OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 13 March 1991 *

Mr President,
Members of the Court,

1. In seeking the annulment of Directive 89/428/EEC on the ground that it has no legal basis, the Commission has raised a substantially new issue which is of undoubted interest: the borderline between the scope of Article 100a and that of Article 130s of the Treaty. [1]

2. It is worthwhile pointing out at this stage that the choice between the two provisions concerned is not a merely formal matter. From the substantive point of view, in fact, Articles 100a and 130s are concerned with different powers of the institutions, since the new environmental legislation referred to in Article 130r et seq. merely entails the grant of subsidiary powers to the Community and is inspired by a philosophy of minimum protection whereas the action to be taken under Article 100a is based on powers which are certainly not subsidiary and are required to be directed towards high levels of protection.

But the fundamental differences between the two provisions are to be apprehended at the procedural level. On the one hand, Article 100a provides that the Council is to adopt measures under the co-operation procedure, which involves, albeit only in certain circumstances, recourse to voting by a qualified majority, together with, on a more general level, more effective participation of the Parliament in the decision-making process; on the other hand, Article 130s provides for mere consultation of the Parliament and, unless the Council determines otherwise (see the second paragraph of Article 130s), for unanimous voting.

In those circumstances it is clear that the choice of the legal basis has a considerable impact on the process by which the measure comes into being and may therefore be reflected in its content. It follows that, as the Court has consistently held (for the first time in its well known 'generalized preferences' [2] judgment, the most recent confirmation being Case 62/88, above), in circumstances such as those of the present case the choice of an incorrect legal basis is not merely a formal defect but amounts to an infringement of essential procedural requirements of such a kind as to render the measure unlawful.

That having been said, it is important to note the significant practical aspect of the question. What is 'at stake' is, of course, not

* Original language: Italian.

1 — It will be remembered that although the Court has on several occasions considered the scope of Article 100 it has not yet taken a position concerning Article 100a, a new provision introduced by the Single European Act for the purpose of approximating national legislation (the scope of Article 100a — in relation to Article 31 of the EAEC Treaty — is also the issue in Case C-70/88 *European Parliament* v *Council*, at present pending before the Court, in relation to Council Regulation (Euratom) No 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingsstuffs following a nuclear accident or any other case of radiological emergency). As regards Article 130s, the Court recently analyzed its scope in relation to the provision concerned with commercial policy, Article 113, in its judgment in Case 62/88 *Hellenic Republic* v *Council* [1990] ECR I-1527.

2 — See judgment in Case 45/86 *Commission* v *Council* [1987] ECR 1493, in particular paragraph 11.

merely the contested directive; the wider issue involved is the determination of the procedure, and in particular the voting rules, to be applied to the adoption of measures of the same kind (as regards their content and effects) as the directive in question here, which, as will become apparent shortly, constitute a category of measures for the harmonization of national legislation on environmental protection that is certainly not of secondary importance.

The arguments of the parties

3. The parties interpret differently both the provisions and the legislative measure at issue.

The Council argues from the premise that, by introducing Article 130r et seq., the Community acquired powers to take specific action on environmental matters. Accordingly, Article 130s should be regarded as the appropriate legal basis for measures which pursue one of the objectives mentioned in Article 130r, namely preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilization of natural resources.

Conversely, in the Council's view, Article 100a constitutes the legal basis for the adoption not of specifically environmental measures but rather of measures directed towards the establishment and functioning of the internal market, as defined in Article 8a of the Treaty. It therefore considers that there is a clear demarcation between the two provisions precisely because they are intended to pursue distinct objectives. As a result, any confusion or overlapping between them is inconceivable.

Having thus stated its position, the Council recognizes that a particular measure may at the same time pursue diverse aims envisaged in different provisions of the Treaty. Therefore, in order to identify the legal basis specific to a measure it is necessary to determine its 'main purpose' or 'centre of gravity'. In particular, the Council concedes that measures for the protection of the environment, like the contested directive, which regulate production conditions in a particular industrial sector are also, in so far as they harmonize the conditions of competition between the undertakings concerned, in some degree intended to promote the establishment and functioning of the internal market; however, the latter objective is wholly subordinate to the main purpose of protecting the environment from pollution resulting from the industrial production processes in question.

