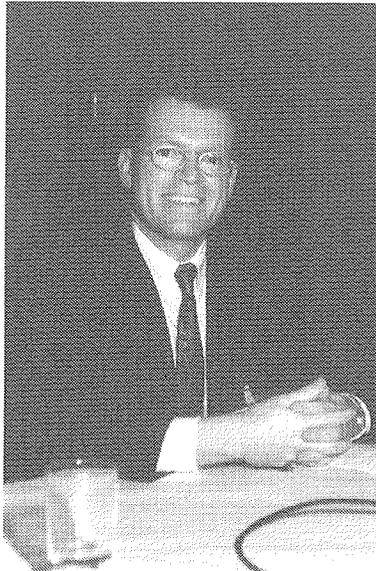


THE COMMON MARKET AND THE ENVIRONMENT: STRIKING A BALANCE



ANDREAS R. ZIEGLER

Introduction

The Latsis Foundation has kindly given me the opportunity to present my research project that was awarded the Latsis Prize 1996 at the University of St. Gallen (HSG). I would like to thank them here once more for the award of the prize and the opportunity to speak to this audience tonight.

My presentation will basically give an overview and an outline of the questions treated in my doctoral thesis entitled “The Common Market and the Environment: Striking a Balance” as it was accepted by the University of St. Gallen in Autumn 1995. For details and the written version of the results I would humbly like to refer to the revised book version of my thesis which will be published by Oxford University Press in November of this year as “*Trade and Environmental Law in the European Community*” (Oxford University Press, Oxford November 1996).

Trade and Environment

The co-ordination of liberalised trade – or even free trade – and environmental protection is one of the biggest challenges facing all existing trade agreements today. Since World War II the liberalisation of trade has been one of the main objectives of international relations and politics. The protection of the environment, on the other hand, has become a priority only in the last 20 years. In 1972 the UN Environmental Conference in Stockholm has started the development of modern international environmental law.

In recent years, however, there has been increasing discussion about the compatibility of liberalised trade and environmental protection and the limitation of either in the interests of the other. Since the early eighties there have been disputes in various trade arrangements such as GATT/WTO, the EC, The Free Trade Agreement

Switzerland WC, or more recently NAFTA, with regard to the compatibility of domestic environmental measures with international rules on the free movement of goods. The integration of sustainable development and economic growth was also a main issue of the 1992 Rio Earth Summit, i.e. the United Nations Conference for the Environment and Development (UNCED).

The protection of the environment often requires State intervention to avoid the negative effects of certain economic activities. Environmental problems have traditionally been viewed as unwanted side effects of economic activities which should be controlled by a range of regulatory measures. A less widely held view is that environmental problems stem from failures within economies – and, therefore, market-based measures are needed to resolve them.

The Free Movement of Goods and the Environment in the EC

The European Community (EC), which is still the correct term whenever one speaks of the economic activities of the European Union members, had and still has as one of its most important objectives the creation of a common market, for goods, later also referred to as the internal market, with slight differences in the terminology. Apart from its far-reaching political integration objectives the Community aims at establishing one common market without internal borders or trade barriers in the form of custom duties, quantitative restrictions on trade or any measures having equivalent effect.

A further element to ensure the establishment of the Common Market is the creation of a system ensuring undistorted competition within the Community. Finally, the Community has undertaken the approximation of national laws to the extent required for the establishment of the Common Market and in certain areas has established common policies. In all these areas, the possibilities for Member

States to take autonomous action in pursuit of domestic objectives are strictly limited by the Community legal order.

When the Community was founded in 1957, the protection of the environment was not an explicit objective of the Treaty; nevertheless, the elimination of technical barriers to trade soon raised questions concerning European and national environmental policy. Divergent national product standards constitute obstacles to trade and thereby lead to market fragmentation, while differing production and process methods, so called PPMs, as well as differences in taxation or the allocation of state aids influence the competitive situation within the Common Market. Thus, regulatory differences between the Member States hinder the establishment of the Common Market in the view of the Community.

This is also true if such measures are taken in the interest of environmental protection. On the other hand, there is a genuine interest in maintaining certain measures necessary for the efficient safeguarding of the environment. Only with the entry into force of the Single European Act (SEA) in 1987 the Community itself has been entrusted with the protection of the environment at a high level.

The Community in Search of Reconciliation

The pursuit of both a common market and adequate protection of the environment, demands, however, certain mechanisms which coordinate the two aims. Legal theory has to elaborate adequate solutions to balance the interests concerned. The contribution I wanted to make with my thesis is to show how this balance between the liberalisation of economic activities and the protection of the environment is guaranteed in the European Community, in view of a possible application to other, maybe global, agreements.

