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The complexity of the development of environmental policy within EU law: a case study

ABSTRACT

The paper aims to show that the development of European Union law needs further examination, which could help to understand the factors involved in the process. The expansion of competences cannot be explained with the sole focus of the Court of Justice of the European Union and the legislative work of the European Commission. For this purpose, the paper presents a case study concerning the development of environmental law within EU law until the adoption of the Single European Act. The international trends influenced the work of international organizations that later became an example for the Commission. The conduct of the Member States and the growing role of the European Parliament emphasised the importance of protecting the environment by highlighting the everyday issues relating to that matter. The Commission experienced its own personal struggles between the commissioners regarding environmental protection, which led to the adoption of action programmes and directives concerning the environment. All of these however highlighted the question of their legal basis. Finally, it was the Court of Justice that legitimised the process by providing the acceptance of the protection of the environment in its case law. These contributed to the emergence of environmental policy as a competence of European integration, which became explicitly embedded in the founding treaties with the adoption of the Single European Act.

KEYWORDS: protection of the environment, environmental policy, EU law, legal history, development of EU law

I. INTRODUCTION

The issue of protecting the environment is not an invention coming from the European integration project. It is also not true that it was the Single European Act that introduced this issue to EU law. However, the emergence of environmental policy

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within the European Economic Community (EEC) was not plucked from the ether. Although the history of the environmental competence of the EEC is usually traced back, as its starting point, to the amendment of the Treaties, there is a long history preceding the treaty revision.

The aim of this paper is to present a multi-faceted history and to provide a more complex picture of the development of environmental law within the Union. This paper specifically points out that an international regulatory trend, the initiative and dedication of the Member States, the work of the European Commission (the 'Commission'), and the "rise" of the European Parliament all contributed to the development of environmental law within the Community law. The Member States were dedicated to improving the ability of the EEC to tackle the problems of the environment. The Commission presented convincing action programmes for the protection of the environment and enacted legislation and to receive more and more competences concerning the matter. The EP invoked issue of the environment to gain a growing weight in European politics. Finally, the Court of Justice of the European Union decided on the legal bases concerning the environment, and on its context with the common market to add further legitimization to the process.

The structure of the article follows this logic. Chapter II deals with the context in which the regulatory need for protecting the environment emerged. This is followed by an examination of the positions of the Member States (covering the European Council and the Council) in Chapter III, and then the approach of the European Commission ('the Commission') in Chapter IV and that of the European Parliament ('EP') in Chapter V. A subchapter [IV.2.b)] examines the legal bases which were used for the adoption of legal instruments concerning the protection of the environment. It then examines the case law of the Court of Justice of the European Union ('the Court of Justice') (Chapter VI). In that regard, the chapter focuses on the findings of the Court of Justice concerning the legal bases were used to adopt legal instruments as well as connection between the protection of the environment and the common market.

The article examines the sources of EU law, also highlighting the case law of the Court of Justice. For ease of reference, it also draws on studies that examine the phenomenon from a legal and historical perspective. In addition, to give a fuller picture on the underlying processes and mechanisms, this article draws on the resources of the archives concerning the European Union (Historical Archives of the European Union, Archive of European Integration), which contain a large number of legislative and other documents.

II. THE INTERNATIONAL LAW CONTEXT OF ENVIRONMENTAL PROTECTION

The protection of the environment did not originate from the institutions of the EEC but rather it was the result of a trend within the international community. The relationship between people and the environment has fundamentally changed in the second half of the 1960s. There have been, for a long time before, legal regulations governing smoke or noise pollution.¹ However, for the first time, the risks posed by nuclear tests, industrial and domestic waste, air and water pollution, the conservation of nature, and animal welfare were brought together in a single approach.² This corroborated by popular scientific works, such as Rachel Carson's *Silent Spring*, which dealt with the harmful effects of chemical inputs in agriculture,³ or *Limits to Growth*, which warned that population growth, industrialisation, pollution, food production, energy consumption, and resource depletion were making the prevailing lifestyle unsustainable.⁴ National policies also sensed this change, or instance, legislation was made at both state federal level in the US between 1965 and 1970.⁵

Second, environmental protection also occurred at the international level. A series of conferences put the question of the environment in the spotlight and brought modern international environmental law to life. In 1961, the Council of Europe proposed the need for a permanent system to protect the countryside, natural reserves and natural resources. A committee was set up in 1962 and, later, an information centre on the matter was also established. The problem of water pollution and air pollution also appeared on the agenda of Council of Europe.⁶ The UNESCO Conference on Man and the Biosphere in 1968⁷ and the United Nations Conference on the Human Environment in Stockholm in 1972 were the first significant steps. For the latter, 113 countries attended the conference. Despite the fact that the German Democratic Republic was not invited to the conference and the Soviet bloc stayed

¹ A. Rome, *Coming to Terms with Pollution: The Language of Environmental Reform, 1865–1915*, (1996) 1 (3) *Environmental History*, 11–15. DOI: <https://doi.org/10.2307/3985154>

² J. I. Engels, *Modern Environmentalism*, in F. Uekötter (ed.), *The Turning Points of Environmental History*, (University of Pittsburgh Press, Pittsburgh, 2010) 119–131. DOI: <https://doi.org/10.2307/j.ctt5hjsg1.11>

³ *The Story of Silent Spring – How a courageous woman took on the chemical industry and raised important questions about humankind's impact on nature*, <https://www.nrdc.org/stories/story-silent-spring> (Last accessed: 29.12.2023.).

