Titanium dioxide

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Case C-300/69, *Commission* v. *Council* (Titanium dioxide), Judgment of 11 June 1991, not yet reported

1. Introductory remarks

Following the institutional changes brought about by the Single European Act, it soon became evident that some issues relating to the implications of these changes would ultimately need to be settled by the European Court of Justice. One of those issues relates to the legal basis pursuant to which Community environmental legislation should be adopted. Although the question is not in itself new (the legitimacy of Community action in this field has long been disputed), the introduction of, on the one hand, Article 100A which empowers the Community to adopt measures aimed at the establishment of the internal market and, on the other hand, Article 130S aimed at the realization of the Community's newly declared environmental objectives has injected a fresh impetus to the debate.[1]

In the first place, the circumstance that the Treaty requires the Community institutions to take into consideration environmental requirements in pursuing the objective of Article 8A and *vice versa* troubles the demarcation of the scope of application of the respective provisions. More importantly, whereas previously the question whether Article 100 alnone could justify Community environmental legislation or, instead, Article 235 should be invoked as an additional basis was to a large extent academic, the present choice between Articles 100A and 130S has profound practical consequences, the most important of which are:

1. For some recent analyses: Freestone, "European Community environmental policy and law", *Journal of Law and Society* (1991), 135–154; Krämer, *EEC Treaty and Environmental Protection* (1990); Saggio, "Le basi giuridiche della politica ambientale nell' ordinamento comunitario dopo d'entrata in vigore dell' Atto Unico Europeo", Riv. Dir. Eur. (1990), 39–50; Scheuning, "Umweltschutz auf der Grundlage der Einheitlichen Europäischen Akte", EuR (1989), 153–192; Vorwerk, *Die Umweltpolitischen Kompetenzen der Europäischen Gemeinschaft und ihrer Mitgliedstaaten nach Inkrafttreten der EEA (1990).*

– measures aimed at the establishment of the internal market can be adopted by a qualified majority whilst Article 130S requires unanimous approval,
– the cooperation procedure, the most important innovation introduced by the Single European Act providing the European Parliament with the greatest degree of participation in the legislative process, applies to Article 100A but not to Article 130S,
– whereas directives adopted on the basis of Article 100A "will take as a basis a high level of protection", in view of Article 130T, measures adopted on the basis of Article 130S would seem to afford a 'minimum' degree of protection,
– the principle of subsidiarity as laid down in Article 130R(4) and which does not apply to Article 100A, even though its legal significance is disputed, would seem to limit the scope for Community action under Article 130S.

Thus it is that, after the changes introduced by the Single European Act, the Commission's choice of the legal basis for a proposed environmental directive bears directly upon its eventual content as well as its democratic legitimation. It is not surprising therefore, that sooner or later the Court should be asked to pronounce on the relation between the two provisions. This opportunity eventually presented itself when the Commission challenged the Council's choice of the legal basis of Directive 89/428 on the harmonization of programmes for the reduction of pollution caused by the titanium dioxide industry.[2] Hence, as Advocate General Tesauro observed, the importance of the case is not limited to determining the correct legal basis in respect of the Directive in question, but extends to establishing the proper procedure for the adoption of a significant category of similar acts.

2. Factual background

Launching the Community's environmental policy, in the 1973 environmental action programme the Commission undertook to take action to

2. O.J. 1989, L 201/56.

tackle pollution caused by certain industrial activities.[3] Directive 78/176 on waste from the titanium dioxide industry is a manifestation of this 'sectoral approach', imposing certain conditions on the titanium dioxide industry, rather than focusing on the specific pollutants to which the production of titanium dioxide gives rise.[4] The aim of the Directive is the prevention and progressive reduction of pollution caused by waste from the titanium dioxide industry, with a view to its ultimate elimination. Whereas protection of the environment and human health is undoubtedly one of its prime objectives, at the same time, as becomes clear from the third recital, the Directive also embodies trade objectives in that it seeks to eliminate unequal conditions of competition by harmonizing national provisions regulating the titanium dioxide industry. As was common practice prior to the codification of the Community's environmental objectives in the Single European Act, the Directive is therefore based simultaneously on Articles 100 and 235 of the EEC Treaty.

Article 9 of the Directive requires Member States to draw up programmes for the progressive reduction and eventual elimination of pollution caused by the titanium dioxide industry, which should have been sent to the Commission by 1 July 1980. On the basis of these national programmes, the Commission then produces suitable proposals for the harmonization of these programmes with regard to the reduction of pollution and the improvement of the conditions of competition in the titanium dioxide industry. After delays due to Member States' tardiness in submitting their reports, on 18 April 1983 the Commission presented a proposal for a directive on the harmonization of programmes for the reduction of pollution caused by the titanium dioxide industry.[5] Like its 1978 predecessor, the proposal was based on both Articles 100 and 235.

