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The Role of the European Court of Justice in the Development of the European Community Environmental Policy*

Introductory remarks

The decisions of the European Court of Justice (hereinafter 'the Court') have certainly had a significant impact on the development of environmental policy in the European Community. The Court has consistently supported the view that the Community should have legislative competence in this domain, notwithstanding the fact that such a competence originally did not appear in the Treaty of Rome, the source of all Community powers. It might seem rather exceptional for a court to take such an activist stance. The European Court, however, is known for its judicial activism in other areas of Community policy as well. In the field of human rights, for instance, Community policy developed entirely on the basis of a judicial inference of powers not mentioned in the Treaty. Similarly, in the field of external relations, the case law of the Court has been decisive in determining the scope of Community powers.

The active role of the Court in interpreting Community law and promoting Community policies is generally recognised as a driving force behind the process of European integration. Although most authors have been appreciative of the Court's attitude (Dauses 1985: 418; Kapteyn and Verloren van Themaat 1989: 169 and authors cited therein), some have criticised it, arguing that the Court's decisions trespass the boundary of judicial powers and run the risk of losing authority (especially Rasmussen 1986). In view of the outcome of the recent Danish referendum it is interesting to note that Rasmussen contended in 1986 that Danish judges were increasingly concerned with the predictable pro-integrationist outcome of the EC Court's judgments (1986:

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* A revised version of this text will appear in J.D. Liefferink, P.D. Lowe and A.P.J. Mol (eds.), *European integration and environmental policy*, London: Belhaven Press (1993).

360 ff). Rasmussen's criticism in turn has been sharply contested (Cappelletti 1987; Weiler 1987).

The nature of the environmental issues addressed by the Court, has changed through time. Two phases can be distinguished, with a potential third phase looming in the distance. The first phase regards the period prior to 1987 when the Single European Act came into force giving environmental policy a legal basis in the Treaty of Rome (hereinafter 'the Treaty'). Until then, the Court's role was largely confined to arguments about the legitimacy of Community environmental measures in view of the lack of attributed powers in the Treaty. The second phase concerns the situation that has arisen after the coming into force of the Single Act. The new provisions about environmental policy have created numerous legal uncertainties which the Court still has to resolve. A possible third phase would start if the Treaty on European Union adopted in Maastricht in February 1992 came into force introducing additional changes regarding environmental protection.

In this chapter the historical development of the Court's environmental case-law is discussed as well as some general aspects of the functioning of the Court. We will start out by looking at the different procedures before the Court (paragraph 2) and the Court's judicial activism in the field of human rights and with respect to external relations (paragraph 3). This short excursion serves to put the discussion of the Court's case law concerning environmental issues in perspective. In paragraph 4 an overview is presented of the early case law of the Court specifically addressing the legitimacy of Community environmental measures. The important changes that were introduced by the Single European Act are described in paragraph 5, followed by a discussion of the Danish bottle case and the Cassis de Dijon doctrine in paragraph 6. The last Court case we will discuss concerns the different decision making procedures to adopt environmental measures. Some comments are added about procedural changes proposed in the Treaty on European Union (paragraph 7). Paragraph 8 draws some conclusions and speculates about the future role of the Court in promoting European integration *vis-à-vis* European environmental policy.

Basically, the analysis in this chapter hinges upon the question to what extent the Court's active support of environmental measures has been instrumental to the overall process of European integration rather than being driven by concern for the quality of the Community's environment policy. If we find that the Court's decisions in this field show a consistent bias in favor of market integration, it is reasonable to assume that the same support will not be given to environmental measures that are inconsistent with integration. The Court's decision in

the Danish bottle case (see below) seems to indicate that the Court is aware of this potential conflict and is, moreover, willing to adjust a simple integrationist approach to the specific requirements of a common environmental policy.

2. The different Court procedures

The task of the European Court of Justice is to ensure the uniform interpretation and application of the Treaty. Proceedings in front of the Court are contentious or non-contentious. Contentious procedures can be initiated by a Community institution, by one of the Member States and, to a lesser degree, by private persons, *i.e.* individuals and legal persons. The non-contentious procedure is a matter of cooperation between the European Court of Justice and the national courts in the Member States.

2.1 The non-contentious Court procedure

One non-contentious procedure exists, the so-called *preliminary ruling* or *preliminary judgment* (Article 177 of the Treaty), in which the Court interprets a specific rule of Community law (Kapteyn and Verloren van Themaat 1989: 311ff; Hartley 1988: 64). National courts can ask for a preliminary ruling whenever they have to apply a Community rule; if deciding in last instance, national courts are required to do so. A preliminary ruling is binding on the national court hearing the case and is intended to secure the uniform interpretation and application of Community law in all the Member States. No formal hierarchy exists, either between the European Court and national courts or between Community law and national law. The priority of Community law over national law stems from the fact that the transfer of certain powers from the Member States to the Community has created a new legal order in which sovereign national competences are restricted (Kapteyn and Verloren van Themaat 1989: 36ff).[1] Thus, a preliminary judgment is recognized by the national legal order of each Member State as if it were issued by a national court (Articles 187 and 192 of the Treaty).

2.2 The contentious Court procedures

Contentious proceedings before the Court can be divided into four categories: proceedings between Member States, proceedings between Community institutions, proceedings between the Commission and a

Member State and proceedings between private persons and Community institutions (Kapteyn and Verloren van Themaat 1989: 152ff). Other procedures exist that are of little relevance to our subject (see Articles 178-181 of the Treaty). A schematic overview of the different contentious proceedings is given in Figure 1.

Defendant Plaintiff	Member State	Commission	Council
Member State	Inter-State Infringement Procedure (Art.170)	Action for Annulment (Art.173) Action against Failure to Act (Art.175)	Action for Annulment (Art.173) Action against Failure to Act (Art.175)
Commission	Infringement Procedure (Art.169)		Action for Annulment (Art.173) Action against Failure to Act (Art.175)
Council		Action for Annulment (Art.173) Action against Failure to Act (Art.175)	
European Parliament		Action against Failure to Act (Art.175)	Action against Failure to Act (Art.175)
Private Parties		Action for Annulment (Art.173) Action against Failure to Act (Art.175)	Action for Annulment (Art.173) Action against Failure to Act (Art.175)

Figure 1 Plaintiffs and Defendants before the European Court of Justice
All articles refer to the Treaty of Rome.)