⁴ J. Muhrel, *The Birth of Global Environmentalism*, <https://voelkerrechtsblog.org/the-birth-of-global-environmentalism/> (Last accessed: 29.12.2023.).

⁵ T. Schulz, *Das Europäische Naturschutzjahr 1970 – Versuch einer europaweiten Umweltkampagne*, (2006) (7) *WZB-Discussion Papers*, 3.

⁶ B. Andemicael, *Regionalism and the United Nations*, (Brill Archive, 1979) 508–510.

⁷ *The Biosphere Conference, 25 years later*, <https://unesdoc.unesco.org/ark:/48223/pf0000147152> (Last accessed: 29.12.2023.).

away, these states also subsequently endorsed the conference's recommendations on the environment.⁸ The development of soft law norms began immediately after the Stockholm conference.⁹ The topics raised there were carried forward to the 1973 Conference in Vienna, which dealt with European aspects of the environment.¹⁰ In 1970, the Council of Europe held the European Year of Sustainability (the same year Earth day was introduced as well as the environment was the issue of the year in the TIME magazine).¹¹ At the conference concerned, ministers agreed that both the Council of Europe and other international organisations should take steps to establish the necessary industrial policy requirements for the production of pesticides, and the reduction of unwanted effects of vehicle exhausts and aircraft engines. They also stressed the need for a European authority to monitor Europe's natural environment.¹²

This internationalization of the environmental matters (specifically after the Stockholm conference) led to the realization for the countries that they need ministries, agencies, departments and offices that they are specialized on a domestic level. Furthermore, Stockholm also led to the increase of national legislation that regulated the different types of pollution in accordance pursuant to the principles set out in the Stockholm UN Declaration on the Human Environment.¹³

III. MEMBER STATES AND ENVIRONMENTAL PROTECTION

Similarly to the US, EC Member States have also started to adopt national environmental legislations during this period. Some authors argue that the Member

⁸ Láng L., Faragó T., Schmuck E., Vásárhelyi J. and Nemes Cs., *Az ENSZ Közgyűlés rendkívüli ülészakka: a fenntartható fejlődés nemzetközi programjának értékelése és a további feladatok*, (Fenntartható Fejlődés Bizottság, Budapest, 1997) 7., http://real.mtak.hu/65840/1/ENSZ1997_Fenntarthato_fejlodes.pdf (Last accessed: 29.12.2023.).

⁹ P-M. Dupuy, *Soft Law and the International Law of the Environment*, (1990) (12) *Michigan Journal of International Law*, 422.

¹⁰ Results of the European Ministerial Conference on the Environment, Vienna, (28–30 March 1973), <https://pace.coe.int/en/files/3589> (Last accessed: 29.12.2023.).

¹¹ O. B. Wxman, *They Were there as the Modern Environmental Movement Began. Earth Day Turns 50, They Say the Planet's Problems Gotten Worse*, <https://time.com/5822525/earth-day-50th-anniversary/> (Last accessed: 29.12.2023.); *Issue of the Year: The Environment* <https://content.time.com/time/subscriber/article/0,33009,942377-5,00.html> (Last accessed: 29.12.2023.).

¹² Council of Europe, *Déclaration sur l'aménagement de l'environnement naturel en Europe. Conférence européenne sur la Conservation de la Nature*, Strasbourg, 9–12 February 1970, <https://www.e-periodica.ch/cntmng?pid=hab-001%3A1970%3A4%3A%3A1165> (Last accessed: 29.12.2023.).

¹³ H. G. Angelo, R. E. Stein and J. L. Hargrove, *International Environmental Protection: Policy, Legal and Trade Aspects*, (1977) 71 *Proceedings of the Annual Meeting (American Society of International Law)*, 49–50.; J. B. Eisen, *From Stockholm to Kyoto and Back to the United States: International Environmental Law's Effect on Domestic Law*, (1998) 32 *University of Richmond Law Review*, 1458–1460.