As regards the contested directive, an analysis both of its content and effects and of its legislative context confirms that its 'centre of gravity' lies in the requirement that the pollution caused by waste from the production of titanium dioxide be eliminated. Therefore, in the Council's view, Article 130s is the only correct legal basis.

The Commission — supported by the Parliament — agrees with the Council that Article 130s et seq. conferred on the Community wide-ranging powers in environmental matters. It maintains,

however, that Article 130s is not the appropriate legal basis for the adoption of measures which, by virtue of their subject-matter, relate to the internal market: such measures should, in fact, be adopted solely on the basis of Article 100a, the only specifically relevant provision. The latter thus represents a sort of *lex specialis* in relation to Article 130s and in relation to all the other Treaty provisions which are not intrinsically directed towards the establishment and functioning of the internal market.

It follows, as a matter of principle, that environmental protection measures should be adopted in accordance with the procedure laid down in Article 100a in cases where three conditions are met: the measures concerned must be harmonizing measures; the harmonized provisions, although laid down for environmental protection, must contribute, by virtue of their subject-matter, to the establishment and functioning of the internal market (the subject-matter must be identified by reference to the content and effects of the measure); and, finally, no provisions must be available which, in relation to the internal market, provide an even more specific legal basis (such as Articles 56(2), 57(2) or 69, which would take precedence by virtue not only of that fact that they are special provisions but also by virtue of the reservation — 'save where otherwise provided in this Treaty' — contained in Article 100a but which are no different, from the procedural point of view, from Article 100a, at least as far as majority voting is concerned). The very wording of Articles 100a and 130s, in the Commission's view, supports this interpretation in so far as it indicates that the requirements of environmental protection are to form an integral part of the harmonizing action undertaken under Article 100a.

The Commission also considers that the view put forward by the Council restricts the scope of Article 100a as compared with that of Article 130s in an unjustified way: the Council in fact is of the opinion that Article 130s may be used as a basis for measures intended to equalize conditions of competition between undertakings, but nevertheless considers that Article 100a may not be used as a basis for harmonizing measures for the protection of the environment.

Finally, the Commission, like the Council, analyses the contested directive but comes to the opposite conclusion. In the Commission's view, the main purpose of the measure (or its 'centre of gravity') is the improvement of the conditions of competition in the titanium dioxide industry. It should therefore have been adopted only on the basis of Article 100a. [3]

3 — At the hearing, the Commission partly amended its interpretation of the relationship between Articles 100a and 130s. It maintained that the two provisions have different purposes. Article 100a is concerned with the harmonization of national legislation, including that relating to the environment, designed to ensure attainment of the single market. By contrast, Article 130s is the basis for measures concerning environmental protection as such, that is to say those measures which are not concerned with harmonization of the rules relating to the functioning of the market. It follows, in the Commission's view, that the principle whereby special provisions are to be preferred is not appropriate to determination of the correct provision to be applied in a specific case. That principle is applicable to cases where the scope of a provision embraces that of another, more specific provision (for example the general principle of non-discrimination enshrined in Article 7 is specifically embodied in other provisions of the Treaty, such as Articles 40(3) or 48). Conversly, there is no overlap between the scope of Article 100a and that of Article 130s. Thus, all that is necessary is to establish whether, having regard to the subject-matter of the measure that it is intended to adopt, one provision or the other is found to be relevant. It should be emphasized, however, that despite that change in its reasoning, the Commission maintains substantially the same approach. Whether it is argued that Article 100a is a special provision or whether it is assumed that the scope of that provision is entirely distinct from that of Article 130s, in both cases the decisive question — in the Commission's view — is whether or not the directive in question, by virtue of its 'main purpose' or 'centre of gravity', comes within the material scope of Classification of the legislation at issue.

