Comment on case C-343/09 - Afton Chemical Limited v Secretary of State for Transport, 08.07.2010

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This judgment once more addresses the possibility of the EU to adopt, based on the precautionary principle, legislative measures in a situation of scientific uncertainty: Directive 2009/30 limited the use of MMT (methylcyclopentadienyl-manganese-tricarbonyl is a metallic additive to fuel for motor vehicles), which some scientists considered to be dangerous to human health, car engines and car equipment and to the environment, while others contested such risks. The ECJ was asked, whether the EU, by adopting Directive 2009/30 had acted legally.

When the Commission submitted its proposal for the Directive, it had not previously assessed the potential risks of MMT, and neither the European Parliament nor the Council had made such a risk assessment during the legislative procedure. Indeed, the Commission had considered the risks for the engines and the anti-pollution equipment not to be sufficiently confirmed; it had rejected a risk assessment on human health, as it was of the opinion that this should be done in the context of the REACH Regulation 1907/2006 on chemical substances. Afton Chemicals, a manufacturer of MMT, therefore questioned the evaluation of the facts made by the EU, first because the conclusions of the Commission’s impact study had not been followed, and second, because Afton had not received from the Commission or the Council the scientific studies which discussed the risk of MMT and which had justified the limitation of the use of MMT.

The Court easily rejected the first argument, mentioning that the EU Treaties allowed the legislature to deviate from the Commission’s proposal. In contrast, its arguments for rejecting the second of Afton’s objections less convincing: The Court starts by mentioning that the limitation of an additive in fuels is “an area of evolving and complex technology” (para 28) where the EU legislature has “a broad discretion” which also extends “to some extent, to the finding of the basic facts” (para 33). Thus, the EU legislature only has to be compatible with Article 95 EC (now 114 TFEU) which requires that the Commission shall take account of “any new development based on scientific facts” and which resembles Article 174 (now Article 191 TFEU) which mentions “available scientific and technical data”. Consequently, the Court is limited to examine, whether the legislature really based its decision on existing scientific data.
Therefore, having specified that the legislature had organised several hearings on the risk of MMT, the Court listed the scientific studies which had been examined during the legislative procedure. Despite the insufficient information transmitted to Afton, the Court considered that “it cannot be maintained that those scientific documents were not taken into account during the legislative procedure”, as all the studies which were used “are in the public domain and therefore accessible to any individual or undertaking who has an interest in the matter” (paras 40 and 39). This conclusion, at first glance problematic in view of the right of access to information, is justified by an element which the Advocate General had mentioned in her conclusions but which were not taken up by the Court: the Commission had adopted, in June 2008, a document which resumed the state of research on MMT, and Afton knew of the existence of this document. Nevertheless, one wonders, whether it may really be argued that a study which is in the public domain, is indeed taken into account by the Parliament and/or the Council.

As regards the substance of the measure, the Court refers to its earlier jurisprudence on the application of the precautionary principle, repeating an often used formula (paragraph 61). However, the method used by the Court to apply this principle, needs clarification. First, it is regrettable that the Court continues to apply the precautionary principle as an element of the principle of proportionality, instead of giving it a general application as a general principle of EU law, or, at least, as an autonomous principle. Indeed, this mixing of principles impairs the clarity of the reasoning, and this all the more as the Court does not take the effort to justify its approach. As a matter of fact, its justification which are implicit in this decision, but explicit in others¹, may be doubtful: the legal basis of Directive 2009/30—Article 95 EC (now Article 114 TFEU)—does not mention the precautionary principle; this principle is only found in the environmental provision of Article 174 EC (now Article 191 TFEU). As, however, Article 191 TFEU also aims at protecting human health, the Court considered in settled case-law that the principle of integrating environmental requirements into all EU policies implied that the precautionary principle applied, whenever environmental or human health problems were at issue, whatever legal base was used².