States played a somewhat greater role within the EEC than the European institutions.¹⁴ In parallel with the Stockholm Conference, the Heads of State and Government of the EEC Member States held a summit in Paris in 1972. In their declaration of intent, they stressed the importance of a Community environmental policy. To this end, they called on the institutions (in practice, the Commission) to draw up a programme of action. The deadline for this was 31 July 1973,¹⁵ which was confirmed by the Member States in Bonn.¹⁶

In addition, Member States also sought to put certain environmental problems explicitly on the EEC political agenda. In this case, it is safe to say that the Member States' efforts were disaster-driven; for instance, after the Amoco Cadiz wreck, a very large crude carrier under a Liberian flag of convenience that sank near the coast of Brittany, France, which resulted in the largest oil spill in history of that date. After that, the European Council agreed to a specific programme on sea pollution.¹⁷ The same phenomenon can be observed in the case of harmful acid rain effects on the Black Forest in Germany, which brought the issue of environmental protection back to the fore for the Member States.¹⁸ The 1985 European Council summits emphasised the importance of environmental protection when it appointed 1987 as the European Year of the Environment.¹⁹

In the Council, Member States' ministers followed a similar approach, although certain differences appeared more explicitly in that forum. Denmark, the Netherlands and Germany took a strong stance on environmental issues, often in contrast to the Mediterranean countries. In addition, the United Kingdom in the Thatcher era objected for a long time to uniform emission standards for water quality control and the use of catalytic converters in favour of a lean burn engine solution to car exhaust emissions.²⁰ However, Freestone underlines that these differences at ministerial level were not surprising. National environmental policies were underdeveloped at that time

¹⁴ E. Rehninder, Umweltschutz in der Rechtsordnung der Europäischen Gemeinschaften, https://www.uni-trier.de/fileadmin/fb5/inst/IRP/03_Events/02_Bitburger_Gespraech/1983/Doc/05_Rehninder_Umweltschutz_in_der_Rechtsordnung_der_Europ%C3%A4ischen_Gemeinschaft.PDF (Last accessed: 29.12.2023.).

¹⁵ Declaration of the Heads of State or Government at the end of the conference in Paris, Paris 19–21 October 1972, 8.

¹⁶ Meeting in Bonn of the environment ministers, 31 October 1972, SEC(72)4042, Memorandum distributed on the instructions of Altiero Spinelli, Brussels, 13 November 1972.

¹⁷ Commission staff paper for the Environment, SEC(84)449; D. Freestone, European Community Environmental Policy and Law, (1991) 18 (1) *Journal of Law and Society*, 138, DOI: <https://doi.org/10.2307/1410105>

¹⁸ C. Van de Velde, Environmental and Consumer Protection, in *The European Commission 1973–86 – History and memories of an institution* (2014), <https://op.europa.eu/en/publication-detail/-/publication/da0dc0fb-1c5b-4e2b-ae9-d233579efd20> (Last accessed: 29.12.2023.).

¹⁹ Freestone, European Community Environmental Policy and Law, 138.

²⁰ S. P. Johnson and G. Corcelle, *The Environmental Policy of the European Communities* (Graham & Trotman Ltd., London, 1989) 126–136.

and there was a consensus among the member states to tackle the problem but with the presence of prevailing economic interests as well.²¹

IV. THE EUROPEAN COMMISSION AND THE PROTECTION OF ENVIRONMENT

1. Turning to the environment

For a long time, the Commission had not taken a unified approach to environmental protection, because there was no interest in environmental protection when the EEC was born. At the time, the Member States and the institutions were both more concerned with how to tackle the setbacks of the European Coal and Steel Community and, later to clarify the exact nature of the Treaty of Rome. This approach changed over time, following the transitional period established for the creation of the common market.²²

Within the Commission, Sicco Mansholt, who was Commissioner for Agriculture between 1958 and 1972, was among the first politicians who realised that the environment needed to play an increasingly important role in the development of agricultural policy. As a member of the Club of Rome, he realized that the demographic explosion, food shortages, and future energy shortages posed major risks.²³ In his letter to the President of the Commission, Franco Malfatti, he stressed that society could no longer be based on growth alone. He underlined that the market must produce goods with a longer life cycle and as little waste as possible.²⁴ However, his approach was harshly criticised by Commission staff.²⁵

Altiero Spinelli, Commissioner for Industrial Affairs at that time, on the other hand, was more cautious in his criticism, because Mansholt's position was in line with the Commission's earlier communications on environmental issues in 1971 and 1972. In that regard, in 1969, Spinelli had delegated Director-General Robert Touleman to focus on environmental issues, and asked Michel Carpentier to head the division responsible for environmental affairs. Carpentier's first task was to draw up a

²¹ Freestone, *European Community Environmental Policy and Law*, 139–140.

²² L. Brinkhorst, *The Road to Maastricht*, (1993) 20 (1) *Ecology Law Quarterly*, 9.

²³ J. Van der Harst, Sicco Mansholt: courage and conviction, in *The European Commission, 1958-1972, History and memories of an institution*, (European Union, Belgium, 2014) 175., <https://op.europa.eu/en/publication-detail/-/publication/ebec8b45-1aab-4d57-887f-0da73489b19e> (Last accessed: 29.12.2023.).