After the entry into force of the Single European Act, however, the Commission changed the legal basis to Article 100A EEC.[6] The Council, in its common position of November 1988, in turn reversed the legal

3. O.J. 1973, C 112/1 at p. 20.
4. O.J. 1978, L 54/19.
5. O.J. 1983, C 138/5.
6. COM(88) 849 final.

basis to Article 130S. The European Parliament, after having been consulted by the Council, agreed with the Commission and rejected the Council's common position.[7] In June 1989, the Council unanimously adopted Directive 89/428 on the basis of Article 130S. On 28 September 1989 the Commission started proceedings pursuant to Article 173 of the Treaty, seeking the annulment of the Directive. The European Parliament, in February 1990 intervened supporting the Commission. The Court reached its decision on 11 June 1991.

3. The judgment

3.1 *Arguments advanced by the parties*

The **Council** explained that it had reached its decision to base Directive 89/428 on Article 130S rather than on Article 100A by examining the "centre of gravity" of the Directive. Thus, it observed, all Community action which aims primarily at the implementation of one of the objectives listed in Article 130R(1) should be based on Article 130S. At the same time, the Council conceded, even acts which primarily pursue environmental objectives often produce effects which coincide with other Community objectives, in particular that of the elimination of barriers to trade. Indeed, this was acknowledged by the Treaty itself, which in Article 130R(2) provides that environmental protection requirements shall be a component of the Community's other policies. However, this general commitment should not obscure the fact that even for those acts it was necessary and possible to determine the "centre of gravity" as falling within the scope of Article 130S, rather than Article 100A.

As for the latter, the Council recalled that its principal aim was to attain the objective of Article 8A of the Treaty, i.e. the establishment of the internal market. Acts such as the directives on emissions from vehicles should hence be based on this provision. It noted, however, that it followed from the wording of the first paragraph of Article 100A that, that being a *lex generalis*, specific provisions of the Treaty should be used if these were applicable. Therefore, Article 100A did not confer the

7. O.J. 1989, C 158/248.

power to adopt specific measures in the field of the environment which did not primarily pursue environmental aims.

In respect of Directive 89/428, the Council reiterated that its prime objective was to protect the environment from waste caused by the titanium dioxide industry though at the same time aiming at certain trade objectives. The "centre of gravity" thus being environmental protection, the Directive was, it maintained, correctly based on Article 130S.

Regarding the different levels of participation of the European Parliament under both procedures, whilst it accepted that this might have an impact on the form as well as the content of a directive, the Council noted that it had consulted the Parliament (i.e. in accordance with Article 130S) about its decision to base the proposal on Article 100A. Even though Parliament had considered the Commission's proposal to be the correct one, the Council, in deciding to base the directive on Article 130S, had taken into account Parliament's views.

The **Commission**'s first observation was to point out that the choice of legal basis has profound consequences for the voting procedure as well as for the degree of participation of the European Parliament. Recalling the Court's judgment in Case 91/79, *Commission* v. *Italy*, where it for the first time ruled that provisions on the environment may be based on Article 100 of the Treaty, the Commission stressed that, similarly, measures to protect the environment could thus be based on Article 100A.[8] This was borne out by paragraphs 3 and 4 which explicitly refer to this concern.

In contrast, according to the Commission, Articles 130R-T do not envisage the establishment of a common environmental policy encompassing the establishment of the internal market. Rather, measures based on these provisions merely afford 'minimum' protection, and can be but subsidiary to action taken by the Member States; they must be financed and implemented by them.

As to the way of determining the scope of application of the two provisions, it agreed with the Council that, in order to honour the Court's case law to the effect that the choice of the legal basis must be based on

8. Case 91/79, *Commission* v. *Italy*, [1980] ECR 1099.

objective criteria susceptible to judicial review,[9] it was necessary to establish the "centre of gravity" of the act. The present case being aimed first and foremost at the free movement of goods and the elimination of differences in the conditions of competition, Article 100A was the proper legal basis. It noted that, unlike Article 100, Article 100A serves a well-defined objective and thus may be invoked for measures concerning the environment. Although the present directive also served certain environmental objectives, this could not justify the Council's reversal of the legal basis to Article 130S. Turning specifically to Directive 89/428, referring to the second recital and Article 1 of the Directive, the Commission noted that it aims at improving the conditions of competition in the titanium production industry.

Finally, given the different procedures under Articles 100A and 130S, the Commission questioned whether Parliament's rights had been honoured in this particular case.

