Annotations

Comment on case C-381/07

by Prof. Dr. Ludwig Krämer

I.
The facts of this case are relatively simple: in France, fresh water fish farms with an annual production capacity of more than 20 tonnes of fish, need an authorisation by the competent Prefect, in order to operate and to discharge waste water into the aquatic environment. Otherwise, they have to make a declaration to the Prefect which may, within two months after receipt of the complete declaration, object to the commencement or to impose limits on discharges.

The Conseil d’Etat, the supreme administrative court in France, doubted, whether these provisions were in line with Community environmental law and asked the Court of Justice for a preliminary ruling.

The Court of Justice stated that Directive 76/464—which had been codified in 2006 under number 2006/11—contained a requirement that Member States had to reduce pollution of fresh waters by the dangerous substances enumerated in a “List II”. This List II mentioned ammonia and nitrates, substances that occur in discharges from fish farming. Article 6(2) of Directive 2006/11 provides that Member States shall establish programmes which contain environmental quality standards for the substances in List II. Based in these programmes, all discharges into the waters which may contain any the substances which are listed in List II, require a prior authorisation. This prior authorisation had to contain emission standards which had to be based on the environmental quality standards of the programmes.

The Court of Justice mentioned that no exception to these provisions was laid down in Directive 2006/11. However, the French provisions provided that fish farms with an annual production capacity of up to 20 tonnes, did not need an authorisation. Therefore, these provisions were incompatible with the requirements of Directive 2006/11.

The Water Framework Directive 2000/60 does not, according to the Court, allow a different interpretation. It is true that Article 11(3)(g) of this Directive allows, under certain circumstances, to provide for point source discharges which may cause pollution, the setting up of a registration scheme. However, that provision can only become applicable after all the other measures
mentioned in it—the identification of river basin districts, the carrying out of analyses in respect of each of them, the establishment of a programme of measures taking into account the results of those analyses, and the definition of the emission controls for the pollutants concerned. As these conditions were not yet fulfilled, the Court held Article 11(3)(g) to be inapplicable and declared the French provisions incompatible with Directive 2006/11.

II.

This conclusion is clear, convincing and difficult to object. It would not need a comment per se. However, this judgment might be an opportunity to mention some of the far-reaching changes which the Community water legislation has undergone during the last thirty years, as regards emissions from point sources.

The adoption of Directive 76/464\(^1\) was the first opportunity for the different concepts on emissions (discharges) into waters to confront each other. While eight of the then nine Member States favoured the elaboration of Community-wide emission limit values for toxic, persistent and bio-accumulative substances—which were inserted into a List I—, the United Kingdom opposed this approach and pleaded for the elaboration of environmental quality standards. As at that time, directives had to be adopted unanimously, a compromise was found in the sense that for substances on List I, the Community should elaborate emission limit values and environmental quality standards.\(^2\) The Commission should regularly report on equivalence. For List II substances—these are substances

> which have a deleterious effect on the aquatic environment, which can, however, be confined to a given area and which depends on the characteristics and locations of the water into which these substances are discharged;

also substances of List I, for which not yet Community standards had been elaborated, formed part of this List-Member States had to elaborate programmes for the reduction of pollution by these substances; the programmes had to

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\(^2\) List I contained organohalogen compounds; organophosphorous compounds; organotin compounds; carcinogenic substances; mercury and its compounds; cadmium and its compounds; persistent mineral oils and hydrocarbons of petroleum origin; persistent synthetic substances.