²⁴ Brief Mansholt over 'Testament' van Commissie (February 1972), https://www.cvce.eu/en/obj/letter_from_sicco_mansholt_to_franco_maria_malfatti_february_1972-en-51303966-0532-46bc-89c7-271ef294eb13.html (Last accessed: 29.12.2023.).

²⁵ Van der Harst, Sicco Mansholt: courage and conviction, 178.

programme of substantive measures,²⁶ which Spinelli himself presented to the other Commissioners, later known as the First Action Programme.²⁷ At the same time, Wilhelm Heferkamp, Commissioner for Energy, also presented a document containing a proposal to harmonise the rules on pollution, particularly water pollution.²⁸ The turnaround was gradually institutionalised within the Commission. In addition, in the Bonn speech, Spinelli drew attention to the need to set up a special body to deal specifically with this problem. The Environment and Consumer Protection Service was accordingly set up on 1 January 1973, which continued to exist as a separate Directorate-General until 1981.²⁹

2. The approach of the Commission

a) An ever-expanding comprehensive approach

The first time that the Commission (after Mansholt and Spinelli's activism and the recent changes in the international environment) drew attention to the Community's crucial role in this field was in its Communication issued in 1971. The text began by stressing the need to improve living conditions for society, which can be traced back to earlier economic policy programmes. The document also recommended drawing up a general action programme to make the necessary legislative proposals, setting up a Community-level network to assess existing infrastructures in the Member States, and establishing a Community-level research programme.³⁰ The document also covered the reduction of the most dangerous pollutants, the reduction of pollution from industrial and agricultural processes, and the protection of the natural environment.³¹ Needless to say, action programmes and legislation followed this communication.

In its proposals, the Commission defined environmental protection as a cross-cutting concept very early on. This follows from the fact that the Commission drew on the programmes of the international organisations mentioned earlier, which had taken

²⁶ Ibid.

²⁷ É. Bussière, *An improbable industrial policy, History and memories of an institution*, (European Union, Belgium, 2014) 468.

²⁸ Travaux effectués dans le cadre du rapprochement des législations dans le domaine de la protection de l'environnement, notamment en ce qui concerne le droit des eaux (lutte contre la pollution des eaux), Communication de M. Heferkamp, 12 February 1971., SEC(71)602.

²⁹ J.-H. Meyer and B. Poncharal, L'eupéanisation de la politique environnementale dans les années 1970s, (2012) (1) *Vingtième Siècle. Revue d'histoire*, <https://www.cairn.info/revue-vingtieme-siecle-revue-d-histoire-2012-1-page-117.htm> (Last accessed: 29.12.2023.) DOI: <https://doi.org/10.3917/vin.113.0117>

³⁰ European Commission, First Communication of the Commission about the Community's Policy on the environment, SEC(71)216 final, 22 July 1971, 3.

³¹ Ibid. 2.

a similarly broad approach. It is not surprising that the Commission appeared, sometimes officially, on the preparations of the documents concerned within the framework of these organisations.³² The Commission's approach therefore included (fresh and sea)³³ water and air pollution,³⁴ radioactive pollution, noise pollution, conservation of natural resources, and the prevention of deforestation as well.³⁵ The first action programme (1972–1976) explicitly emphasised both the short and long-term effects of such pollution.³⁶ The second action programme (1977–1981) placed particular emphasis on pollution prevention, land use, the use of mineral fertilizers and waste management.³⁷

In addition, the Commission identified the relationship of the environment with other policies within the EEC. One of the most important aspects is the relationship with the common market, as earlier legislation regarding the issue of the four freedoms occasionally contained provisions related to the environment.³⁸ In this respect, the Commission stressed that if Member States alone regulated these issues, they may constitute obstacles to the common market in the future. This finding is not surprising: it shows that common market thinking was also at the forefront at this time, and that thinking about the environment in the single market context was very new.³⁹ It should be noted that the third action programme placed greater emphasis on common market issues in addition to environmental protection.⁴⁰ However, the protection of the environment had a relationship with other policies, such as

³² J-H. Meyer, *Appropriating the environment: Who the European institutions received the novel idea of the environment and made it their own*, (2011) (31) *KFG Working Paper Series*, 15.

³³ Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting within the Council of 17 May 1977 on the continuation and implementation of a European Community policy and action programme on the environment, OJ. 1977, C 139/1., 27–49.

³⁴ European Commission, *Programme of Action of the European Communities on the Environment*, 22 November 1973. C:1973:112:TOC.

³⁵ Communication from the Commission to the Council on a European Communities' programme concerning the environment, SEC(72)666, 22. March 1972., 12, <http://aei.pitt.edu/4647/1/4647.pdf> (Last accessed: 29.12.2023.).

³⁶ European Commission, *Programme of Action 1973*.

³⁷ Resolution of the Council 1977.

