Chapter 10

The Court of Justice and Environmental Protection

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1.0 INTRODUCTION

The Treaties founding the European Communities contained no specific reference to protection of the environment or, indeed, to protection of the consumer. This reflected the relative unimportance, from a political point of view, of those issues at that time when the Treaties were drafted. The subsequent growth of political and public concern posed legal problems for the institutions of the European Communities, of which there are four: the European Parliament, the Council of Ministers and the Commission (the 'political' institutions), and the Court of Justice. The Single European Act, which was signed in 1986 and came into force in 1987, contained new provisions relating to the environment, but without resolving the pre-existing legal problems.

This Chapter examines the approach of the Court of Justice to two of the most compelling developments in the field of environmental protection: first, recognition of environmental protection as a counterweight to one of the fundamental principles of the European Economic Community, the free movement of goods; and second, the response of the Court to the lack of a definitive legal base in the original treaties for measures of environmental protection, and the new problems raised by the Single European Act.

Environmental protection has now become firmly established at the centre of Community objectives and is an example of the flexibility of Community law in responding to new political concerns. The Court's approach to consumer protection closely resembles its approach to environmental protection and shows many temporal and jurisprudential similarities.

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2.0 THE TREATY PROVISIONS

The closest reference to environmental protection included in the founding Treaties is to be found in Chapter III of the Treaty establishing the European Atomic Energy Community (Euratom). This provides for 'basic standards' and cooperation between member states, usually through the medium of the Commission, in the field of health and safety for workers and for the general public. The Treaty refers, in particular, to the levels of radioactive contamination in the air, water and soil. These provisions have given rise to one case concerning the disposal of radioactive waste from the French nuclear power station at Cattenom near the Luxembourg, German and Belgian frontiers: Saarland v Ministry for Industry, Post and Telecommunications and Tourism.

Article 37 of the Euratom Treaty requires member states to furnish the Commission with data concerning the transfrontier effects of the disposal of radioactive waste, in order that the Commission can deliver an expert opinion. The French authorities authorised the disposal of radioactive waste from Cattenom without prior notification to the Commission. The Court ruled that the Commission's opinion, based on the findings of experts, was of 'very great importance ... to the protection of the population and the environment against the risks of nuclear contamination'. It was therefore essential that member states provide the Commission with the relevant data prior to the authorisation of disposal plans, in order that the findings of the experts be fully effective.

However, even the Euratom Treaty deals with problems of environmental protection, which are now of acute public concern, only in outline. The European Economic Community Treaty (Treaty of Rome) conferred no specific legislative powers and defined no specific Community objectives in the field of environmental protection. It was not thought necessary to derogate from the primary economic aims of the Communities with regard to such matters, and the derogations provided for in Article 36 of the EEC Treaty defining the permissible restrictions on free movement of goods, were considered exhaustive.

Political interest in environmental protection emerged, at Community level, at the Paris Summit in 1972, partly due to the start of what has now become a string of environmental disasters. But pursuit of environmental objectives in the wide fields...
of water, air, waste, chemicals, noise and flora and fauna was limited by the lack of legal basis in the Treaties. The first of the Community’s Environmental Action and Research Programmes in 1973 was therefore based on the slender references to ‘the constant improvement of the living and working conditions of [their] peoples’ in the Preamble, and to ‘harmonious’ and ‘balanced’ economic development and expansion in Article 2 of the EEC Treaty. The adoption of legislation by the Council, for example the 1975 Directive on Waste, was based upon Articles 100 (approximation of legal provisions which directly affect the functioning of the Common Market) and 235 (measures necessary to achieve one of the objectives of the Community for which powers have not otherwise been provided).

Although criticisms were made of the Council’s legislative approach Articles 100 and 235 in conjunction, or Article 235 alone were used extensively as the legal basis for further legislation. Perhaps more significantly, these developments at Community level were paralleled by initiatives at national level in the fields of environmental and consumer protection which brought the member states into conflict with the treaty provisions on free movement of goods. Purposive interpretation of the objectives of the treaty was necessary in order to accommodate these new political concerns.