The Court procedure that is applied most frequently to environmental cases is the *infringement procedure*, initiated by the Commission against a Member State that fails to fulfil its obligations under the Treaty (Article 169 of the Treaty). An infringement procedure is brought before the Court after a mandatory round of consultation with the incriminated Member State. During the phase of consultation a Member State is given the opportunity to voluntarily adjust the alleged infraction. It is the discretionary power of the Commission to decide whether or not to file suit if a Member State persists in its non-compliance. The Court hears the parties before it delivers its judgment, often accompanied by

an opinion of the Advocate-General. If a Member State is convicted, its punishment is mostly restricted to political embarrassment, since the executive enforcement powers of the Court and the Commission are very limited.

With respect to environmental measures, infringement procedures are typically directed at the failure of a Member State to adopt national legislation implementing EC Directives. In most cases, Directives must be implemented within two years after the date of their issuance, but sometimes another time period is indicated in the Directive. The number of infringement procedures in the area of environmental policy has recently increased dramatically: in 1990, 362 cases were pending (EC Commission DG XI 1991). We must keep in mind, however, that the effect of a preliminary ruling, addressed to the judiciary of the Member State in question, although limited in scope, since it only affects the outcome of the instant case, might be more direct than the impact of an infringement procedure directed at the legislature. It often takes a Member State years to adjust its legislation to the changes required by a condemnation in an infringement procedure.

Member States can initiate infringement procedures in the so-called *inter-State complaint* (Article 170 Treaty). In that case the Commission gives a reasoned opinion about the case. Member States, however, are usually hesitant to file a complaint against other Member States: those who live in a glass house should not throw the first stone.

The other two procedures mentioned in Figure 1 are the *action for annulment of Community acts* and the *action against the failure to act in violation of the Treaty*. The first is a typical judicial review procedure in which the Court tests the legitimacy of decisions of the Council and the Commission (Article 173 Treaty) and annuls decisions that violate the Treaty (Article 174 Treaty). Although the Treaty does not mention decisions of the European Parliament, the Court has accepted on several occasions to review decisions of the Parliament.[2] Each Member State, the Council and the Commission can ask for the annulment of a Community act. Private parties have a limited right of action, confined to decisions with an individual character which directly affect them. The same restriction applies to private parties in the case of an action against a failure to act by Community organs (Article 175 Treaty). In the latter procedure, the European Parliament is granted an equal position as the Member States, the Council and the Commission; each of them can resort to the Court to ascertain the failure of the Council or the Commission to fulfil their obligations under the Treaty and to adopt the necessary measures (Article 175 Treaty).[3]

3. The role of the Court in other policy fields

The Court's role in the field of environmental policy must be assessed against the background of its contribution to other Community policies. Indeed, a brief review of the origins of the Court's judicial activism is indispensable to frame the role of the Court's jurisprudence in the shaping of the Community's environmental policy.

3.1 The Community's human rights policy

The lacuna in the Treaty of Rome with respect to human rights protection has been the subject of much academic and political debate. The suggestion that the Community join the European Convention on Human Rights (ECHR) was given serious attention (Clapham 1991: 84 ff) and the Commission formally proposed accession to the ECHR in 1979 (Dauses 1985: 414). This proposal, however, failed and the Treaty was never amended on this point. Thus, the Court did not seem competent to apply human rights.

After an initial period of 'judicial reticence' (Weiler 1986: 1114), the Court started its activism with respect to human rights protection in the late sixties. Beginning in 1969, a series of decisions were issued in which the progressively established its power to apply fundamental human rights notwithstanding the constitutional omission in the Treaty. In its first judgment, the Court decided that human rights were enshrined in the general principles of Community law which the Court has to apply (Case 29/69, *Stauder v. City of Ulm*, ECR 1969). Respect for human rights forms an integral part of the general principles of law protected by the Court, and has to be ensured within the framework of the structure and objectives of the Community (Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECR, 1970). In protecting human rights, the Court, moreover, draws inspiration from the constitutional traditions common to the Member States as well as from the international treaties for the protection of human rights of which the Member States are signatories (Case 4/73, *Nold v. Commission*, ECR 1974 and Case 44/79, *Hauer v. Rheinland-Pfalz*, ECR 1979).

The Court, in other words, applies human rights as if they were incorporated in the Treaty. The absence of a written bill of rights has been offset by the Court's judicial activism creating additional guarantees for the individual citizen (Weiler 1986: 1117). The question whether this activism is driven by concern for human rights or by the interest of market integration recently surfaced again in two decisions reported by

Clapham (1991: 48-49). Contrary to other legal systems, the Court does not grant human rights the sense of absoluteness normally associated with rules that enjoy the highest rank within the legal order. The Court stated explicitly that restrictions may be imposed on the exercise of fundamental rights 'in the context of the common organization of the market' (*idem*). Thus, we may conclude that the activist role of the Court in the field of human rights protection must be seen in the light of the Court's continuous contribution to European integration.

