Legal Basis of EC Environmental Legislation

Commission of the European Communities v *Council of the European Communities*
(Case C-155/91)

(European Court of Justice, O. Due, President, C. N. Kakouris, M. Zuleeg, J. L. Murray (Presidents of Chambers), G. F. Mancini, R. Joliet, F. A. Schickwiler, J. C. Moitinho de Almeida, F. Grevisse, M. Diez de Velasco, and P. J. G. Kapteyn (Judges), 17 March 1993)

The Judgment

The following judgment was given:

1 Par requête déposée au greffe de la Cour le 11 juin 1991, la Commission des Communautés européennes a, en vertu de l'article 173, premier alinéa, du traité CEE, demandé l'annulation de la directive 91/156/CEE du Conseil, du 18 mars 1991, modifiant la directive 75/442/CEE relative aux déchets (JO L 78, p. 32).

2 La directive 75/442 a instauré au niveau communautaire une réglementation relative á l'élimination des déchets. Pour tenir compte de l'expérience acquise lors de l'application de cette directive par les Etats membres, la Commission a présenté, le 16 août 1988, une proposition aux fins d'adoption de la directive 91/156, précitée. La base juridique retenue par la Commission était l'article 100 A du traité. Le Conseil a toutefois dégagé une orientation commune tendant á fonder la future directive sur l'article 130 S du traité. Malgré les objections formulées par le Parlement européen qui, consulté par le Conseil conformément á l'article 130 S, avait jugé appropriée la base juridique retenue par la Commission, le Conseil a arrêté la directive en cause sur la base de l'article 130 S du traité.

3 A l'appui de son recours, la Commission invoque un seul moyen tiré du choix erroné de la base juridique de la directive en cause. Le Parlement, intervenu au soutien des conclusions de la Commission, demande en outre l'annulation de l'article 18 de la directive.

4 Pour un plus ample exposé des faits du litige, du déroulement de la procédure ainsi que des moyens et arguments des parties, il est renvoyé au rapport d'audience. Ces éléments du dossier ne sont repris ci-dessous que dans la mesure nécessaire au raisonnement de la Cour.

Sur la base juridique

5 La Commission, soutenue par le Parlement européen, fait valoir en substance que la directive a pour objet tant la protection de l'environnement que l'établissement et le fonctionnement du marché intérieur. Dés lors, celle-ci aurait dû être adoptée uniquement sur la base de l'article 100 A du traité, tout comme la directive relative aux déchets de l'industrie de dioxyde de titane qui a fait l'objet de l'arrêt du 11 juin 1991, Commission/Conseil (C-300/89, Rec p 2867, ci-aprés 'arrêt dioxyde de titane').

6 Le Conseil soutient en revanche que l'article 130 S du traité constitue la base juridique correcte de la directive 91/156 qui, eu égard á son but et son contenu, vise essentiellement la protection de la santé et de l'environnement.

7 Selon une jurisprudence désormais constante, dans le cadre du systéme de compétences de la Communauté, le choix de la base juridique d'un acte doit se fonder sur des éléments objectifs susceptibles de contrôle juridictionnel. Parmi de tels éléments figurent notamment le but et le contenu de l'acte (voir en dernier lieu arrêt du 7 juillet 1992, *Parlement/Conseil*, C-295/90, Rec p I-4193, point 13).

8 Quant au but poursuivi, les quatriéme, sixiéme, septiéme et neuviéme considérants de la directive 91/156 soulignent que, pour atteindre un niveau élevé de protection de l'environnement,

'titanium dioxide' judgment and was intended to approximate the national rules on the conditions of production in a particular sector of industry with the object of removing distortion of competition in that sector.

In those circumstances the contested directive was validly adopted on the sole basis of Article 130s of the Treaty.

Article 18 of the directive

The Parliament sought the annulment of Article 18 of Directive 91/156 on the ground that the procedure of the Rules Committee for which it provided was incompatible with the Treaty.

The third paragraph of Article 37 of the Statute of the Court of Justice provided that submissions made in an application to intervene must be limited to supporting the submissions of one of the parties.

While the Commission sought the annulment of Directive 91/156, the Parliament sought the annulment of Article 18 of the directive for reasons entirely different from those put forward by the Commission. The Parliament's claims could not therefore be regarded as having the same object as those of the Commission and had therefore to be dismissed as inadmissible.

The Court held:

1. The application is dismissed;

2. The Commission is ordered to pay the costs. The Kingdom of Spain and the European Parliament are ordered to bear their own costs.'