³⁸ C. Knill and D. Lieffering, *The Establishment of the EU Environmental Policy*, in A. Jordan and C. Adelle (eds), *Environmental Policy in the EU. Actors, institutions and processes*, (Routledge, Abingdon, 2013) 14.

³⁹ Meyer and Poncharal, *L'européanisation de la politique environnementale dans les années 1970s*; Knill and Lieffering, *The Establishment of the EU Environmental Policy*, 3.

⁴⁰ Resolution of the Council of the European Communities and of the Representatives of the Government of the Member States, meeting within the Council of 7 February 1983 on the continuation and implementation of a European Community policy and action programme on the environment (1982 to 1986), 11.

the common agricultural policy, competition policy, energy policy,⁴¹ regional policy, and social policy⁴² as well.⁴³

This highlights that a comprehensive approach emerged relatively early on from the Commission to tackle the protection of the environment. In addition to seeking to address the issue at policy level in a way that was consistent with the common market, the Commission sought to identify as many sub-problems as possible at the EEC level. At the same time, the question logically arose as to the legal basis for binding rules within the EEC.

b) The question of legal basis

Although the Euratom Treaty stressed the issue of human health and the impact of nuclear energy, this document can hardly be seen as taking a comprehensive approach.⁴⁴ In addition, the Treaty of Rome did not contain provisions on environmental policy at the time. Even in its preamble, it merely stated that the contracting parties would lay the foundations for a closer union in order to ensure their economic and social development to ensure their economic and social development. However, there were directives that were enacted that can be related to the protection of the environment, such as the one concerning the classification, packaging, and labelling of dangerous substances,⁴⁵ and the permissible sound level and the exhaust system of motor vehicles.⁴⁶ Regardless, it should be pointed out that the Commission (more precisely, Spinelli representing the Commission in the Paris Summit) had the necessary powers to enact legislation on the environment.⁴⁷

However, this was not so self-evident in the text of the Treaty of Rome. In its communication on the subject, the Commission explained that Article 2 explicitly referred to the harmonious development of the economy and the improvement of the quality of life in the Member States as being a prerequisite for protecting the

⁴¹ Progrès nécessaires de la politique énergétique communautaire (Commission communication to the Council), COM(72)1200, 4 October 1972, European Commission 1977, 71–75.

⁴² European Commission, Preliminary guidelines for a community social policy programme, 17 March 1971.

⁴³ European Commission 1972.

⁴⁴ Bándi Gy., A környezeti szabályozás útja az európai integrációban, példákkal illusztrálva, (2014) (2) *Iustum Aequum Salutare*, 123.

⁴⁵ Council Directive 67/548/EEC of 27 June 1967 on the approximation of laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances, OJ 196, 16.8.1967, 1–98.

⁴⁶ Council Directive 70/157/EEC of 6 February 1970 on the approximation of the laws of the Member States relating to the permissible sound level and the exhaust system of motor vehicles, OJ L 42, 23.2.1970, 16–20.

⁴⁷ Intervention de A. Spinelli à la conférence ministérielle sur l'environnement, Bonn, 31 October 1972, <http://aei.pitt.edu/13036/1/13036.pdf> (Last accessed: 29.12.2023.).

environment.⁴⁸ However, this only represented the objectives of the Treaty, which was not considered to be an adequate legal basis.

What is certain is that environmental legislation led to the Commission (and therefore the Communities) being criticised as having no competence in the field of the environment.⁴⁹ The lack of an adequate legal basis was confirmed by legal experts at the time.⁵⁰ It is also clear, however, that neither the Commission nor other institutions, such as the European Parliament (and sometimes even the Member States) attached too much importance to this. Although there have been references to this from time to time in the legislation of Member States, no Member State has ever challenged the legal basis of any relevant EU instrument before the Court of Justice of the European Union.⁵¹

The first Action Programme only referred to Article 2 of the EEC Treaty. It should be noted that, during the development of environmental policy, much of the legal literature agreed that Article 2 could include environmental protection as an objective to be achieved, an interpretation which, incidentally, was also heavily influenced by circumstances.⁵² The majority of EU legal scholars agreed on the need for an environmental policy at the Community level. It should be noted that Carpentier himself authored a number of studies in which he was in line with this approach. For example, in his 1973 study, he only explicitly mentions Article 2 of the EEC Treaty as a legal basis, but at the end of the study he concludes that the first environmental action programme was sufficient for the Commission to envisage a very ambitious programme for the future.⁵³ However, as regards the legal basis for the various legal instruments (directives), it can be seen that, until the Single European Act, reference was made to other legal bases that already existed but did not relate to the environment, such as Articles 100 and 235 of the EEC Treaty.

Article 100 (now Article 115 TFEU) covered cases where certain environmental legislation in a Member State would directly affect the establishment or functioning of the common market. This required the unanimity of the Council and prior consultation of the General Assembly and the Economic and Social Committee. Article 100 was

⁴⁸ European Commission 1973.