3.2 The external relations competences of the Community

Clear Community competences regarding external relations exist only in the area of foreign commercial policy (Articles 110-116 of the Treaty). In most other fields, competences are derived from the general provisions in the Treaty concerning the legal personality of the Community and its competence to conclude international agreements with third countries and international bodies (Articles 210, 228-231, 238). Besides the case-law of the Court, the process of European Political Cooperation and the activities of the Commission have had a significant role in this development.[4]

The first important decision of the Court in the famous *ERTA* case (Case 22/70, *Commission v. Council*, ECR 1971), was to set aside the principle of enumerated powers, *compétences d'attribution*, with respect to external relations, and to adopt the doctrine of implied powers (Hartley 1988: 156-165). Contrary to the prevailing doctrine and contrary to the opinion of the Advocate-General, the Court ruled that Community treaty making powers concerning transport were to be inferred from its internal powers in this field. The Court determined that the Community had the power to enter into external relations in all the fields for which it holds internal competence. No separation must be created, according to the Court, between the system of internal Community measures and external relations (ECR 1971: 274). The adoption of certain internal measures necessarily confers on the Community the authority to enter into international agreements relating to the subject matter governed by that measure, to the exclusion of concurrent powers on the part of the Member States (*idem*: 275, 276). Implied powers exist, in other words, for external relations with respect to all fields in which the Community has internal competences. This is referred to as the doctrine of *parallel powers*. The implied power doctrine was upheld in the *Kramer* case concerning agricultural policy (Joint cases 3,4 and 6/76, *Cornelis Kramer and others*, ECR 1976). Here, the competence to enter into an agreement on the conservation of

ocean fishing was derived from the power to adopt a common agricultural policy and from an internal Council regulation on fisheries conservation in the Member States (ECR 1976: 1309, 1310).

An issue that was not clarified in these decisions, was to what degree external competences could only be derived from the existence of a specific internal measure, or could also be based on a general competence to adopt internal measures in a certain field. This question was addressed in a subsequent case which the Court heard in 1976. In Opinion 1/76 (*Draft Agreement establishing a European laying-up fund for inland water vessels*, ECR 1977), the Court stated that Treaty making powers do not necessarily depend on a prior internal measure but may flow from the general provision creating the internal competence if the participation of the Community in the international agreement 'is necessary for the attainment of one of the objectives of the Community' (ECR 1977: 755).

The Court's interpretation of the limited Treaty provisions concerning external relations has expanded the overall competences in this field considerably. In principle, the implied power doctrine applies equally to the Community's foreign environmental policy that has recently become an increasingly important aspect of Community foreign affairs (Nollkaemper 1987).

4. The first environmental cases and the Single European Act

The beginning of the Community environmental policy can be traced back to 1972 when the Heads of State and government issued a statement at the Summit meeting in Paris, expressing the need for developing such a policy. In 1973, the Commission published its first Environmental Action Programme and issued proposals for several environmental Directives (Koppen 1988). Some Member States were slow in implementing the Community measures and by the end of the seventies the Commission had started infringement procedures against several countries. In the cases against Italy and Belgium that are discussed below, the Court addressed the issue of the legitimacy of environmental measures in the absence of an explicit reference in the Treaty. By interpreting the general provisions in the Treaty, the Court determined that environmental policy fell within the sphere of competence of the Community. In a preliminary ruling a few years later, the Court went even further by stating that environmental protection was one of the Community's essential objectives. Considering the fact that environmental protection was not yet included in the Treaty, this was

a bold statement, reminiscent of the Court's judgments in the field of human rights and external relations.

4.1 Infringement procedures against Belgium and Italy

The Commission filed suit against Italy for not implementing a Council Directive on the approximation of the laws of the Member States relating to detergents as well as a Directive on the approximation of the laws of the Member States relating to the sulphur content of certain liquid fuels.[5] The first provided for an 18 months implementation period, which expired on May 27, 1975, the second gave the Member States until August 26, 1976 to adopt the necessary internal measures. The Commission started the infringement procedures in May 1979 and the Court issued its judgments in March of the following year (Cases 91 and 92/79, *Commission v. Italy*, ECR 1980, 1099 and 1115). Against the claim of the Commission that it had failed to fulfil its obligations under the Treaty, Italy stated that it would not raise the question whether the directives were 'valid in the light of the fact that combating pollution was not one of the tasks entrusted to the Community by the Treaty' (ECR 1980: 1103 and 1119). However, Italy did maintain that the matter lied 'on the fringe' of Community powers and that the contested measures were actually an international convention drawn up in the form of a directive (*idem*). The argument Italy was trying to make was weak. First of all, as was pointed out by the Advocate General, if Italy really wanted to challenge the validity of the Directives it should have brought an action for annulment under Article 173 of the Treaty (ECR 1980: 1110-1111). Moreover, the Directives were not only adopted as part of the Programme of Action of the Community on the Environment but also under the General Programme for the elimination of technical barriers to trade adopted by the Council in 1969. The Court ruled that the Directives in question were both validly based on Article 100 of the Treaty, which authorizes the Community to adopt all measures necessary to eliminate trade barriers resulting from disparities between provisions in the national legislation of the Member States. Article 100, in other words, was recognised as the legal basis for environmental measures which were adopted in order to harmonise national provisions. 'If there is no harmonization of national provisions on the matter,' according to the Court, 'competition may be appreciably distorted' (ECR 1980: 1106 and 1122). Thus, the legitimacy of Community environmental measures was recognised to the extent that the harmonisation of national measures was necessary to eliminate trade barriers.

A few years later, in a series of six cases against Belgium, the Court broadened the legal basis of environmental directives by interpreting Article 235 of the Treaty which authorizes all Community action, not explicitly included in the Treaty, that proves to be 'necessary to attain, in the course of the operation of the common market, one of the objectives of the Community' (Cases 68-73/81, *Commission v. Belgium*, ECR 1982: 153, 163, 169, 175, 183 and 189). The cases were similar to those against Italy. Belgium had failed to implement a number of environmental Directives and the Commission brought an action against it for failure to comply with its obligations under the Treaty.[6] All six Directives were based on Articles 100 and 235 of the Treaty. The Court accepted this dual basis, repeating that environmental measures may on the one hand be required to 'eliminate disparities between the laws of the Member States likely to have a direct effect upon the functioning of the Common Market' (ECR 1982: 171) and, on the other hand, may be necessary 'to achieve one of the aims of the Community in the sphere of protection of the environment and improvement of the quality of life' (ECR 1982: 191). By adding the second phrase, the Court established environmental measures as one of the *implied powers* of the Community, similar to the case law regarding external relations competences (Hartley 1988: 104). As far as the relevant objectives of the Community are concerned, they were to be found in the Preamble and in Article 2 of the Treaty. *Inter alia*, such objectives include the constant improvement of the living and working conditions and an accelerated raising of the standard of living.