Analysis by Nicolas de Sadeleer, Assistant Director, Centre for Research into Environmental Law, Facultés St Louis, Brussels

1. Since the Single European Act came into force, there have been two main thrusts to the European Community's environmental policy.

Firstly, the enactment of articles 130 R, S and T in Title VII of the Single European Act, which deals solely with the environment, conferred express powers on the Community in environmental matters. The exercise of these powers must comply with certain principles,[1] take account of certain criteria,[2] and seek to attain certain objectives.[3] Action taken by the Community relating to the environment under article 130 S is also subordinated to two principles. Firstly, it must obey the principle of subsidiarity, under which 'the Community shall take action relating to the environment to the extent to which the objectives of environmental policy can be attained better at Community level than at the level of the individual Member States'. The Single Act also introduces a principle of integration, by which environmental protection requirements must be a component of the Community's other policies. This latter principle not only highlights the importance of environment policy for the Community's broader development, but also the priority to be ascribed to it within the Community's other policies.[4]

[1] Article 130 R 2 requires action taken by the Community relating to the environment to be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. These principles have subsequently been explicitly embodied in the Community's four action programmes on the environment.

[2] Article 130 R 3 specifies that in preparing its action relating to the environment, the Community shall take account of available scientific and technical data, environmental conditions in the various regions of the Community, the potential benefits and costs of action or lack of action, and economic and social development.

[3] Article 130 R 1 sets a number of objectives, viz: to preserve, protect and improve the quality of the environment, to contribute towards protecting human health, and to ensure a prudent and rational utilization of natural resources.

[4] The principle of integration is a major innovation in the Single Act as no other treaty provision prescribes that the requirements of a specific policy should be a component of other Community policies. Other Treaty

The establishment of the internal market may also be a contributory factor in developing a Community environment policy. In this respect, article 100 A of the SEA, which replaces Article 100 of the EEC Treaty, empowers the Community to harmonize national regulations with a view to achieving the internal market. Environmental protection forms part of the completion of the internal market in this connection, since Article 100 A, para 3, requires the Commission to take a high level of protection as a base for its environmental protection proposals.

2. The question of whether a measure should be legally based on Article 100 A or Article 130 S is anything but an academic exercise.

Article 100 A provides that the Council shall act by qualified majority using the cooperation procedure with the European Parliament, while Article 130 S requires that the Council shall act unanimously after merely consulting the European Parliament.[5] The choice of legal basis also has significant repercussions on the leeway enjoyed by Member States in writing the Community rule into national law. Under Article 130 T of the SEA, Member States retain the freedom to introduce more stringent environmental protection measures than those fixed by Community legislation, provided they are compatible with the principles enunciated by the Treaty.[6] Article 100 A leaves Member States markedly less leeway, since the Community regulation is a harmonizing measure and Member States may not, as a general rule, introduce more stringent measures than those deriving under the Community rule unless expressly authorized by that rule. States placed in a minority position by the majority decision-making procedure had to be offered a trade-off, however.[7] Article 100 A, para 4, authorizes minority States to continue to apply existing provisions which are more stringent than the Community harmonization measure.[8] The legal basis chosen can, therefore, be of importance both to setting the content of the Community measure and its implementation in the national law of the Member States.

3. The problem of which measures should be grounded in which new provision has been amply commented on in the literature. The majority of writers have accepted that environmental measures which entail no harmonization of rules affecting the internal market can be grounded in Article 130 S. Conversely, Community environmental protection measures which affect the internal market should, *a priori*, be based on Article 100 A. Since harmonization of product stand-

provisions, let it be said, may have significant implications for environment policy. They include Article 99 of the EEC Treaty dealing with the harmonization of indirect taxation; Article 113 of the EEC Treaty dealing with the common commercial policy (for measures governing Community trade with third countries), the agricultural provisions of the EEC Treaty, especially Article 43, which provides the legal basis for the regulations on the production and marketing of agricultural products, and finally, the health protection provisions of the Euratom Treaty.

[5] The Council, acting unanimously, may nonetheless define those matters on which decisions are to be taken by a qualified majority (Art 130 S, para 2).

[6] In other words, more stringent protective measures enacted by Member States pursuant to Article 130 T may not infringe the free movement of goods rule laid down in Article 30 of the EEC Treaty, unles the measure is justified on one of the grounds prescribed in Article 36 or is an imperative requirement on the grounds of public policy.