As Community law stands, the (prima facie) dilemma between national environmental measures and the elimination of trade-hindering regulatory differences has been tackled mainly in two ways.

a) Market Principles and Exceptions

One approach is to establish certain basic principles concerning the application of national (environmental) measures: The Treaty provides an important number of rules for the application of national environmental standards, regulations and prohibitions as well as for the use of economic instruments and voluntary agreements. While this amounts in many cases to the application of a mere non-discrimination principle, there are areas where Member States are prohibited from applying certain instruments because of their general trade-hindering or competition-distorting effect. However, there are exceptions for specific interests, such as the protection of the environment, which allow Member States to deviate from the general rules in cases where this is necessary to achieve these specific objectives.

The most important examples in this field are the rules applicable to the free movement of goods, the competition policy rules and the rules with regard to the subsidisation of specific industries. In all these fields the application of domestic environmentally justified laws, subsidies and private agreements are possible as long as they fulfil conditions laid down in the treaty and the corresponding Community practice. Particularly famous is the decision in the Danish Bottle Case, a decision of the European Court of Justice of 1988 where the boundaries for a Danish law relating to the recycling of glass bottles were presented in a particularly illuminating way. The Commission and, in particular, the Court of Justice, have developed specific guidelines which allow for the application of

domestic measures and instruments for optimal protection of the environment at the national and local level without, however, allowing Member States to jeopardise the establishment of the Common Market. To find the balance is often a very delicate and difficult task.

b) Community Environmental Policy

Another way of eliminating the remaining obstacles to trade is the harmonisation of environmental standards. Under the Treaty of Rome the Member States have given the European Community a broad power to harmonise national laws, rules and administrative measures which hinder the establishment of the Common Market. This power has also been used to harmonise national environmental standards. In certain areas the Community has the power to establish common policies such as a common agricultural policy, a common transport policy or a common commercial policy. These policies also have important environmental aspects. Under the Single European Act the existing set of competencies was complemented by an explicit power to introduce a comprehensive environmental policy at Community level.

Very early in its existence the Community started to adopt its own environmentally relevant measures. During an initial phase they were predominantly adopted to avoid maintaining differences in product and production related domestic environmental measures which would hinder the establishment of the Common Market. With the growing awareness of today's environmental problems, however, the protection of the European environment has become an equally important issue of European primary and secondary law.

c) Subsidiarity and Shared Regulatory Power

Recently, however, the harmonisation of national rules has come under repeated criticism. The principles of subsidiarity and competition of regulatory systems express a strong desire to limit the

harmonisation measures taken by the Community to those absolutely necessary. Some of the Member States might wish to apply national environmental measures more stringent than those at Community level, but the Community has the task of ensuring both objectives: the establishment of the Common Market and the protection of the environment at a high level. The established principle of subsidiarity, however, requires the application of mechanisms which allow a certain degree of choice as to the local level of protection.

The harmonisation of environmental standards raises many questions with regard to the desirable extent of Community regulation and the level at which measures should be taken. The principle of subsidiarity and the economic consideration on competition among regulatory systems may be helpful in deciding on the optimal use of regulatory measures and economic instruments for the protection of the environment at a local, national, regional and European level. The Treaty itself provides for several instruments which allow for the implementation of a locally adequate, high level environmental policy without jeopardising the Community's other objectives.

Conclusion

The protection of the environment is a shared responsibility of the Community and its Member States. In the promotion of its objectives, the Community has to respect the environment and to achieve a high level of environmental protection. The existence of environmental measures at Community and Member State level shall help to ensure the best possible protection for the environment. As a divided-power-system the Community legal order has developed instruments to co-ordinate Community, national and local measures without jeopardising the Common Market. Domestic and Community measures complement each other where appropriate for the protection of the environment at a high level.

Whenever the existing Community acts provide for the adoption of more stringent domestic environmental rules or in the absence of relevant Community law, national, regional and local entities are entitled to take necessary action provided they do not jeopardise the Community legal order and, in particular, the establishment of the Common Market. The abuse of environmental measures by national authorities for the hindrance of trade or the distortion of competition has to be avoided through the stringent application of the Community principles. Nevertheless, the compatibility of domestic environmental measures with the basic freedoms and rules governing the Common Market and Community law in general must be interpreted in consideration of the established principles of Community environmental policy and in view of the achievement of a high level of environmental protection.

Ladies and Gentlemen, before I conclude I would like to express once more my gratitude to the Latsis Foundation for the award of the University Prize and, in particular thank Professor Ernst-Ulrich Petersmann, Director of the Institute for European Economic Law and Professor Heinz Hauser, Director of the Swiss Institute of Research into International Economic Relations and Structural and Regional Economics, both at the University of St. Gallen for their ongoing support and stimulating influence. Thank you.

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