Classification of the legislation at issue

4. There is thus a clear difference of opinion between the parties concerning both the interpretation of the provisions and the classification of the contested measure. Let us consider the latter aspect first. It must first be stated that the opposing (as regards the result) readings by the parties of the directive at issue derive only apparently from a difference of analytical approach. It is true that the Commission laid emphasis on determination of the main 'subject-matter' of the measure whereas the Council considered that the decisive factor in classifying the measure was to be found in its main 'objective'. However, that difference is, if anything, purely terminological. On the one hand, the Commission does not fail to take account also of the aim of the measure in question and, on the other, the Council, precisely in order to avoid the risk (and the charge) that its analysis was based on a subjective criterion (its conviction as to the purpose of the measure) is careful to make clear that the 'purpose' of the measure can be seen only by reference to its content and its effects, these being aspects which are also considered by the Commission in its analysis of the subject-matter of the directive. Moreover, from the terminological standpoint as well the differences between the two institutions appear to diminish, to the point where they disappear, in that they both regard as necessary and as decisive the identification of what they describe as the 'centre of gravity' of the contested measure.

There is thus no real divergence as to the analytical criteria employed. How, therefore, can it be explained that the parties, although purporting to have relied solely on 'objective factors which are amenable to judicial review' (in accordance with the principle established by the Court in the 'generalized preferences' case cited earlier), then arrived at diametrically opposed results?

5. In order to answer that question it must be borne in mind that the Council and the Commission agree that the directive is concerned with two matters, namely harmonization of the conditions of production, and therefore of competition, in the titanium dioxide industry, and the pursuit of action to combat pollution. The real difference between the parties relates only to the relative importance of the two aspects and consequently the determination of the preponderant or main aspect of the measure.

That said, let us now examine the measure. It is appropriate to point out that the directive at issue forms part of and adds to the rules provided for by the preceding Council Directive, 78/176/EEC. That directive had already given rise to a dispute concerning its legal basis. The Commission had proposed that it be adopted only under Article 100 and the Council — following a practice to which I shall revert — added Article 235 as a second legal basis.

Recourse to the twofold legal basis is justified in the third and fourth recitals in the preamble to Directive 78/176/EEC in the following terms:

'. . . any disparity between the provisions on waste from the titanium dioxide industry already applicable or in preparation in the various Member States may create unequal conditions of competition and thus directly affect the functioning of the Common Market; . . . it is therefore necessary to approximate laws in this field, as provided for in Article 100 of the Treaty;

. . . it seems necessary for this approximation of laws to be accompanied by Community action so that one of the aims of the Community in the sphere of protection of the environment and improvement of the quality of life can be achieved by more extensive rules; . . . certain specific provisions to this effect should therefore be laid down; . . . Article 235 of the Treaty should be invoked as the powers required for this purpose have not been provided for by the Treaty'.

It must be emphasized that the recitals that I have just cited merely repeat a stereotyped formula which is normally found in those measures which, as part of (more or less specific) action to ensure environmental protection, harmonize national legislation concerning production conditions for undertakings. There come to mind, for example, Council Directive 75/439/EEC on the disposal of waste oils (second and third recitals), Council Directive 75/440/EEC concerning the quality required of surface water intended for the abstraction of drinking water in the Member States (third and fourth recitals), Council Directive 82/501/EEC on the major-accident hazards of certain industrial activities (first and second recitals) and, above all, Council Directive 75/442/EEC, which lays down general harmonizing rules regarding waste disposal (first and second recitals) and thus constitutes a precedent which is certainly relevant to the present case.

In all those measures, the need for Article 100 (in addition to Article 235) is justified by the consideration that the dissimilarity between the national provisions to be harmonized creates disparities of competition and therefore has a direct impact on the functioning of the market.[4] On the other hand, where this aspect of protection of the market and elimination of distortions of competition did not seem important, the Council relied *only on Article 235*, properly omitting any reference to Article 100. That approach is exemplified by Council Decision 75/441/EEC, which lays down procedures for the exchange of information concerning atmospheric pollution caused by certain compounds and suspended particulates and Council Directive 79/409/EEC on the conservation of wild birds.

