversity usually means that certain territories are placed under protection, establishing prohibitions and restrictions on property and economic activities there. This makes nature protection the most complicated sector of environmental protection in legal context. Practice has shown that often, territories placed under protection are a ground for competition between different interests. Most often, the interests of environmental protection conflict with economic interests.

What kind of arguments (interests, values) relating to nature protection could be such as to successfully compete with economic arguments and social arguments, which are often connected with economic ones? In principle, the aspect that damage to the environment is not absolutely certain and the extent of potential damage is uncertain should not by itself be a reason to give precedence to economic interests. On the contrary, environmental interests should be given even more substantiality because of the uncertainty. As regards the assessment of the proportionality of nature-protection measures and the related weighing, the following arguments should be pointed out.

First of all, I think that the most important argument is irreversibility, which often accompanies damage to biological diversity. Naturally, we cannot take that argument to the height of absurdity and state that any environmental impact will have irreversible consequences. Felling a tree is irreversible and the release of even a minute quantity of a bioaccumulating substance into the environment is irreversible. In the author's opinion, we should begin primarily from the potential consequences that such irreversible intervention in the nature may bring about and on the impact that this may have on the condition and survival of habitats, species and the ecosystem. It goes without saying that such assessment is, again, related to uncertainty. If different interests are weighed in a situation of uncertainty, environmental interests should be given preference over economic interests.

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[35] About the circumstances of the case, see also: H. Veinla. Inimõigused ja ettevaatusprintsiibil põhinev keskkonnakaitse (Human Rights and Environmental Protection based on the Precautionary Principle). – Juridica 2003/9, p. 605.

[36] Case T-70/99 (Note 33).

[37] Case T- 13/99 (Note 34).

[38] Case T-74/00 Artegodan GmbH v. Council, paragraph 183. Available at: http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&nomusuel=Artegodan&resmax=100.

[39] *Ibid.*, paragraph 184.

It must be emphasised that taking uncertainty into consideration in favour of the environment (*in dubio pro natura*) is also reasonable in economic terms. For example, the French economist N. Treich has expressed the opinion that in the event of potentially irreversible consequences disguised by scientific uncertainty, a way back must always be left open. If there is uncertainty, natural areas may even be left undeveloped, waiting for new knowledge regarding the consequences. Hence non-development has its value, called the 'option value' by N. Treich.*[40] I would call it the value accumulated in the options that are still left. This value has most definitely a significant weight.

At this point, it is quite appropriate to move to the next argument, namely the interests of future generations.

The concept of sustainable development is based on the consideration of the interests of future generations (regarded by some as 'the rights of future generations') in making decisions today. The selection of environmental protection measures and assessment of their proportionality must be based on the long perspective. Changes going on in ecosystems are often of a long-term nature and may take an unpredictable course. At the same time it is known that such factors affecting biological diversity as forest cutting, drainage of swamps and wetlands or decreases in the diversity of species may have an impact on the habitability of the entire planet. That impact is often disguised by uncertainty. Due to the long-term nature of the impacts on biological diversity, nature protection is often underrated and economic exploitation of natural areas is preferred because of the obviousness of the benefits related thereto. N. Treich has asserted justifiedly that today's decisions and actions will influence the well-being of future generations not only by potentially narrowing their freedom of choice but also by leaving the burden of potential negative changes on their shoulders.*[41] I think that respect for future generations will certainly add much weight to the interests related with the protection of the environment.

Another aspect adding weight to nature protection is the great deal of attention paid to that sector of environmental protection in the European Union. Community nature protection directives have also attempted to solve the question of the relation between nature protection and the economic and social spheres.