⁴⁹ E. Renbinder and R. Stewart, *Environmental Protection Policy*, Vol 2., (De Gruyter, Berlin, 1985) 21.

⁵⁰ Inter alia R. C. Béraud, *Fondements juridiques du droit de l'environnement dans la Traité de Rome*, (1979) *Revue du Marché Commun*, 35; M. Carpentier, *L'action de la Communauté en matière d'environnements*, (1972) *Revue du Marché Commun*, 385; G. Close, *Harmonisation of Laws: Use or Abuse of the Powers under the EEC Treaty*, (1978) *European Law Review*, 461; C. Offermann-Clas, *Das Abfallrecht der Europäischen Gemeinschaften*, (1981) 96 *Deutsches Verwaltungsblatt*, 1125–1126.

⁵¹ L. Krämer, *The Single European Act and Environmental Protection: Reflections on Several New Provisions in Community Law*, (1987) 24 (4) *Common Market Law Review*, 660, DOI: <https://doi.org/10.54648/COLA1987032>

⁵² Renbinder and Stewart, *Environmental Protection Policy*, 21.

⁵³ M. Carpentier, *Un Programme Communautaire en Matière D'environnement*, (1973) *Annuaire Européen*, 52–65, DOI: https://doi.org/10.1007/978-94-015-1218-3_4

the legal basis for many directives, such as the approximation of laws relating to the packaging of dangerous substances, on the permissible sound level and the exhaust system of motor vehicles, and on the approximation of law relating to measures to be taken against air pollution by emissions from positive-ignition engines of motor vehicles.⁵⁴ However, it was argued that this provision could not be used to develop a coherent environmental policy, since it was mainly concerned with harmonising a single approach, and excluded the possibility of any innovation.⁵⁵

By contrast, Article 235 (now Article 352 TFEU) allowed the Communities to legislate in cases where it was necessary to achieve the Community's objective but the Community did not have the competence to do so. This also required unanimity in the Council and consultation: with the Assembly. Examples of this are the directives on waste and on the conservation of wild birds.⁵⁶ It is clear that the authors agreed very early on that the term "common market" had grown beyond simple economic issues,⁵⁷ and this was sufficient to allow the legal basis to be applied to environmental issues.⁵⁸

V. THE EUROPEAN PARLIAMENT AND THE PROTECTION OF THE ENVIRONMENT

For the first time, although not yet elected, the European Parliament was one of the first institutions to put the environment on the EU political agenda on a regular basis, even before it became a mainstream issue within European integration. In 1969, a significant amount of the Rhine's fish population had been destroyed,⁵⁹ and several MEPs strongly criticized those involved. Later, in 1970, members of the EP's Committee on Public Health and Social Affairs, Jacob Boersma and Hans Edgar Jahn, produced reports calling for joint action, on the environment, including the use of DDT.⁶⁰ It is important to note that it was one of Boersma's reports on the pollution

⁵⁴ Council Directive 70/157/EEC and Council Directive 70/220/EEC of 20 March 1970 on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles, OJ L 76, 6.4.1970, 1–22.

⁵⁵ Renbinder and Stewart, *Environmental Protection Policy*, 21.

⁵⁶ Council Directive 75/442/EEC of 15 July 1975 on waste, OJ L 194, 25.7.1975, 47–49 and Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds OJ L 103, 25.4.1979, 1–18.

⁵⁷ F. Behrens, *Rechtsgrundlagen der Umweltpolitik der Europäischen Gemeinschaften*, (Erich Schmidt Verlag, 1971) 243–244; Carpentier, *L'action de la Communauté en matière d'environnements*; Offermann-Clas, *Das Abfallrecht der Europäischen Gemeinschaften*, 1127.

⁵⁸ See H. Lesguillons, *L'extension des compétences de la Communauté économique européenne par l'article 235 du Traité de Rome*, (1974) 20 *Annuaire Français de Droit International*, 886–904, DOI: <https://doi.org/10.3406/afdi.1974.2306>

⁵⁹ J-H. Meyer, *Pushing for a Greener Europe – The European Parliament and Environmental Policy in the 1970s and 1980s*, (2021) (1) *JEIH Journal of European Integration History*, 60, DOI: <https://doi.org/10.5771/0947-9511-2021-1-57>

⁶⁰ Meyer and Poncharal, *L'eupéanisation de la politique environnementale dans les années 1970s*.

of the Rhine that influenced Spinelli (who himself was there at the plenary during Boersma's speech) to take the issue of environmental protection seriously.⁶¹