4.2 Preliminary judgments about the Directive on the disposal of waste oils

The French association of waste oil incinerators, the *Association de Défense des Brûleurs d'Huiles Usagées (ADBHU)*, contested the validity of some provisions in the EC Directive of 16 June 1975 on the disposal of waste oils (OJ No L 194/23) in a national case before the *Tribunal de Grande Instance de Créteil*. Since the matter regarded the interpretation of Community law, the *Tribunal* asked the Court for a preliminary judgment (Case 240/83, *Procureur de la République v. l'Association de Défense des Brûleurs d'Huiles Usagées*, ECR 1985: 531). The question put before the Court was whether the Directive, by empowering Member States to create restrictive systems of waste-oil collection and treatment, violated the principles of freedom of trade, free movement of goods and freedom of competition (ECR 1985: 548). Articles 5 and 6 in particular, concerning the assignment of exclusive zones to waste oil collectors and

the prior approval and licensing of disposal undertakings, were under scrutiny.

In an earlier judgment about the same Directive, the Court had ruled that the Directive did not authorize Member States to prohibit the export of waste oils to other Member States since this would constitute a barrier to intra-Community trade. France had adopted national legislation to implement the Directive which had this effect (Case 172/82, *Fabricants raffineurs d'huile de graissage v. 'Inter-huiles'*, ECR 1983: 555).

In its 1985 judgment, the Court refers to the earlier decision, adding that the legitimacy of the restrictions to the freedom of trade adopted by France on the basis of the Directive, has to be interpreted in view of its aim 'to ensure that the disposal of waste oils is carried out in a way which avoids harm to the environment' (ECR 1985: 549). 'The principle of freedom of trade,' according to the Court, '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 [...]. The directive must be seen in the perspective of environmental protection, which is *one of the Community's essential objectives*' (*idem*, italics added IJK). Restrictions posed by environmental measures may be justified, according to the Court, as long as they are not discriminatory nor disproportionate. The Court concluded that the Directive had not exceeded these limits (*idem*).

Two aspects of the judgment deserve particular attention. First of all, we observe that the Court digressed to state that environmental protection was one of the Community's essential objectives. The phrase was added to strengthen the line of reasoning of the Court, but it was not indispensable. It was, moreover, not true. Environmental protection was not yet mentioned in the Treaty as a Community policy, let alone as a Community objective. Why then did the Court choose such a strong formulation? Undoubtedly, the judgment had an impact at the time on the discussions that were being held about the proposed Treaty changes. The Court took a position in these discussions, by showing its support for the proposal to include environmental protection among the objectives of the Community. This is indeed a typical instance of judicial activism of the Court. The Court ruled according to what it thought the law ought to be and not according to what the law was (Hartley 1988: 77-78).

Having put environmental protection on equal footing with other Community objectives, the Court was then able to make a relative assessment of the different interests at stake. It was the first time that the Court undertook to balance the interests of environmental protection against the interests of the internal market, applying the principles of

non-discrimination and proportionality. A few years later, the Court applied this method another time and developed it further (see the discussion of the Danish bottle case, below). It must be kept in mind, however, that this was after environmental protection had been included in the Treaty. In 1985, the Court's reasoning was certainly beyond the limits of orthodox legal interpretation. With its activism, the Court made up for some of the political and legislative inertia of the Community, just as it had done in other policy areas (Rasmussen 1986: 416; Weiler 1986: 1116-1117).

5. The amendments introduced by the Single European Act

With the coming into force of the Single European Act (SEA) on July 1, 1987, environmental protection was included in the Treaty as one of the Community policies (Articles 130R, 130S and 130T). Environmental protection is mentioned as well in Article 100A, a provision inserted in the Treaty by the SEA, which authorizes the adoption of all harmonization measures necessary for the establishment of the Internal Market. Thus a dichotomy is created between environmental measures that are part of the Internal Market programme and action that is not related to the functioning of the Internal Market. The distinction has several important consequences.

First of all, Article 100A establishes that all harmonization measures adopted in the context of the Internal Market are adopted by qualified majority, whereas measures based on Article 130S require a unanimous vote in the Council. The difference in the voting procedure is furthermore reflected in a different role of the European Parliament. This particular aspect will be discussed separately, in the light of recent case law of the Court (paragraph 7).

Another difference that needs to be considered regards the margin of discretion of Member States to enact national legislation after the adoption of a Community measure. If a measure is adopted on the basis of Article 130S, this 'shall not prevent Member States from *maintaining or introducing* more stringent protective measures compatible with this Treaty' (Article 130T). Measures adopted on the basis of Article 100A, however, allow a Member State to *apply* a national provision after notifying the Commission who must verify that the national provision is not 'a means of arbitrary discrimination or a disguised restriction on trade between the Member States' (Article 100A para 4). The difference in the wording of the two articles, 'maintaining or introducing' as opposed to 'applying' is generally interpreted as follows. If a measure is adopted

on the basis of Article 100A, Member States can continue to apply *already existing* national provisions, to the extent that they have been approved by the Commission. In the case of measures based on Article 130S, Member States are free to adopt *new* national legislation on the same topic as long as it contains more stringent standards. The requirement that the national provisions must be compatible with the Treaty means that they have to fulfil the same general requirements that apply to national environmental legislation in the absence of Community rules. Therefore, the choice of the legal basis of a proposed environmental measure has significant ramifications and it is one of the issues addressed by the Court in its case law after the SEA (see paragraph 7).

Among the principles that underlie Community environmental policy, enumerated in Article 130R, one deserves special attention. The *integration principle* requires that environmental considerations be an integral part of all other Community policies. This principle gives environmental policy a unique status in the Community since it is the only policy field for which such a requirement is explicitly formulated. Although many were sceptical at the time about the implementation of the new principle, five years later we must acknowledge that some results have been attained. Recent initiatives in the transport sector might serve as an example (Directorate General VII 1992). Moreover, the principle has served the Court as a guidance in interpreting other aspects of Community environmental law.

