Law Governing the Institutions

Recent Case-Law of the European Court of Justice and the Court of First Instance

Trade-related environmental measures – double legal basis

ECJ, judgment of 10 January 2006 – Case C-178/03 – action for annulment Commission v European Parliament and Council of the European Union

On those grounds, the Court (Second Chamber) hereby:
2. Maintains the effects of that regulation until the adoption, within a reasonable period, of a new regulation founded on appropriate legal bases.

Case Note*

The case concerned the choice of the legal basis for Regulation 304/2003 concerning the export and import of dangerous chemicals.

Facts and arguments of the parties

Regulation 304/2003 on the export and import of dangerous chemicals was adopted on the basis of Article 175(1) EC Treaty by unanimous decision of the Council and of the European Parliament. The European Commission which had based its proposal on Article 133 EC Treaty, applied to the Court of Justice. It argued that the wrong legal basis had been chosen and that the Regulation should have been based on Article 133. This followed already from the title of the Regulation which dealt with 'exports' and 'imports' of products, demonstrating that the Regulation dealt predominantly with commercial issues. Furthermore, the centre of gravity of the Regulation was of commercial nature; indeed, the classification, labelling and packaging of chemical products which were addressed by Regulation 304/2003, were, within the Community, treated under provisions that had been based on Article 95 EC Treaty. The international aspect of trade in dangerous chemicals which was dealt with in Regulation 304/2003, was just the mirror of these internal, trade-related provisions on trade in dangerous chemicals which had been, with one exception, based on Article 95. Trade with third countries had to be regulated uniformly so as to avoid any distortion of intra-Community trade; this required the application of Article 133 EC Treaty.

The Council and the European Parliament which were supported by France, Finland and the United Kingdom, argued that the centre of gravity of the Regulation was of environmental nature; therefore, Article 175 was the appropriate legal basis, as the protection of human health and the environment was central to the objective of Regulation 304/2003.

Indeed, the final Regulation did not only deal with chemicals that had been prohibited or restricted at EC level, but also included chemicals that had been prohibited or restricted in one or several Member States only. The defendants were of the opinion that the legal basis of Article 175 would not create any major distortion to trade, as was evidenced by past EC experience.

The opinion of the Advocate General

The Advocate General, Mrs. Julia Kokott, examined the context, content and objectives of Regulation 304/2003 and concluded that its centre of gravity was in the field of environmental policy. She was of the opinion that the fact that Regulation 304/2003 went beyond the international Convention which it intended to transpose into EC law, was not relevant, as this extension also had been made for environmental reasons. And the Commission's fear that Member States might, in the absence of exclusive Community competence in the area of trade in chemicals, adopt unilaterally stricter matters, was unjustified. Indeed, it might well be that in the field of environmental policy, there might well exist an

* All Case Notes are written by Prof. Dr. Ludwig Krämer, Visiting Professor, Brussels.
exclusive external competence of the Community which would prevent Member States from acting unilaterally. However, this might be left open, as even in the case of shared competence Member States would have to comply with existing EC secondary law nor may they infringe primary law, in particular 'the fundamental freedoms of the EC Treaty and Article 95(4) to 10 EC'. Furthermore, the Advocate General excluded a double legal basis of Articles 133 and 175, as the prerogatives of the European Parliament would be very different in both cases: while the Parliament had co-decision rights under Article 175 EC, it only is 'at most consulted optionally within the scope of the common commercial policy'. The two provisions of the EC Treaty were thus incompatibile with each other.

Findings of the Court
The Court found that Regulation 304/2003 contained elements of commercial as well as of environmental nature. It examined the aim and the content of Regulation 304/2003 and concluded that it indissociably linked the objectives of trade and environmental protection, without one being secondary and indirect in relation to the other. The fact that other trade-related EC legislation had been based on Article 175 EC Treaty alone - the Court quoted Regulations 259/93 on trade in waste, 338/97 on trade in endangered species and 2455/95 on trade in chemicals - was not an argument, as each EC legislation had to be examined on its own merits.

As Regulation 304/2003 thus had to be based both on Articles 133 and 175, the Court annulled that Regulation, but maintained its effects until a new regulation had been adopted. The different rights of the European Parliament under both articles were, according to the Court, not really relevant, as the recourse Article 175 made it possible for the European Parliament to co-decide on the adoption of the new regulation.

Comments
This judgment comes as a surprise. It is the first time that the Court decided on a double legal basis for a trade-related environmental measure. And the judgment leaves a number of questions open. This does not concern, though, the finding that in Regulation 304/2003 trade and environmental issues were indissociably linked and that no 'centre of gravity' could be detected. Where the eminent lawyers of the Commission, the Council and the European Parliament disagree among themselves on the question which the centre of gravity of a legislative act is, one might imagine that there is some discretion for the Court to decide either way - or leave that question undecided.

The real issues lie elsewhere and are likely to appear in the future. The first question concerns the participation of the European Parliament in the decision-making procedure. The Court concluded that the co-decision procedure of Article 175 EC Treaty should apply. It did not explain, why the decision of the EC Treaty not to give to the European Parliament any co-decision competence in trade-related matters, was to be set aside. One might guess that this is one of the attempts of the Court to create more democratic procedures of the EC institutions. However, this is a policy argument, not a legal one. And this argument is not likely to avoid future disputes on the appropriate legal basis for trade-related environmental issues.

More substantial is even another question which the Court did not discuss. What about the right of Member States to adopt more stringent measures at national level than those provided for under Regulation 304/2003? Can they adopt such measures at national level, according to Article 176 EC Treaty or do they need a consent by the Commission? Such a consent is needed under Article 95 EC Treaty - provided the EC legislation from which the Member State wants to deviate was based on Article 95 EC Treaty. However, Article 133 EC Treaty does not allow any Member State to deviate from the common EC legislation.

In practical terms, thus: when Denmark decides to completely ban lead in products - except from products which are regulated at EC level - may it do so under Article 176 EC Treaty, may it not do so with regard to trade with non-EC countries (that is the concept of Article 133 EC Treaty), or may it do so, provided such a trade restriction could, within the EC, be justified under Articles 28 and 30 of the EC Treaty? The Court did not raise this question.

With regard to trade within the EC, the decision might lead to the consequence that in future trade-related environmental measures might be adopted under both provisions of Articles 95 and 175 EC Treaty; then, the question arises anew, whether Article 95(4) to (10) or 176 apply with regard to unilateral national measures. This affects the burden of proof of the necessity of such legislation, furthermore the conditions, under which such legislation