[7] The FRG and Denmark deemed it essential to be free to apply more stringent provisions than those laid down in the Community harmonization measure in order to give added protection to what were deemed paramount interests.

[8] It is generally accepted that Article 100 A, para 4, does not permit Member States to introduce new, more restrictive measures after the Community measure has been adopted.

ards is central to achieving freedom of movement, it is conventionally accepted that harmonization measures in this area can only be based on Article 100 A. The question of the appropriate basis for legislation with the twofold objective of environmental protection and market integration, however, has remained controversial: some arguing for a liberal interpretation of Article 100 A, others for a more restrictive interpretation.

4. There was no question but that the elective ability to frame Community environmental policy around two radically different policy thrusts was bound to be a source of major controversy as to the choice of legal basis and referral to the Court of Justice to adjudicate on the diametrically opposed positions of the Council and Commission.[9] Less to be expected was that the Court's decisions would follow such a tortuous path, leaving commentators distinctly unsure as to the respective weight to be given to aspects relating to the accomplishment and operation of the single market, and those related to environmental protection.

5. On 17 March 1993, the Court of Justice of the Communities delivered this landmark decision on the choice of legal basis for Community measures and actions relating to the environment.[10] The decision is the latest in a line of decided cases which merit a cursory examination here. Two decisions prior to that had already provided the basis for a series of criteria to delimit the scope of the provisions.

6. In its *Greek Chernobyl* judgment, the Court upheld the validity of a regulation on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power station. The regulation concerned was based on Article 113 of the Treaty, which deals with the common commercial policy.[11] Here, the Court held, *inter alia*, that the use of Article 130 S in action by the Community relating to the environment was unjustified in this instance. Both the aim and content of the impugned regulation pointed to the rule's primary purpose being to regulate trade between the Community and third countries, thus more properly falling within the scope of the common commercial policy. Furthermore, the principle of integration enunciated in Article 130 R, para 2, which provides that 'environmental protection requirements shall be a component of the Community's other policies' sanctioned the pursuit of environmental ends through other policies.

7. The Court appeared to have cut the Gordian knot of the choice of legal bases in its *Titanium dioxide* judgment which held that Article 100 A prevailed over Article 130 S for Community measures which embodied the twin objectives of environmental protection and completion of the internal market.[12] The Court's reasoning in this case was underpinned by three conclusive arguments. Firstly, the harmonization of rules governing production conditions in a given sector of industry had to be based on Article 100 A since such harmonization entailed elimination of the distortions of competition likely to be generated by excessively stringent or unduly lax environmental protection standards. Secondly, the proced-

[9] On this, see in particular my own study 'Le droit communautaire de l'environnement, un droit sous-tendu par les seuls motifs économiques?'. *Amén-Env*, 1991/4, 217 *et seq.*

[10] CJEC, 17 March 1993, *Commission* v *Council*, Case C-155/91.

[11] CJEC, 29 March 1990, *Greece* v *Council*, Case C-62/88.

[12] CJEC, 11 June 1991, *Commission* v *Council*, Case C-300/89.

ure prescribed by Article 100 A was markedly more democratic than that laid down in Article 130 S. And finally, the Court took the view that the integration principle presupposed that measures to protect the environment would fall within the province of other Community policies. The Court's precedent seemed to be inexorably pushing the whole sphere of environment policy into the purview of the internal market, and strengthening the Commission's hand in the inter-institutional dispute.

8. On the very day on which the *Titanium dioxide* judgment was delivered, the Commission, relying on the judgment in its favour, made an application for the annulment of Directive 91/156/EEC, adopted four months earlier on the same legal basis as the Directive just declared void. In this particular instance, the Council had replaced the Commission's proposed legal basis of Article 100 A with that of Article 130 S, under which Member States retain a greater degree of sovereignty over the development of their environmental protection policies. Council Directive 91/156/EEC of 18 March 1991 amends Directive 75/442/EEC on waste, and constitutes the framework of Community regulations on waste management.

The lessons of the *Titanium dioxide* judgment could apply only in cases where environmental protection was inextricably linked to completion of the internal market. In all other cases, the operative criterion would remain the predominant aspect or aim. Accordingly, the issues raised in the present instance related to the severability of the objectives set by Community legislation and, where applicable, the predominance of one over the other.

In its judgment of 17 March 1993 on the validity of the legal basis taken for the Directive on waste, the Court firstly referred back to the rule of its established precedent that the choice of legal basis of a measure must be based on objective factors open to judicial review; these include the purpose and content of the measure.