With respect to Community external relations in the field of environmental protection the Single Act has created an ambiguous situation. Article 130R para 5 determines that the conclusion of international agreements by the Community 'shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.' The provision seems to imply that Community competence in this field never excludes concurrent powers on the part of the Member States. This interpretation, however, would be contrary to the general case-law of the Court on external relations. It would especially come into conflict with the Court's decision in the ERTA case. A partial solution to the dilemma can be found in a Declaration that was added to the Final Act of the Intergovernmental Conference where the SEA was adopted, which states that the provisions of Article 130R para 5 'do not affect the principles resulting from the judgment handed down by the Court of Justice in the ERTA case.' From this we can derive that the ERTA doctrine of implied external competence is applicable to environmental policy. *A contrario*, this would mean that the other relevant decisions of the Court in this matter, most notably the Kramer case and Opinion 1/76, do not apply to environmental poli-

cy. External powers could then be legitimately based on an existing internal measure, excluding concurrent powers of the Member States. They could not, however, be deduced from the existence of the general competence to adopt internal measures concerning a certain subject matter. The Court of Justice has not yet had the occasion to clarify the situation. It is doubtful that the Court would limit itself to applying the ERTA doctrine to international environmental agreements without reference to the other aspects of the jurisprudence it developed about external relations competences. For the moment we can observe that in practice the Community assumes exclusive powers only concerning matters for which internal rules have been adopted. For all other issues the Community participates in international negotiations alongside the Member States. Most international environmental agreements are so-called *mixed agreements*, signed by the Community and by the Member States (Nollkaemper 1987: 70ff; Haigh 1991: 173).

6. Towards 'diversified integration': the freedom to be cleaner than the rest

The judgment of the Court in the Danish bottle case (Case 302/86, *Commission v. Denmark*, ECR 1988: 4627) is one in a series of decisions about the scope of admissible exceptions to the general prohibition of quantitative import restrictions and all measures having equivalent effect in the Community (Article 30 of the Treaty). The Treaty itself lists a number of acceptable reasons including public morality, public security, public health and the protection of national monuments (Article 36). Member States have extensively tried to exploit these categories of exceptions to try and convince the Court of the necessity to apply a national rule that created an obstacle to free trade. The argument of consumer protection for instance was used at a number of occasions, and the case law thus developed served as a precedent for the first decision about environmental protection as a legitimate exception.

6.1 French liqueur, Belgian margarine and German beer

The first relevant case law of the Court dates back to 1979, when the Court issued its decision in the case Cassis de Dijon (Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, ECR 1979: 649). Germany had banned the import of the French liqueur Cassis de Dijon on the grounds that its alcohol content, 15 to 20 percent, did not satisfy the German requirements for the import of

spirits contained in the Law on the Monopoly in Spirits of 1922, which required a minimum wine-spirit content of 32 percent. The Court observed dryly that the fixing of a minimum wine-spirits content for potable spirits could certainly not be justified by reasons related to human health, as the German government had maintained, and obliged Germany to adjust its national legislation in order to allow for the marketing of the French liqueur.

A similar decision was issued in 1982, when the Court ruled that Belgian legislation concerning the shape of the packaging of margarine constituted an obstacle to free trade unwarranted by the need to protect or inform the consumer (Case 261/81, *Walter Rau Lebensmittelwerke v. De Smedt PvbA*, ECR 1982: 3961).

Two years later, the Commission brought an action against Germany for its restrictive legislation on the quality of imported beer. German legislation prohibited any additives in beer. The Commission observed that this resulted in limited imports of beer into Germany while favoring the export of German beer. The German government emphasized that its legislation, referred to as the *Reinheitsgebot*, the purity requirement, dating back to 1516, was a measure to protect public health, and was thus acceptable as a legitimate exemption from the prohibition of Article 30. The Commission maintained that this was merely a pretext, since additives were allowed in Germany in other products. In its judgment (Case 178/84, *Commission v. Germany*, ECR 1987, 1227), the Court repeated the arguments it had put forward in the two cases mentioned above, also referred to as the *Cassis de Dijon formula*:

> In the absence of common rules relating to the marketing of the products concerned, obstacles to free movement within the Community resulting from disparities between the national laws must be accepted in so far as such rules, applicable to domestic and to imported products without distinction, may be recognized as being necessary in order to satisfy mandatory requirements relating *inter alia* to consumer protection. It is also necessary for such rules to be proportionate to the aim in view. If a Member State has a choice between various measures to attain the same objective it should choose the means which least restricts the free movement of goods (ECR 1987: 1270).

It was with respect to the last requirement that the Court deemed the German legislation excessive. An absolute prohibition on additives was not necessary, according to the Court, since it was 'contrary to the principle of proportionality' (*idem*: 1276).

Recapitulating, we can say that although the Court in principle recognised consumer protection as a mandatory requirement justifying

derogations to Article 30, it was reluctant to apply this argument in practice.

6.2 The Danish bottle case

In view of the Court's restrictive application of consumer protection as a ground to justify quantitative import restrictions, the Commission must have been quite certain of its case when it filed suit against Denmark for the packaging requirements it had issued for beer and soft drinks. It was certainly a test case and the Commission made it clear that it was of great importance to establish 'whether and to what extent the concern to protect the environment has precedence over the principle of a common market without frontiers since there is a risk that Member States may in future take refuge behind ecological arguments to avoid opening their markets to beer as they are required to do by the case-law of the Court' (ECR 1988: 4611; Sands 1990: 696-697).