Turning, after that brief digression, to Directive 78/176/EEC, I should point out in the first place that it is perfectly consistent with the usual practice followed by the institutions. Moreover, the statement of the reasons for the adoption of Directive 78/176/EEC (and for the measures that are substantially analogous to it) fully confirms

4 — Similarly, for the same reasons (impact on competition and on the market) Article 100 (alone) is used as the basis for directives that harmonize national legislation which, in areas other than the environment, in any way affects the conditions under which undertakings operate. See for example Council Directive 85/374/EEC concerning producers' liability for damage caused by defective products, or Council Directive 75/117/EEC concerning equal pay for men and women.

that in such cases Community action, together with the *environmental* component, also includes a *market* component, and that the latter is an *equally essential part* of the measure, undeniably requiring recourse to Article 100; and that is so despite the fact that Article 1 of that directive states that its aim is 'the prevention and progressive reduction, with a view to its elimination, of pollution caused by waste from the titanium dioxide industry'.

The content of the directive also shows how the two essential components are interrelated and merge with each other. As well as repeating, in Articles 2 and 3, the fundamental principles underlying Community action on the treatment of waste, that is to say disposal of waste without risk to health or to the environment, prevention and recycling (principles that were already laid down in Articles 3 and 4 of the general directive on waste, Directive 75/442/EEC which I mentioned earlier), Directive 78/176/EEC prohibits, unless authorization is granted, the discharge, dumping, storage, tipping and injection of waste from the titanium dioxide industry (Article 4); the directive harmonizes conditions for authorization (Articles 5 and 6) and lays down the conditions for monitoring operations (Article 7) and for action to be taken in certain emergency situations (Article 8). In other words, the directive does harmonize national requirements for protection of the environment but at the same time, and by means of the same provisions, it lays down uniform rules for all Community undertakings producing titanium dioxide, thus contributing to the elimination of disparities in costs and conditions of competition; and it was for that reason — I say yet again — that the Council referred to Article 100 (as well) as a legal basis.

But the provision of Directive 78/176/EEC which is most important to the present analysis is contained in Article 9, which provides that the Member States are to draw up national programmes for the progressive reduction, and eventual elimination, of pollution from titanium dioxide plants. Article 9(3) provides, however, that such programmes are merely to form the basis for further harmonization, to be implemented at Community level within precise time-limits; this harmonization — let it be emphasized — is intended to secure the reduction, and thereafter the final elimination, of pollution, both in order to secure 'improvement of the conditions of competition in the titanium dioxide industry'.

6. It is precisely that harmonization which forms the subject-matter of the contested directive. It is appropriate to point out that Directive 89/428/EEC was originally proposed by the Commission on the twofold legal basis of Articles 100 and 235 already selected by the Council for the earlier Directive 78/176/EEC. Following the entry into force of the Single European Act, the Commission amended its proposal by using as the sole legal basis Article 100a, for which provision the Council subsequently substituted Article 130s. It should also be observed that those changes of legal basis did not derive from changes made to the actual provisions of the directive.

In order now to determine the legal classification of the contested directive, it is necessary, as required by the judgment in Case 62/88 *Hellenic Republic* v *Council*, cited earlier, to examine its objectives and content. The objectives are seen to be the same — it could not be otherwise — as those already set out in Article 9(3) of the

earlier Directive 78/176/EEC, namely on the one hand environmental protection and, on the other, the elimination of distortion of competition in the common market. That emerges clearly from the second recital in the preamble to Directive 89/428/EEC, which, moreover, uses the same terms as Article 9(3) of Directive 78/176/EEC, which I quoted earlier; and this is clearly confirmed by Article 1 of the contested directive, which provides as follows:

'This directive lays down, as required by Article 9(3) of Directive 78/176/EEC, procedures for harmonizing the programmes for the reduction and eventual elimination of pollution from existing industrial establishments and is intended to improve the conditions of competition in the titanium dioxide industry.'

The text of Article 1 is thus absolutely unequivocal: Directive 89/428/EEC pursues a *twofold aim*, of protecting the environment and safeguarding the functioning of the internal market; and, unless part of Article 1 is arbitrarily disposed of, there are no grounds for concluding that either of those aims is more important than the other.