3.0 THE RULE OF REASON

In 1979, in its Cassis de Dijon judgment, the Court of Justice recognised that the derogations provided for in Article 36 were not sufficient to cope with overriding considerations of national policy such as effective fiscal supervision, protection of public health, prevention of unfair trading practices and consumer protection. The Court enunciated a ‘rule of reason’ which would allow member states to give effect to such overriding considerations, inelegantly referred to as ‘mandatory requirements’, in regulating the marketing of goods. Until recently, it was assumed that the doctrine of ‘mandatory requirements’ could be invoked only where the national rules in question were ‘indistinctly’ applicable – that is, applicable without distinction to goods of domestic origin and goods imported from other member states. As will be seen later, this is not necessarily so.

Although environmental protection was not one of the ‘mandatory requirements’ specifically mentioned in Cassis de Dijon, the Commission, the Netherlands and Denmark soon afterwards invoked it as such in the FNMBP case. That case

13. The need to ensure that competition was not distorted was cited as the element in the functioning of the common market which required the approximation of national legal provisions by Art. 100.
14. See, eg, the 22nd Report of the House of Lords Select Committee, Session 1977-78.
17. ‘Mandatory requirements’ was the phrase used to translate the French exigences impératives. A better translation would be ‘overriding needs’.
concerned the question whether Netherlands legislation requiring prior approval of plant protection products could be invoked to prevent the marketing of 'Fumicot Fumispore' lawfully marketed in France. The Court noted the point but found that the requirement of prior approval for such products already fell within Article 36.

In *Procureur de la République v Association de défense des bruleurs d'huiles usagées (ADBHU)* the Court was asked whether certain elements of Council Directive 75/439/EEC on the disposal of waste oils, including the administrative zoning of the collection and disposal of waste, were compatible with the fundamental treaty principles of freedom of trade, free movement of goods and freedom of competition. (The Directive had been enacted on the dual legal basis of Articles 100 and 235.) The Court held that 'the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community', and that environmental protection is 'one of the Community's essential objectives'. Environmental protection cannot, however, justify discriminatory or disproportionate measures, and Advocate General Lenz emphasised that it was 'especially important' that absolute territorial protection was not contemplated.

Environmental protection as an exception to the Treaty rules on free movement came up next in the *Danish bottles* case. The question was whether the Danish compulsory deposit-and-return system for beer and soft drinks bottles fell within the rule in *Cassis de Dijon*. Advocate General Slynn believed that it did not do so, both because it was, in effect, discriminatory as between Danish and non-Danish producers and because it was disproportionate. However, the Court repeated its ruling in the waste oils case that environmental protection is an essential Community objective, referred to the environmental provisions brought into force in the Single European Act and, on that basis, ruled that the Danish system was, at least in part, justified since ‘... the protection of the environment is a mandatory requirement which may limit the application of Article 30 of the Treaty’.

The difference of approach between the Court and the Advocate General in the *Danish bottles* case illustrates the difficulty of finding objective criteria to judge whether national rules purportedly aimed at environmental protection are in reality disguised non-tariff barriers. Are they in truth ‘indistinctly applicable’ as between domestic and imported products and dictated by overriding policy considerations, or are they only dressed up to appear so?

This question became even more acute in *Commission v Belgium*, which concerned the importation of waste products into the region of Wallonia. The Walloon Regional Executive had imposed a ban on the importation of all waste products into their region, including importation from other regions of Belgium. On
the face of it, the ban offended, not only against the principle of the free movement of goods, but also against the provisions of two Directives on the transfrontier shipment of hazardous waste.\(^{28}\)

A preliminary point arose as to whether waste of no monetary value is ‘goods’ to which the Treaty rules on free movement apply. The Advocate General and the Court agreed that objects carried across a frontier with a view to commercial transactions (in this case the transaction by which the waste would be disposed of for payment) are ‘goods’ within Article 30.\(^{29}\) They disagreed however about the application of the rule of reason.