The most important case of the European Court of Justice regarding the relation between biological diversity and the development of the economic (and social) sphere is the so-called *Lappel Bank Case.*[*42] The Port of Sheerness in the County of Kent is an economically successful undertaking and an important employer. The port is adjacent to Lappel Bank, which, according to ornithological criteria, is an important bird area. Under the Natura 2000 (92/43) directive, that area should have been given the status of a special protection area. At the same time, the Port of Sheerness was planning its extension and the only possible direction for that was Lappel Bank. On the basis of economic and social (employment) considerations, the United Kingdom did not establish a special protection area there. The aspect that development of the port was important from the viewpoint of the entire region and thus an important component of regional development served as an additional argument. The European Court of Justice sharply rejected all arguments of the United Kingdom and held that non-establishment of a special protection area in an important bird area can be justified only on exceptional grounds, being grounds corresponding to a general interest superior to the general interest represented by the ecological objective of the directive.*[43] At the same time the court held that economic requirements could not on any view (*sic!*) be superior to ecological interests that must be taken into account in designating special protection areas.*[44]

Such position of the Court of Justice is absolutely explicit, unambiguous and categorical, and further comments on that are therefore not needed. Hence, special protection areas can be delimited only on the basis of ecological criteria. Economic considerations must be left aside for good.[45]

4. Conclusions

The environmental policy of the European Union is aimed at achieving a high level of protecting and improving the quality of the environment. According to the principle of loyalty, a European Union member state must actively contribute to the achievement of that objective. In the opinion of the author of this article, a high level of environmental protection means, in addition to orientation towards the level of the

[40] N. Treich. What is the Economic Meaning of the Precautionary Principle? – The Geneva Papers on Risk and Insurance 2001 (26) 3, p. 337.

[41] *Ibid.*

[42] Case C-44/95 Regina v. Secretary of State for the Environment. Available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61995J0044.

[43] *Ibid.*, paragraph 29.

[44] *Ibid.*, paragraph 30.

[45] See also L. Krämer. Casebook on EU Environmental Law. Hart Publishing 2002, pp. 314–320.

more 'environment-friendly' member states, the application of the precautionary principle and the principle of integration.

The author also reached the conclusion that on the basis of the Treaty establishing the European Community and the positions repeatedly stated by the European Court of Justice, each member state has the right to determine the level of the protection of health and the environment. At the same time, member states must not disregard certain restrictive aspects. The most general framework for determining the level of environmental protection in a member state is provided by the European Union objective to ensure a high level of protection. Besides that general instruction, more specific conditions must also be taken into account by member states. In the event of a sector with no harmonisation measures, the member state must observe the restrictive requirements of article 30 of the EC Treaty as well as the doctrine of the rule of reason. Even if there are no harmonisation measures, a member state must, as a general rule, be able to justify the chosen level of protection. At the same time, on the basis of the precautionary principle, even initial and incomplete scientific evidence referring to the possibility of a hazard will be sufficient. However, the *Case of Danish Bottles* demonstrated that a member state cannot choose a too ambitious level of protection creating unreasonable and disproportionate barriers to the free movement of goods.

If harmonisation measures exist, the options of a member state to pursue a level of protection which is higher than that provided in those measures is clearly more limited, particularly in the case of environmental product directives. With this regard, the member state must be capable of proving that stricter environmental requirements are justified and, in certain cases, based on new scientific evidence, or even justified because of a problem specific to that member state. Indeed, I am of the position that the precautionary principle will also apply to the proving of such circumstances and even incomplete evidence will be sufficient.

However, in no case may the measures be a disguised restriction on trade or a vehicle of arbitrary discrimination. There have been cases in which environmental protection was used only as a cover for the achievement of other, mainly economic goals.

Precautionary measures accordant to the level of environmental and health protection chosen on the basis of the above criteria must be proportional. The assessment of the proportionality of the measures is mainly based on the (high) level of protection. The position of the Community institutions and, in particular, the Court of Justice has been explicit enough: the protection of health and, in certain cases, the so-called pure environmental protection (protection without a direct impact on human health) will take, in the event of a conflict, precedence over economic considerations and the related social considerations. Adaptation to such system of values is a big challenge for Estonia, requiring substantial changes in the habitual way of thinking, which, as a rule, puts social and economic considerations first.