As far as content is concerned, the contested directive prohibits, or reduces in accordance with strict rules, the discharge of waste by establishments producing titanium dioxide and lays down a number of time-limits for final implementation of the various provisions. The final result is a harmonized system which, by imposing specific obligations on Member States and more particularly on industries (specifically 'existing industrial establishments') regarding the treatment of waste from the production process, on the one hand limits pollution levels and, on the other, lays down more uniform conditions concerning production, costs and, as a result, competition.

An analysis of the content of the measure thus confirms, once again, the existence of a twofold component, relating on the one hand to environmental protection and, on the other, to protection of the market. Moreover, as already noted with respect to Directive 78/176/EEC, those two components have the same status: they are both presented as *essential and inseverably linked*, since the anti-pollution rules regulate the market at the same time, in order to ensure greater balance in its operation.

7. The validity of that conclusion is not undermined by any of the matters raised by the Commission and the Parliament to show that, in the shaping of the contested directive, a *leading* role was played by the requirement of harmonization of conditions of competition. Both the Commission and the Parliament emphasised that provisions to combat pollution by waste from titanium dioxide production were already included in the national programmes adopted under Article 9 of Directive 78/176/EEC. The subsequent harmonization brought about by Directive 89/428/EEC therefore met, above all, the requirement of preventing distortion of competition deriving from the differing economic impact of national requirements which were somewhat disparate. In support of that view, the Commission produced the results of studies carried out in 1984 and 1989 which show that the various bodies of anti-pollution rules had a direct impact on

prices in the various Member States of between 10 and 20% in 1984 and that price divergences had increased between 1984 and 1989.

The resultant distortion of competition and the consequent need to find a remedy were also specifically confirmed in the views expressed, as the contested directive progressed through its preparatory stages, by the Economic and Social Committee and by the European Parliament. The latter in particular, in a resolution of 10 April 1984, deplored the delays on the part of the Member States and the Commission in adopting the harmonizing measures envisaged in Directive 78/176/EEC and stressed that 'il est indispensable d'harmoniser le plus rapidement possible sur le plan communautaire les programmes nationaux de réduction de la pollution, en vue, notamment, d'éviter les distorsions de concurrence entre producteurs de dioxyde de titane dans la Communauté' and that 'une prorogation du délai de 1987 à 1993 provoquerait des distorsions de la concurrence, dont bénéficieraient les entreprises qui, jusqu'à présent, n'ont pris aucune mesure ou très peu de mesures pour se conformer à la directive de base 78/176/CEE'. [5]

Finally, the Commission cited various statements made by national delegations within the Council as Directive 89/428/EEC went through the legislative process, from which it is apparent that the Member States were particularly aware of the need to improve conditions of competition in the titanium dioxide industry. [6]

5 — OJ 1984 C 127, p. 34

6 — The Council did not oppose the inclusion of those statements in the file on the case but denied that they served to demonstrate that economic considerations played a more important role than those of an environmental nature

8. Those considerations, however, although relevant — and not substantively challenged by the Council — cannot, I believe, be decisive as regards interpretation of the measure at issue. It is no accident that they relate mainly to the preparatory stages. By reference to them, it is thus possible to establish the specific reasons for which, at a given time, the legislature was prompted to intervene *(occasio legis)* but they are not, according to the usual canons of interpretation, of decisive importance in identifying the intention underlying the measure. That intention is embodied and disclosed in the legislative text and essentially must be gathered from the actual meaning of the words, from the function of the measure itself and from the system of which it forms part. An analysis of these aspects shows immediately that harmonization of conditions of competition is a fundamental component of the directive; that fact is simply confirmed by the observations concerning the early stages of the directive. However, it is also undeniable that the contested directive contains new anti-pollution rules and, therefore, that this second element must also be taken into consideration in identifying the correct legal basis.

It seems to me, in fact, that, short of interpreting the measure solely on the basis of subjective, and for that reason arbitrary, data, it must necessarily be recognized that it is impossible to identify in the directive one main or predominant component and another which is merely incidental or secondary, but that there are two components which are both essential and are inseparably linked.