Advocate General Jacobs held that, although environmental protection falls within the scope of the ‘mandatory requirements’ exceptions to Article 30, those exceptions could not be relied upon in this case as the national rules in question were ‘plainly not indistinctly applicable’\(^{30}\) — that is, they were plainly discriminatory as between goods of domestic origin and goods from other member states. Although regional compartmentalisation of waste management accords with the principles of the Basle Convention\(^{31}\) (self-sufficiency and proximity of disposal) and, potentially, with the amended Article 5 of Council Directive 75/442/EEC,\(^{32}\) the measure in question clearly discriminated against waste originating in other member states and thus did not properly apply the international principles at the Community level.

The Court, however, drew a distinction between waste and other sorts of goods on the grounds of the peculiar characteristics of waste, and in particular the increased dangers caused by massive influxes into a certain region. It held that the measures in question, although not ‘indistinctly applicable’, could not be considered discriminatory (and therefore illegal under Article 30) since ‘discrimination’ was an unavoidable consequence of applying the principles of self-sufficiency and proximity (disposal as close as possible to the source of production), principles found both in Article 130R(2) of the EEC treaty as amended by the Single Act and in the Basle Convention.\(^{33}\)

It is, at least in theory, open to question whether the discrimination in question was an unavoidable consequence of applying the principles of self-sufficiency and proximity. The nearest waste disposal plant might, in some cases, be in another member state and the principle of self-sufficiency is relevant only if the appropriate test is self-sufficiency within national frontiers — a test which might be thought no longer to be appropriate in a Community context. There were, however, genuine grounds for concern that Wallonia might become ‘the dustbin of Europe’ and it


\(^{30}\) At point 20 his Opinion Jan. 10 1991.


\(^{33}\) See supra note 27, points 30–36.
would be unwise to draw conclusions of general application from a rather special case.

In particular, Commission v Belgium should not be seen as authority for the proposition that member states have carte blanche to partition markets on national or regional lines in real or purported pursuit of environmental goals. On the other hand, the case does illustrate the strength of the commitment to environmental protection as a Community objective.

It is important also to explain an aspect of the case which has given rise to some misunderstanding. Although the Court held that the Walloon Regional Executive was entitled to legislate against the import of waste for disposal, it held that the Executive was not entitled to do so in respect of hazardous waste. The reason for this, at first sight extraordinary, conclusion was that the measure in question was in direct contravention of the hazardous waste directive. It was therefore a measure which the Executive could not lawfully take, and which the Court could not lawfully authorise.

4.0 ENVIRONMENTAL LEGISLATION

Recognition of the political priority now afforded to environmental protection at a substantive level has been accompanied by a significant refinement in the legal basis of environmental legislation. The Single Act added three articles to the EEC Treaty as Title VII on the Environment, and the inclusion of this Title was, as has been seen, invoked by the Court as a reason for recognising environmental protection as a ‘mandatory requirement’. Article 130R sets out wide-ranging Community objectives, including the quality of the environment, human health and the prudent and rational use of natural resources. Article 130S goes on to empower the Council, after consulting with the European Parliament and the Economic and Social Committee, to legislate by unanimous vote to achieve these objectives.

The Council’s power to legislate under Article 130S has not, however, established a universal legal basis for environmental measures. The Single Act’s adoption of the principles of Lord Cockfield’s White Paper also introduced Article 100A on the approximation of laws with the aim of completing the single market as set out in Article 8A. Unlike Articles 100, 235 and 130S, legislation under Article 100A involves the co-operation procedure with the European Parliament and only a qualified majority in the Council. Article 100A(3) requires the Commission, in any proposals concerning health, safety, environmental protection and consumer protection, to ‘take as a base a high level of protection’. The significance of this provision lies in the fact that, under Article 149(1), the Council can amend a Commission proposal only by unanimous vote. A member state wishing to maintain a high level of protection can therefore block any watering down of a Commission proposal provided that that proposal starts from a high level.