In Denmark, legislation had been enacted requiring that beer and soft drinks be marketed in re-usable containers approved by the National Agency for the Protection of the Environment. A limited number of 23 containers had so far been admitted. The number was kept small since that was the only way to make sure that each container would be taken back by every retailer of beverages, irrespective of the place where the product had been purchased. This, in turn, greatly enhanced the effectiveness of the mandatory system, ensuring a return rate of 99 percent, a figure that could never be reached with any other deposit-and-return system. Beverages in non-approved containers were allowed up to a yearly quantity of 3000 hectoliters per producer, provided that a deposit-and-return system was established by the producer. Non-approved containers would only be taken back by the retailer who sold the beverages. No form of metal container was allowed. The rationale behind the system, according to the Danish government, was to protect the environment and to conserve resources and energy as well as to reduce the amount of waste.

Allegedly, the Danish requirements made it very difficult to import beer and soft drinks into Denmark and the Commission questioned whether this trade barrier was justified on the grounds put forward by the defendant. The Commission did not question the general principle that environmental protection was one of the Community's essential objectives and as such one of the *mandatory requirements recognized by Community law* that could justify certain import restrictions. The Commission questioned the sincerity of Denmark's ecological concerns, just as it had challenged Germany's concern for consumer protection in

the case concerning beer additives, noting that the severe packaging requirements only applied to beer and soft drinks and not to other products like milk and wine which were not subject to competition between foreign and domestic producers. If Germany was not allowed to invoke its *Reinheitsgebot* to justify import restrictions on beer, than Denmark could not hide behind mandatory recycling requirements that had a similar effect. The Advocate General supported the Commission's claim and expressed the opinion that the judgment of the Court had to be similar to the judgment in Case 178/84: the Danish requirements were disproportionate in view of their aim (ECR 1988: 4619-4626). But the Court took a more subtle stance. First of all, the Court referred to the Cassis de Dijon formula: obstacles to the free movement of goods within the Community must be accepted in so far as 1) no common rules relating to the marketing of the products in question exist, 2) the national rule in question applies equally to domestic and imported products and 3) the rule is necessary to satisfy mandatory requirements of Community law. The national rules must, moreover, be proportionate to the aim in view. Then the Court repeated its decision in Case 240/83: environmental protection is one of the Community's essential objectives which may as such justify certain limitations of the principle of the free movement of goods. Thus the Court recognized that environmental protection is one of the mandatory requirements which may limit the application of Article 30 of the Treaty and extended the Cassis de Dijon doctrine to include environmental protection. This was the first important pronouncement in the case.

The Court then went on to interpret the proportionality of the Danish measures in view of the alleged aim of environmental protection. In full support of the Danish arguments, the Court stated simply that the establishment of an obligatory deposit-and-return system with a limited number of containers was indispensable to ensure the re-use of containers and therefore necessary to achieve the aim. Only one aspect of the rules was disproportionate, according to the Court, namely the fact that a maximum marketing quota of 3000 hectoliters was established for beverages sold in non-approved containers in addition to the requirement that the producer set up a deposit-and-return system for the containers. This aspect of the Danish rules was considered in violation of Article 30 of the Treaty.

Determining where to draw the line between disproportionate and proportionate measures is hardly a matter of juridical interpretation. It is a subjective assessment of advantages and disadvantages and an allocation of responsibilities. In this case, the Court tried to strike a balance between the economic interests of the Community and the increasing

concern for environmental values. The decision shows that the Internal Market does not preclude differences between environmental standards in the Member States. From an environmental point of view this is an important achievement. The situation is still more complex if Community measures on the same topic exist. In that case the freedom of the Member State to adopt divergent national standards depends on the legal basis that was chosen for the Community rule (see paragraph 5). This is one of the topics that will certainly be brought before the Court in the near future.

7. Different procedures to adopt environmental measures

As we have seen, since the coming into force of the SEA, two different procedures exist to adopt environmental measures. The Single Act introduced the so-called *cooperation* procedure which grants the Parliament the power to put forward amendments to proposed measures. This procedure applies to all measures related to the Internal Market that are adopted by the Council with qualified majority. Instead, if a measure is based on Article 130S, the Council must decide unanimously, after *consultation* of the Parliament. In the consultation procedure, the opinion of the Parliament does not have any binding effect. In both cases proposals must come from the Commission since in the legislative system of the Community the Commission has the exclusive right of initiative.

The ambiguous system thus created left a major question unanswered: how to determine when an environmental measure has to be adopted on the basis of Article 100A as part of the Internal Market programme and when a measure should be based on Article 130S. The Court addressed this question in a case in which the Commission, the Parliament and the Council disagreed about the legal basis of an environmental Directive. Before looking at the Court decision itself, we will briefly examine the role of the Parliament in the different procedures. A final paragraph is included in which the situation that will arise when the Maastricht Treaty on European Union comes into force is described.

7.1 The role of the European Parliament

The cooperation procedure introduced by the SEA enlarged the role of the Parliament in the Community legislative process. Although Parliament's powers are still limited and the democratic content of Community decisions remains questionable, a slight increase in influence

was achieved. The cooperation procedure basically adds a phase to the procedure followed in the case of consultation. When the Commission issues a proposal, the proposal is first sent to the Parliament for its opinion. The Commission is free to adjust the proposal to the changes suggested by the Parliament. The proposal and the EP's opinion are then forwarded to the Council. If the procedure of Article 130 is followed, the Council at this point takes a final decision and the proposal is adopted if the Council reaches unanimity. In the case of the cooperation procedure, however, the Council adopts a common position about the proposal. The common position is returned to the Parliament. If the Parliament agrees with the common position, the Council can adopt the proposed action by qualified majority. If the Parliament rejects the common position, the Council can only adopt the action only by unanimity. If the Parliament proposes amendments, these are reviewed by the Commission who sends a revised proposal to the Council. At this stage the Council can adopt the second Commission proposal by qualified majority. If the Council wants to make any further changes these have to be adopted by unanimity. The main effect of the second phase is that the Parliament's opinion, if endorsed by the Commission, can force the Council to decide unanimously which sometimes means that a decision gets actually blocked. Another effect of the enlarged procedure is that Parliament is kept better informed of the considerations and arguments of the Council. Communication between the institutions is, therefore, intensified.