The clear wording of the directive does not permit any other interpretation. I must add that this observation applies not only to the product at issue here. It is inevitable that, in general, where there is harmonization of national measures for environmental protection, which regulate the characteristics of products or the conditions under which they are manufactured, Community intervention displays two aspects, the environmental and the economic; and, again, it is extremely difficult to discover, case by case, whether the 'centre of gravity' of a measure adopted by the Council is to be found in one requirement or the other. Now, this difficulty — or impossibility — of identifying the predominant component means that any analysis is certainly influenced, in a decisive manner, by considerations of a subjective nature and of an undoubtedly political nature, linked as they are with the differing voting procedures and rules associated with the legal bases in question.

This leads to a situation of uncertainty which is irreconcilable with the principle repeatedly upheld by the Court whereby the choice of the legal basis for a measure must be amenable to judicial review. This fundamental requirement of certainty thus makes it necessary to seek a more comprehensive and certain solution to the problem which confronts us. A solution, therefore, which does not stop at an attempt to identify a *hypothetical* 'centre of gravity' of the measure; a solution which places the problem of determination of the legal basis not only in the context of interpretation of the *measure* but also in that of interpretation of the *rules* which are considered relevant, namely Article 100a and Article 130s.

Moreover, it is the very difference between the Commission's and the Council's interpretations of the *scope* of those two provisions that explains why the institutions arrived at opposite conclusions concerning the legal basis of the directive in question.

Interpretation of the provisions

9. The difficulties involved in defining the scope of these provisions were focused upon by a number of authors before the present action was brought.[7] However, agreement must be reached as to the actual scope of those difficulties. In fact, there is no doubt as to the applicability of Article 130s alone (and, before the entry into force of the Single European Act, of Article 235 alone) as the legal basis for environmental protection measures *which do not involve harmonization of measures affecting the internal market*; such measures are numerous, ranging from those which establish programmes to those which provide for specific action to be taken at Community level, for the purpose of more or less directly protecting flora, fauna and the environment in general (for examples of measures adopted after the Single European Act, see those mentioned below in part 14).

7 — See: B. Langeheine, le rapproachement des législations nationales selon l'article 100A du traité CEE: l'harmonisation communautaire face aux exigences de protection nationales, *Revue du marché commun*, 1989, p. 347; C. D. Ehlermann, The Internal Market Following the Single european Act, *Common Market Law* Review, 1987, p. 361; R. Kromareck, Commentaire de l'Acte unique européen en matière d'environnement, *Revue juridique de l'environnement*, 1988, p. 76; F. Roelants du Vivier e J. P. Hannequart, Une nouvelle stratégie européenne pour l'environnement dans le cadre de l'Acte unique, *Revue du marché commun*, 1988, p. 205; A. Saggio, le basi giuridiche della politica ambientale nell'ordinamento comunitario dopo l'entrata in vigore dell'Atto unico, *Rivista di diritto europeo*, 1990, p. 39.

It is also undisputed, in legal literature and in the practice of the institutions, that Community environmental protection measures which involve the harmonization of national requirements concerning *products* are normally based on Article 100a alone, just as, before the entry into force of the Single European Act, those measures were normally based on Article 100 alone (the example usually cited is that of Council Directive 70/220/EEC, which harmonizes national provisions to combat atmospheric pollution from motor-vehicle exhaust emissions).

On the other hand, the problem of defining the scope of Article 100a and Article 130s respectively arises essentially with respect to the rules for the harmonization of national environmental legislation relating not to products but to *industrial installations* which manufacture them, they being rules which, before the changes made by the Single European Act, were usually issued — as we have seen — on the basis of *Articles 100 and 235 together*. This third category of measure clearly includes harmonized legislation which — like the directive at issue — relates to the treatment and disposal of industrial waste.

On a practical level, it is thus in the area of harmonization of environmental rules concerning industry that the need is apparent to establish clear criteria to govern the relationship between Article 100a and Article 130s.

10. In examining this problem it is necessary to deal with a preliminary question. It has been stated more than once that measures of the same kind as the contested directive were, before the Single European Act, usually based on Articles 100 and 235. Now, if it is taken for granted that, after the Single European Act, Article 235 was replaced (in so far as is relevant to the present proceedings) by Article 130s, can it also be concluded that, for the purposes of such measures, Article 100 was replaced by Article 100a?