In contradistinction to its analysis of the Titanium Dioxide Directive—which related specifically to a particular type of waste—where it considered that neither objective could be said to predominate over the other, the Court concluded in this case that the objectives and content of the framework directive on waste were primarily directed towards protecting the environment.

The Commission's submission that the directive at issue was intimately bound up with the completion of the internal market in authorizing the free movement of commercially exploitable waste and discouraging movements of waste intended for disposal was rebutted by the Court on the grounds that the principle of free movement of waste was qualified by compelling public policy requirements of environmental protection, citing its decision in the *Wallonian waste* case upholding the validity of the Walloon regulation prohibiting imports of waste into Wallonia from other countries.[13] The Court's judgment relied, *inter alia*, on the principle enshrined in Article 130 R, para 2, of the Treaty, that environmental damage should as a priority be rectified at source in holding the regional measure not to be a form of discrimination. In the present instance, the Court held the Directive

[13] CJEC, 9 July 1992, *Commission* v *Belgium*, Case C-2/90, *Amén-Env*, 1992/3, 162, author's comments. Reported in this Journal Vol 5, No 1, 133.

at issue to fall within the purview of the principles deriving from Article 130 R, para 2, of the Treaty. This effectively confirmed the legal scope of a series of environmental principles and implicitly recognized the validity of the provisions of Directive 91/156/EEC which enshrined the 'proximity principle', itself deriving from the principle that pollution should be controlled at source.

Likewise, the submission that competition might be distorted if the implementation of widely differing environmental protection policies—which had been accepted as decisive in the *Titanium dioxide* case—were countenanced was given short shrift by the Court here with the remark that while certain provisions of the directive have repercussions on the operation of the internal market, it nonetheless remained that the use of Article 100 A as a basis was not justified where harmonization of market conditions within the Community was only incidental to the measure to be adopted. The main purpose of the harmonization intended to be achieved by Directive 91/156/EEC, said the Court, was the management of waste within the Community, regardless of origin, in a manner which protected the environment; its effect on the conditions of competition and trade was no more than incidental.

Accordingly, the Court held that Directive 91/156/EEC had been validly adopted on the basis of Article 130 S of the EEC Treaty.

9. It must be stressed that in denying the exclusivity of Article 100 A, the Court restored Title VII of the EEC Treaty on environmental protection to its proper status. Extending the rationale of the *Titanium dioxide* decision to other Community measures more directly concerned with environmental conservation would have rendered Title VII of the EEC Treaty on the environment nugatory. The consequences of invalidating the directive would also have been particularly irksome for those Member States who wished to maintain or develop an environmental policy with high levels of protection. The use of Article 100 A would have frustrated any moves in that direction.

One thing is certain—the judgment of 17 March 1993 did not overturn but merely qualified the Court's established precedent somewhat. The Court will surely be condemned for failing to lay down sufficiently clear criteria to identify the precise stage at which a measure can be said to be chiefly designed to protect the environment or to achieve the internal market, such as to achieve a clear demarcation between Articles 100 A and 130 S. And while it cannot be said that this problem has always been answered satisfactorily, the following distinction can, nevertheless, be adduced from the case law.

On one side of the dividing line we have a residual category of all those measures whose aim and purpose can, on examination, be seen to be the achievement of a high level of environmental protection. Such measures must be based on Article 130 S of the Treaty.

On the other side lie all those measures specifically designed to harmonize the environmental protection aspects of certain industrial production processes, but whose primary objective is to eliminate distortions of competition. Only in this very limited case will the use of Article 100 A be justified. The *Titanium dioxide* judgment must, therefore, be included among the exceptional cases falling into this category.

10. It remains to be seen whether the different institutions will continue to take conflicting views on identifying those measures whose 'internal market' aspects are linked to the aim of environmental protection. The challenge mounted by the European Parliament against Council Regulation 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community[14] would appear to preclude all hope of a much-awaited peace agreement on this matter. Nor will the entry into force of the Maastricht Treaty do anything to defuse the situation, since the amendments introduced by the new Treaty actually perpetuate the dichotomy between a strictly environmentalist approach and an internal market-oriented one and continue to fuel the doubts about the true scope of the procedural provisions which are at the heart of these two approaches. But the front-line victims of such drawn-out conflicts are legal certainty and a credible Community environmental policy.

[14] OJEC No.