7.2 Commission and Parliament v. Council: majority v. unanimity voting

A little more than a year after the coming into force of the SEA, the first dispute arose between the Council and the Commission about the different procedures envisaged to adopt environmental measures. In June 1991, the Court passed its first judgment about the issue (Case 300/89, *Commission v. Council*, ECR 1991: I-2867). The Commission, supported by the European Parliament, asked for the annulment of Directive 89/428/EEC of 21 June 1989 about the harmonisation of programmes to reduce waste from the titanium dioxide industry (OJ L No 201/56). Contrary to the Commission's proposal, the Directive had been adopted unanimously by the Council on the basis of Article 130S. The Commission had suggested Article 100A as the basis for the Directive since its principal objective, its *centre of gravity*, according to the Commission, was to improve the conditions of competition in the titanium dioxide industry, which made it clearly an Internal Market measure.

In its judgment the Court stressed that the legal basis of a proposed measure has to be chosen according to objective criteria like the aim and the content of the measure (ECR 1991: I-2898). The aim and the content of the Directive under scrutiny, however, did not result in a clear answer since the Directive is as much related to environmental protection as it is related to the Internal Market (*idem*: I-2898/2899). A dual legal basis was excluded by the Court arguing that the two Articles in question require different and incompatible decision-making procedures. If Articles 100A and 130S were to be applied simultaneously, this would force the Council to decide unanimously. This, in turn, would exclude the cooperation procedure and limit the role of the European Parliament. In that context the Court recalled the importance of the stronger role of the Parliament emphasizing that the cooperation procedure was added to the Treaty 'to strengthen the participation of the European Parliament in the legislative process of the Community. [...] This participation is the reflection, at the Community level, of a fundamental democratic principle, by which the people participate in the exercise of power through the intermediary of a representative assembly' (*idem*: I-2900).

Besides the emphasis placed on the role of the European Parliament, three elements can be discerned in the Court's decision to annul the Directive. First of all, the Court argued that the integration principle implies that measures to protect the environment do not always have to be adopted on the basis of Article 130S (*idem*: I-2901). Secondly, the Court referred to its early judgments in the cases against Italy, to recall that the harmonisation of national environmental measures is often necessary to prevent the distortion of competition. This type of harmonisation measures thus contributes to the establishment of the Internal Market and falls within the scope of Article 100A. Finally, the Court pointed to the fact that Article 100A itself requires that harmonisation measures concerning environmental protection take as a base a high level of protection. This provision is a guarantee, according to the Court, that environmental objectives can be effectively pursued on the basis of Article 100A.

The consequences of the decision are rather complex. From now on, most environmental measures are likely to be based on Article 100A, which makes environmental protection more closely related to the Internal Market policy of the Community. This is a realistic solution in view of the fact that the two policy fields need to be integrated. The Court's favorable attitude towards the cooperation procedure and the larger role played by European Parliament is positive in view of the enhanced 'democratic content' of Community environmental legislation.

Majority voting will, moreover, facilitate decisions about issues that would otherwise be blocked by a veto (Dehousse 1992: 17). This last point is, however, also one of the potential dangers of the decision: Member States that object to a proposed measure because the level of protection it sets is not high enough will have difficulty to prevent its adoption, *i.e.* to form a blocking coalition. Once the measure is adopted, Member States are not allowed to adopt more stringent national standards, an option they have if a Community rule is adopted on the basis of Article 130S.[7] Until now there is little reason to have much confidence in the requirement that proposed harmonisation measures take as a base a high level of protection. The conclusion, then, must be that the Court's judgment was primarily inspired by considerations of integration; not the integration of environmental requirements into other Community policies, but the integration of the European market, a Community objective that continues to have priority over environmental protection.

7.3 If the Treaty on European Union comes into force

In the Treaty on European Union, major procedural amendments are proposed. The new Article 130S refers to three different kinds of decision-making procedures. The old procedure requiring a unanimous decision of the Council after consulting the Parliament remains applicable only to measures concerning taxation, town and country planning and the energy supply of Member States. The cooperation procedure will apply to all other measures, with one exception. The Community's general action programmes shall be adopted in accordance with the so-called *co-decision* procedure, a new procedure that is introduced for all decisions based on Article 100A related to the Internal Market.

In the co-decision procedure the role of the Parliament is further enlarged. If the Parliament rejects the Council's common position, or if the Council does not want to adopt the amendments proposed by the Parliament, a *conciliation committee* is formed, composed of an equal number of representatives of the Council and the Parliament. If the Committee reaches a consensus, the proposal will be adopted, if the Committee does not reach a consensus, the proposal fails if the Parliament rejects the text by absolute majority. Hence, Parliament has been given veto power.

Another change introduced by the Treaty on European Union relevant to our discussion is that environmental protection is recognized as a Community objective. An explicit reference to environmental protection is contained in Article 2 which enumerates the objectives of the

Community. The inclusion of environmental protection among the objectives of the Community, besides having a symbolic value, also strengthens the political status of environmental policy as compared to other Community policies, the Court is not likely to be much affected by this change. After all, the Court had already decided in 1985 that environmental protection was 'one of the Community's essential objectives' (ECR 1985: 549).

However, one area exists in which the change might have an impact, namely the external relations powers of the Community in the field of environmental protection. As was argued above, although in practice Community competence is generally defined on the basis of the ERTA-doctrine, the Court would be likely to apply other case-law as well, in particular the decision in which the Court held that external competences do not necessarily depend on an internal Community measure, but may flow from the general internal competence to act in a certain field (Opinion 1/76, ECR 1977: 755, see above). This interpretation is even more likely to hold true once the Treaty includes environmental protection as a Community objective, since the condition for the recognition of a Community external competence formulated in Opinion 1/76 was that the participation of the Community in the international agreement had to be '*necessary for the attainment of one of the objectives of the Community*' (ECR 1977: 755).