The **European Parliament**, not surprisingly, first focused on the last point raised by the Commission. It noted that by changing the legal basis to Article 130S, the Council had deprived the Parliament of a second reading as provided under Article 149(2)(b) and (c) and therefore had violated Parliament's rights. Recalling the Court's judgment in case 62/88, *Greece* v. *Council*, it concluded that by thus acting the Council had infringed an essential procedural requirement which should lead to the nullity of the Directive.[10]

In respect of the choice of the correct legal basis, though rejecting the theory of "the centre of gravity", by emphasizing that the Treaty provision whose objective and object most specifically corresponds with the objective and object of the measure in question should take precedent over more general provisions, the same result was arrived at. Thus, an analysis of the Directive revealed that rather than establishing, for example, a Community programme supported by financial provisions and a Community research programme for the control of pollution from the titanium dioxide industry (which would need to be based on Article 130S), the Directive merely harmonized the national program-

9. In particular case 45/86, *Commission* v. *Council*, [1987] ECR 1493, annotated by Steenbergen, J., in CML Rev. (1987) p. 737.

10. Case 62/88 of 29 March 1990, *Greece* v. *Council*, not yet reported.

mes which Member States presented under Article 9(1) of Directive 78/176. This objective flowed from Article 1 of the Directive which seeks to eliminate disparities in the conditions of competition.

Parliament noted that, even though the Directive also fulfilled environmental objectives, Article 130R required that Community action relating to the environment must be better attained at Community level than at the level of the individual Member States. The Council had not shown this to be the case. In comparison to Article 130S, Article 100A provided the Community with a specific power to adopt measures aimed at the harmonization of national laws and the improvement of conditions of trade. For these reasons, the Directive should have been based on Article 100A.

3.2 *The decision*

Recalling its judgment in case 45/86, *Commission* v. *Council*, the Court first confirmed that in the framework of the Community's system of competences, the choice of the legal basis of an act does not depend merely on the conviction of an institution in respect of its aim, but must be based on objective criteria susceptible to judicial review.[11] Such criteria are notably to be found in the aim and the contents of the act.

The Court then proceeded to apply this test to Directive 89/428. In respect of its aim, according to Article 1, the Directive seeks, on the one hand, to harmonize national programmes for the reduction of pollution caused by the titanium dioxide industry so as to reduce such pollution and, on the other hand, to improve the conditions of competition in the titanium dioxide sector. The Directive hence pursued the dual objective of protection of the environment and the improvement of trade conditions. Regarding the contents of the Directive, the Court noted that by imposing precise obligations in respect of the treatment of waste from the titanium dioxide industry, the nature of the Directive was at the same time to establish uniform conditions for production and competition as well as to reduce pollution. It followed that both in terms of its

11. Cited note 9 *supra*.

aim as well as its contents, the Directive's concern to protect the environment and eliminate obstacles to trade were inseparable.

The Court then confronted Articles 100A and 130S. Article 130S provides that the Council decides what action is to be taken by the Community in the field of the environment. Article 100A on the other hand relates to the harmonizing measures to be taken by the Council for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment of the internal market. According to Article 8A, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is assured. For the implementation of this objective, Article 100A empowered the Community, in accordance with the procedure laid down in that provision, to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States so as to remove disparities in national laws which may hinder trade.

In view of its earlier conclusion that the Directive, taking account of its contents and aim, at the same time represents action in the field of the environment in the sense of Article 130R, as well as constituting a harmonizing measure in the meaning of Article 100A, the Court recalled its judgment in case 165/87, *Commission* v. *Council* where it ruled that, to the extent the competence of an institution resides in two provisions of the Treaty, the institution must base the corresponding act on both provisions.[12] However, the Court noted, this jurisprudence could not apply to the case at hand. It observed:

> "In effect, one of the enabling provisions in question, Article 100A, prescribes the application of the cooperation procedure, as set out in Article 149, paragraph 2, of the Treaty, while the other provision, Article 130S, prescribes a unanimous vote of the Council after only a consultation of the European Parliament. In such a case, the cumulative effect of these legal foundations would be to remove all substance from the cooperation procedure." [para 18].

The Court further elaborated this argument by emphasizing that, un-

12. Case 165/87, *Commission* v. *Council*, [1988] ECR 5545.

der the cooperation procedure, the Council decides by a qualified majority if it intends to accept the amendments proposed by the European Parliament, taken over by the Commission in its re-examined proposal, whilst it has to attain unanimity if it wants to legislate after Parliament has rejected the common position or if it intends to amend the Commission's re-examined proposal. This vital element of the procedure, the Court stressed, would be endangered if, because the directive were based simultaneously on Articles 100A and 130S, the Council were required to reach unanimity in any event. Referring to previous case law, the Court noted that "[the cooperation procedure] reflects, at Community level, a fundamental democratic principle, according to which the people participate in the exercise of power by means of a representative assembly." For these reasons, simultaneous recourse to both Articles 100A and 130S was ruled out.