This trend only intensified when MEPs were elected in 1979. As in the case of the Rhine pollution, the European Parliament also urged the European Communities to enforce a more serious environmental policy following the *Seveso dioxins* case. It should be stressed that the EP's action at this time seems to have only served to strengthen the push for Community-level competence in environmental protection. It should be underlined that the EP did not only stress the introduction of action programmes. For example, the it adopted a specific resolution on Seveso dioxins, and welcomed the Commission's proposal to bring the management of hazardous waste under Community management, and expressed concern at the lack of Community legislation in this area.⁶² It is no coincidence that, in this context, the Council adopted a Directive on the supervision and control of transboundary movements of hazardous wastes by sea in 1985, on a proposal from the Commission.⁶³ It is also worth noting that the focus of the parliamentary debates on the issue had shifted,. While common market issues had dominated, even in relation to the environment, this had changed: from 1983 onwards, the arguments increasingly focused on the Commission acquiring more powers in the field of environmental protection.⁶⁴

It must be noted that the European Parliament, similarly to the Commission, also identified different environmental aspects in its approach to the problem; not only water pollution, but also air pollution, the protection of wildlife, but including nuclear waste, and the disposition of waste in general were on the political agenda of the European Parliament.⁶⁵

VI. LEGITIMATION OF THE PROTECTION OF THE ENVIRONMENT: TASK OF THE COURT OF JUSTICE

It should be noted that the Court of Justice had to deal with the issue of the protecting the environment. In its case law, the Court made comments, not only on the legal basis of the policy but its relationship with the common market as well. In doing so, the

⁶¹ Meyer, Pushing for a Greener Europe – The European Parliament and Environmental Policy in the 1970s and 1980s, 64, 71.

⁶² EP, Resolution on the application of the Community Directives on toxic substances and the shipment and storage of the Seveso dioxin, in *OJEC*, C 128, 16.5.1983, 60.

⁶³ Council Directive 84/631/EEC of 6 December 1984 on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, OJ L 326, 13.12.1984, 31–41.

⁶⁴ Meyer, Pushing for a Greener Europe – The European Parliament and Environmental Policy in the 1970s and 1980s, 77.

⁶⁵ C-91/79, *Commission of the European Communities v. Italian Republic*, 6–8.

Court identified the main problems that were fundamentally identifiable from the point of view of Community law when a policy was introduced to the Community: the Court's interpretation helped to legitimise the policy by pointing out how the legal bases should be dealt with, and clarified the relationship of the issue of environmental protection to the common market.

1. Legal basis

Cases 91/79 and 92/79 raised the question of the legal status of the directives on the approximation of laws of the Member States in relation to detergents⁶⁶ and on the approximation of laws of the Member States relating to the sulphur content of certain liquid fuels.⁶⁷ In these cases, the Court of Justice emphasised that the subject matter of the directives in question was already covered by the 1973 Environmental Action Programme, as well as by the 1969 general programme for the elimination of technical barriers to trade. As both directives imposed technical requirements, the Court stressed that this had an impact on the situation of the common market. However, it noted that there was no reason that environmental rules could not be based on Article 100. It also pointed out that provisions made necessary by environmental and health considerations could impose a burden on businesses if national provisions were not harmonised on the matter. In this respect, it should also be noted that, although the Court referred to the justification for the legal basis, the Italian Government (which introduced arguments on its behalf), did not actually question the legal basis in those cases.⁶⁸ More importantly, the Italian Government explicitly stated that it did not intend to raise whether the directive was valid in the light of the fact that combating pollution was not one of the tasks entrusted to the Community by the Treaty.⁶⁹ However, perhaps on policy considerations, the Court introduced this explanation in the decision.

2. Relationship with the Common Market

One of the most important cases where the Court of Justice had to weigh up the question of the common market with environmental protection was the *ADBHU* case. It concerned a preliminary ruling on the Directive on the treatment of waste soils, insofar as only certain organisations were allowed to burn such oils. The main issue was

⁶⁶ Council Directive 73/404/EEC of 22 November 1973 on the approximation of the laws of the Member States relating to detergents, OJ L 347, 17.12.1973, 51–52.

⁶⁷ Council Directive 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, OJ L 307, 27.11.1975, 22–24.

⁶⁸ C-91/79, *European Commission v. Italy*, para. 8.

⁶⁹ *Ibid.* 1103.

the compatibility of certain provisions of the directive with the freedom of trade, the free movement of goods and free competition.⁷⁰ It should be noted that the background to this was the so-called *Inter-Huilles* case, in which the Court of Justice was confronted with the type of system introduced in France, which made it impossible to export waste oils legally to other sites in other Member States. The French government tried to justify the regulation on environmental grounds, which the Court rejected at the time since no Member State should organise its system in such a way as to prevent exporting to legal installations in other Member States.⁷¹ This was subsequently confirmed by the Court of Justice in other judgments, even following the Single European Act.⁷²