8. Conclusions

It would be too simple to characterize the case-law of the European Court of Justice concerning Community environmental policy as merely pro-integrationist. The cases described above show a more complex picture, a line of reasoning in which a two-fold orientation can be discerned. Besides elements of traditional judicial activism in favor of market integration, we also notice an increasing concern for the protection of the environment in Europe.

A strong element of market integration was present in the first environmental cases (Cases 91 and 92/79, *Commission v. Italy*, ECR 1980: 1099 and 1115) in which the Court recognised environmental measures to the extent that they harmonised national provisions which would otherwise create trade barriers and distort competition. Two years later, the Court slightly adjusted this reasoning by adding that environmental measures may also be necessary to achieve one of the aims of the Community (Cases 68-73/81, *Commission v. Belgium*, ECR: 153ff), thus establishing a broader legal basis for Community action. In

the preliminary judgment issued in 1985 (Case 240/83, *Procureur de la République v. l'Association de Défense des Brûleurs d'Huiles Usagées*, ECR 1985: 531), the Court started to challenge its own concern for market integration by first of all stating that environmental protection was in itself one of the Community's essential objectives and secondly upholding the contested French measures even though they created obstacles to trade in the field of the treatment and disposal of used oils. The argument is a matter of simple deduction: environmental protection is a Community objective, Community objectives may pose limits to each other's application, environmental protection may therefore pose limits to the application of other Community objectives. The same construction was applied again in the Danish bottle case with respect to intra-Community trade. The Court upheld Danish packaging requirements although they created in fact an obstacle to the import of beer and soft drinks into Denmark. The Court accepted the Danish argument that the requirements were justified by reasons of environmental protection and ruled that, as one of the Community's essential objectives, environmental protection was one of the mandatory requirements of Community law which may limit the scope of the general prohibition of quantitative import restrictions of Article 30 of the Treaty.

It is beyond doubt that the objectives of market integration and environmental protection are at times hard to reconcile. In this respect it is important to note that the Court in its most recent case-law seems to have given priority to the imperative of market integration. Faced with the question which legal basis to choose for environmental measures, the Court insisted on linking environmental protection closely to the Internal Market programme (Case 300/89, *Commission v. Council*, ECR 1991). Although the Court stressed in its judgment that the provision contained in Article 100A paragraph 3, that all Commission proposals must take as a base a high level of protection, should function as a guarantee, the fear remains that the harmonization measures adopted by the Community will force several Member States to lower their national standards.

Therefore, it seems to us that the best guarantee for a high level of environmental protection, is to grant Member States a certain amount of freedom to adopt more stringent national measures. This freedom already exists if a Community measure is adopted on the basis of Article 130S. It is not clear, however, to what extent Article 100A allows a similar freedom.

So far, the Court has not passed any judgments about the extent to which national measures may diverge from Community rules. This is likely to be one of the first issues which the Court will address in its

future case-law. It will be a major challenge for the Court to strike the right balance between the traditional forces of market integration and the growing concern for environmental protection in Europe. If the Court decides to uphold its decisions in Case 300/89, it should decide subsequently to give a broad interpretation to the derogation clause contained in Article 100A, allowing the application of both new and already exisiting measures to the extent that they pass the test of proportionality. If, on the other hand, a restricted interpretation is given to Article 100A para 4, the Court will have to reconsider its decision in Case 300/89 and allow for more environmental measures to be based on Article 130S. Such a *revirement* in the jurisprudence of the Court is all the more needed when one realizes that the different realities existing in Member States require decentralised environmental action. Either way, the essence of the Court's efforts, if it wants to continue to support the progressive development of environmental protection in Europe, must be to elaborate the doctrine of 'diversified integration', the basic tenets of which were set forth in the Danish bottle case.

Notes

1. The special features of Community law *vis-à-vis* national law were established by the Court in a series of cases, the most important of which are: Case 26/62, *Van Gend en Loos v. Nederlandse administratie der belastingen*, ECR 1963; Case 6/64, *Costa v. ENEL*, ECR 1964; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, ECR 1978. Other relevant case law is cited in Kapteyn and Verloren van Themaat 1989: 38ff. See also Hartley 1988: 219ff.

2. The most important cases are: Case 230/81, *Luxembourg v. European Parliament*, ECR 1983; Case 108/83, *Luxembourg v. European Parliament*, ECR 1984; Case 294/83, *Parti Ecoligiste Les Verts' v. European Parliament*, ECR 1986; 34/86, *Council v. European Parliament*, ECR 1986.

3. The Parliament did so once, in a famous case regarding the (lack of a) Community transport policy: Case 13/83, *European Parliament v. Council*, ECR 1985. For a detailed discussion of the position of the Parliament in both procedures, see Barnard 1987; Hartley 1988: 77-78, 374-375; Kapteyn and Verloren van Themaat 1989: 143-145, 281-290.

4. It is not possible here to analyze these complex processes in any detail; I refer to the overview article by Stein 1991 and the literature cited there for further reading. See also Kapteyn and Verloren van Themaat 1989: 21-28 and Hartley 1988: 153-176.

5. Council Directive No 73/404/EEC of 22 November 1973 on the approximation of the laws of the Member States relating to detergents (Official Journal L No 347/51) and Directive No 75/716/EEC of 24 November 1975 on the approximation of the laws of the Member States relating to the sulphur content of certain liquid fuels (Official Journal L No 307/22).

6. The following Directives had not been implemented: Directive No 75/439/EEC of 16 June 1975 on the disposal of waste oils (OJ L No 194/23); Directive No 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States (OJ L No 194/26); Directive No 75/442/EEC of 15 July 1975 on waste (OJ L No 194/39); Directive No 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ L No 31/1); Directive No 76/403/EEC of 6 April 1976 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls (OJ L No 108/41); Directive No 78/176/EEC of 20 February 1978 on waste from the titanium dioxide industry (OJ L No 54/19). See the Opinion of the Advocate General (ECR 1982: 159) and Koppen (1988) for a description of the cases.

7. The derogation clause of Article 100A para 4 has sofar not been used. It could possibly be interpreted more broadly to include also newly adopted national measures (see Conclusions).

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