This being the case, the Court had to determine the proper legal basis for the Directive in question. It first recited Article 130R(2). As was seen, this provision provides that "environmental protection requirements shall be a component of the Community's other policies." The principle implies, according to the Court, that a Community act is not dependent on Article 130S for the sole reason that it also pursues environmental objectives. Rather, literally repeating the formula used in cases 91&92/79, *Commission* v. *Italy*,[13] the Court ruled that:

> "Provisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and if there is no harmonization of national provisions on the matter, competition may be appreciably distorted." [para 23].

It followed that action aimed at the approximation of national measures regarding the conditions of production of a specific branch of industry, coinciding with the aim of eliminating unequal conditions of competition, contributes to the establishment of the internal market and hence falls within the field of application of Article 100A.

13. Case 91/79, *Commission* v. *Italy*, cited note 8 *supra*, case 92/79, *Commission* v. *Italy*, [1980] ECR 1115.

Finally, the Court drew attention to Article 100A(3), obliging the Commission, in its proposals concerning environmental protection, to take as a base "a high level of protection." This provision, the Court noted, explicitly indicates that the environmental objectives of Article 130R can be pursued effectively by way of harmonizing legislation based on Article 100A.

For these reasons, the Court found that the directive should have been based on Article 100A and therefore annulled the directive.

4. Implications of the judgment

The Court's underlying test in order to resolve the question whether an environmental directive should be based on Article 100A or Article 130S revolves around, first, the aim of the directive and, second, the content of its provisions. Applying this test to the existing body of (proposed) environmental directives it is difficult to escape the impression that, as the Court found in the present case, the rationale underpinning the bulk of Community environmental law is both the protection of the environment and the elimination of barriers to trade.

Since the Court has firmly rejected the possibility to base a directive jointly on Articles 130S and 100A, this in fact implies that the majority of future Community environmental law should be based on Article 100A. Measures such as the habitat directives, Community research programmes, and a possible directive relating to standing in national courts for individuals and common-interest groups in respect of environmental protection would probably still fall within the ambit of Article 130S.

The Council may seek some comfort in the fact that Directive 89/428 regulates a particular branch of industry and hence has a more direct impact on trade than most other environmental directives. However, even though the Court often explicitly referred to Directive 89/428, it seems unlikely that the import of the judgment is limited to environmental directives of the 'sectoral' type. Rather, by ignoring the rigid formula of "the centre of gravity" adhered to by the Council and the Commission, the Court has acknowledged the fluid line between the

trade and ecological objectives most environmental directives pursue simultaneously.

In view of the differences in procedure under Article 130S and 100A, increased recourse to Article 100A may lead to an improvement in the rate of adoption and quality of Community environmental directives, but this is rather speculative. If, as is widely believed, the Treaty is to be amended so as to extend qualified majority voting to the whole field of the environment in any event, then the judgment merely anticipates this change. The fact remains, however, that the ruling *de facto* extends majority voting to the vast majority of environmental acts, a change which the Inter Governmental Conference would certainly not have endorsed without discussion.

Evidently, the outcome of the case represents an important victory for the European Parliament, as its involvement in environmental decision-making will intensify significantly as a result of the ruling. Yet, the fact that the Court arrived at the conclusion that in cases where Community competences to adopt environmental measures reside both in Articles 100A and 130S the former prevails mainly by referring to the cooperation procedure as "a fundamental democratic principle" is important for other reasons as well.

In the first place, by ignoring the arguments advanced by the parties to the effect that action based on Article 130S can merely be 'subsidiary', the Court seems to reject a strict interpretation of Article 130R(4) as a manifestation of the so-called 'principle of subsidiarity'. This, in turn, is important for the Community's environmental competences under Article 130S. In other words, the Court's reasoning, while extending future use of Article 100A in the field of the environment, has not eroded the scope of application of Article 130S in so far as environmental measures cannot be brought under Article 100A.

Secondly, and this may in fact prove the ruling's most significant aspect, it would seem not at all too far-fetched to argue that the present line of reasoning leads to similar results in respect of the other concerns listed in Article 100A(3), i.e. consumer protection, health and safety. The Court did not reach its decision that the Directive should be based on Article 100A by arguing that Article 130S did not provide the necessary powers. Rather, it ruled that to the extent that the competence of

an institution resides in two provisions, in the case where one of those provisions is governed by the cooperation procedure (in this case Article 100A) and the other is not, the corresponding act should be based on the former. Thus, once it can be shown that measures concerning health, safety, environmental protection and consumer protection can effectively and justifiably be pursued under Article 100A – the criterion used by the Court – this provision will take precedence over other enabling provisions which may likewise contribute to the achievement of the said objectives.

The question remains, in the words of Advocate General Tesauro, what exactly is 'the category of similar acts' to which the ruling applies. One needs merely to refer to present controversies surrounding the Commission's implementation of action under the Social Charter to appreciate the importance of the answer to this question.

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