It should be noted that the Court of Justice dealt with the issue of the protection of the environment on the merits, unlike in the previous cases. According to the Court, the free movement of goods and free trade, although fundamental but not absolute rights, may in certain cases be restricted in order to achieve the Community's interest. In this context, the Court identified environmental protection as precisely such a fundamental objective,⁷³ despite the fact that it was not included among the objectives to be achieved in the Treaty of Rome at that time and that the policy did not have a corresponding legal basis. It is important to highlight that the Commission submitted a written submission in this regard, in which it stressed that environmental protection had already become a fundamental interest and objective of the Community. Moreover, the reasoning in the Commission's submission did not emphasise the logic of the common market, but rather the environmental aspect of the case.⁷⁴ This is no coincidence, as the Directive itself does not deal much with the issue of the common market or, for that matter, competition; its recitals placed greater emphasis on the harmful effects of such oils on the environment. This was reflected in the legal basis chosen: the Directive referred to both Articles 100 and 235.⁷⁵ However, the Court did not appear to refer to it in any way, merely to the recitals of the Directive and the Directive as a whole.⁷⁶ It felt no need to justify this part of the reasoning. Jacobs points out that even the qualification of human rights as a fundamental principle of law required justification by the Court.⁷⁷ This is interesting, if only because it is clear that

⁷⁰ C-240/83, *Procureur de la République v. Association de défense des brûleurs d'huiles usagées*.

⁷¹ C-172/82, *Syndicat National des Fabricants Raffineurs d'Huile de Graissage et al v. Groupement d'Intérêt Économique „Inter-Huiles” et al.*, paras 9–16.

⁷² C-295/82, *Rbones Alpes Huiles*; C-37/92, *Vanacker*; C-203/96, *Chemische Afvalstoffen*.

⁷³ C-240/83, paras 10–11.

⁷⁴ *Ibid.* 541–542.

⁷⁵ Commission Directive 75/349/EEC of 26 May 1975 on detailed rules concerning equivalent compensation and prior exportation under inward processing arrangements.

⁷⁶ C-240/83, para. 13.

⁷⁷ F. Jacobs, *The Role of the European Court of Justice in the protection of the environment*, (2006) 18 (2) *Journal of Environmental Law*, 188, DOI: <https://doi.org/10.1093/jel/eq1012>

the Court applied a teleological interpretation of the law in the case in question without providing any evidence to support it.

The other similar case was the *Danish Bottles* case, which was not a preliminary ruling but an infringement procedure against Denmark. The measure in question was Denmark's introduction of legislation requiring that beer and soft drinks could only be sold in reusable containers and also requiring producers and importers to set up a deposit and return system.⁷⁸ To this end, the Court examined the system of mandatory requirements then adopted in the *Cassis de Dijon* case. Under *Cassis de Dijon*, such requirements could serve, inter alia, to protect public health or even consumers, and that justified being an exception to the free movement of goods.⁷⁹ In this context, the Court held (citing *ADBHU*)⁸⁰ that, since the issue of environmental protection is a fundamental interest of the Community, a Member State may rely on this interest to restrict imports of goods from another Member State. This, in addition to confirming the previously mentioned case-law, confirmed that it is not necessary to invoke the protection of public health, but that environmental protection itself can also serve as a justifiable ground for Member States to impose certain restrictions on the free movement of goods. It is also true that the Commission did not then question the environmental justification, but the proportionality of Denmark's measure.⁸¹ It should be noted, however, that the Court of Justice had already referred to the Single European Act in its judgment.⁸² This could highlight the fact that although the concept of the protection of the environment as an essential objective still did not get its explanation (as the Court only referred to the *ADBHU* case), the introduction of the Single European Act could finally serve as an adequate justification for that argument.

VII. CONCLUSION

It can be seen that the question of the environmental protection was present within the European integration before the Single European Act. The trend emerged in the legislation of various states, including the EU Member States. This influenced the work of international organisations as well, in which the European Commission also participated. This and the disasters occurring in the Member States were convincing enough for certain individuals in the Commission to work on creating an environmental policy for the European Commission. Despite the fact that the Treaty of Rome did not

⁷⁸ P. Sands, European Community Environmental Law: Legislation, The European Court of Justice and Common-Interest Groups, (1990) 53 (2) *Modern Law Review*, 696, DOI: <https://doi.org/10.1111/j.1468-2230.1990.tb01834.x>

⁷⁹ C-120/78, *Rewe-Zentral AG v. Bundesmopolverwaltung für Branntwein*, paras 11–15.

⁸⁰ C-302/86, *European Commission v. Denmark*, paras 8.

⁸¹ Jacobs, The Role of the European Court of Justice in the protection of the environment, 188.

⁸² C-302/86, paras 8–11.

have legal bases for environmental policy, the Commission could nevertheless rely on these flexible legal provisions. Neither the Member States, nor the EP protested against such an approach. For the EP, this was an appropriate approach that could also help the will of the Parliament to push forward the issue of the protection of the environment in the Community. In the end, the Parliament even urged for the Community to create its competence for the matter. Finally, the Court of Justice settled the matter concerning the legal bases and the relationship between the protection of the environment and the common market. This was enough for the Community to gain, finally, competence of the environmental protection to the Single European Act.