35. Art. 130S(I).
36. Completing the Internal Market COM(85) 310 Final.
The result is that the Treaty contains potentially conflicting procedures for adopting environmental protection legislation which did not exist during the period of reliance upon Articles 100 and 235 (both requiring unanimity) before the passing of the Single European Act.

The correct procedure for the adoption of environmental protection legislation came before the Court in the Titanium dioxide case\(^\text{37}\) which concerned the legal basis on which the Council had adopted the second titanium dioxide directive.\(^\text{38}\) The Commission, supported by the Parliament, challenged the fact that the Council had adopted the directive under Article 130S, thus excluding the procedure of co-operation with the Parliament. The Commission had proposed the directive, prior to the Single European Act, under Articles 100 and 235, and had subsequently changed the basis to Article 100A. The Council’s preferred use of Article 130S minimised the legislative input of the ‘greener’ Parliament.

The Court held that although the legislation had the dual aims of environmental protection and the elimination of disparities in the conditions of competition, it was necessary to establish its ‘centre of gravity’ in order to determine the most appropriate of the two incompatible procedures. Drawing upon the wording of Article 130R(2), which provides that environmental protection ‘...shall be an integral component of the Community’s other policies’, the high base level of protection required by Article 100A(3) and the democratic prerogatives of the Parliament, the Court asserted the predominant role of Article 100A in measures with dual objectives. Where measures are adopted to harmonise national rules with a view to completing the Internal Market, Article 100A is the correct legal base. The Court referred to the ‘burden upon the undertakings’\(^\text{39}\) created by the environmental measures prescribed as a justification for according precedence to Article 100A.

The ‘centre of gravity’ approach does not, however, exclude Article 130S as the correct legal base in every case. Case C155/91 Commission v Council\(^\text{40}\) concerned the correct legal base for Council Directive 91/156/EEC, which amended Council Directive 74/422/EEC on waste. The Commission challenged the Council’s adoption of the Directive on the legal base of Article 130S, since there was also a Single Market objective. The Council, however, sought to limit the Titanium dioxide case to ‘exceptional’ cases where it is necessary to choose between legal bases when dual, or mixed, objectives are equal. The Court held that, although the directive had an effect on the operation of the Single Market, its primary aim was to protect the environment through management of industrial and domestic waste. Indeed, the directive could not be regarded as promoting free movement of waste within the Community, first, because of the proximity principle and, second, because protection of the environment, as a mandatory requirement, justifies exceptions to Article 30. The directive’s ancillary purpose of harmonising the conditions of competition and trade was not sufficient to require the adoption of legislation on the basis of Article 100A. The case therefore establishes that Article 130S, as a legal base, is


\(^{39}\) Supra note 37, point 23.

not confined to matters such as establishment of the European Environmental Agency.41

The tensions between the principles of democratic legislative input and the need to choose between two conflicting legal bases for measures of environmental protection may, to some extent, be released by the partial harmonisation of procedures in the Maastricht Treaty on European Union. This provides that Article 100A is to be governed by Article 189B (co-operation and conciliation) and Article 130S by Article 189C (co-operation). Although both procedures allow the Council to legislate by qualified majority, there are differences in the Parliament’s powers. But the legal basis question will not be wholly resolved by the Treaty, especially as difficulties may arise from the application of Article 139S(2), requiring unanimity for defined environmental areas. Nor is certainty for the future assured by the fact that, in the minds of some at least, environmental legislation is seen as a candidate for the axe of subsidiarity.

5.0 CONCLUSIONS

The EEC Treaty did not include environmental protection as a distinct objective of the Community, but development of political and public concern required the Court to balance protection of the environment with the explicit economic principles of the Treaty. The case law of the Court suggests that, at least as far as the Court is concerned, this initially unmentioned Community objective can now be taken to rank amongst the Community’s central objectives and, potentially, as a fundamental priority. The legislative process, even as developed by the Single European Act and by the Maastricht Treaty, perpetuates the initial difficulties of the lack of a definitive legal base and is likely to remain a source of tension between the member states, the Commission and the European Parliament.