In that regard I should point out first of all that recourse to Article 100 was justified by the direct impact which those measures had on competition and on the Member States (see the preamble to Directive 78/176/EEC and those of the analogous directives cited earlier in part 5). That approach is confirmed in the judgments in Cases 91/79 and 92/79 *Commission* v *Italy* (in both cases) [1980] ECR 1099 and 1115, in which the Court stated that:

'Provisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and if there is no harmonization of national provisions on the matter competition may be appreciably distorted.'

So, in determining whether measures like the directive at issue here now fall within the scope of the new provision on harmonization of national laws, Article 100a, it must first be observed that the scope of that provision is not determined *ratione materiae* but rather by reference to a criterion of a *functional* nature, extending laterally to all measures designed to ensure attainment of the 'internal market'. Article 100a in fact concerns 'measures for the approximation of

the provisions laid down by law, regulation or administrative action . . . which have as their object the establishment and functioning of the internal market'; in more general terms, it is confirmed that the purpose of that provision is the 'achievement of the objectives set out in Article 8a'.

Article 8a defines the internal market as an 'area without internal frontiers, in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty'.

It is clear, therefore, that definition of the term 'internal market' is an essential step in determining the scope of Article 100a, just as a definition of the term 'common market' is fundamental in establishing the limits within which Article 100 applies.

It seems to me to be fully consistent with the logic underlying the Single European Act to conclude that the 'area without internal frontiers' referred to in Article 8a is to be seen as a truly integrated area where the prevailing conditions are as close as possible to those of a single internal market: an area, therefore, in which there is harmonization not only of the rules concerning products but also of those which more generally affect the conditions of competition between undertakings. Indeed, I do not see how it is possible to achieve a genuinely single, integrated market without eliminating divergences between national legislation which, by having a differing impact on production costs, prevents the development of competition on the basis of real equality within the Community.

That interpretation essentially bases the concept of 'internal market' on that of the 'common market', as defined by the Court both in its two judgments cited earlier in Cases 91 and 92/79 and, from a more general standpoint, in the judgment in *Schul*,[8] in which is it stated that:

'The concept of a common market as defined by the Court in a consistent line of decisions involves the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market.'

It should follow that, just as, before the Single European Act, the Council and the Commission always considered that the harmonization of environmental provisions capable of having an impact on production costs and competition *'directly affected* the establishment or functioning of the common market' within the meaning of Article 100, therefore giving rise to recourse to that provision as a legal basis, then after the Single European Act entered into force it would necessarily be the case that such harmonization, for the same reasons (impact on the burdens borne by undertakings and on competition), should be regarded as functionally linked with the establishment and functioning of the 'internal market' within the meaning of Article 100a, so that that provision had to be regarded as appropriate in place of Article 100. In other words, no difference — from the present standpoint, needless to say — can exist

8 — Cade 15/81 *Schul* [1982] ECR 1409, paragraph 33.

between the concept of 'common market' and that of 'internal market'; the two concepts differ in breadth, in that the 'common market' extends to areas which are not part of the 'internal market', but not in depth, in that both concepts relate to the same level of integration.

On the other hand, to conclude that the harmonization of conditions of competition falls outside Article 100a, even though it is common ground that such harmonization previously fell within the scope of Article 100, would be equivalent to concluding that the concept of 'internal market' in Article 100a involved a *less advanced* level of integration than that of 'common market' within the meaning of Article 100. And that, in the absence of textual confirmation in the Single Act, seems to me to be quite unacceptable, particularly since such a reading involves a restrictive interpretation of the scope of Article 100a to which, inter alia for the fundamental reasons which I shall consider shortly, I certainly cannot subscribe.

In short, I consider that the harmonization of national environmental legislation relating to industrial installations contributes, no less than and no differently from that relating to products, to the 'achievement of the objectives set out in Article 8a' and therefore falls within the scope of Article 100a. [9]

9 — See, to that effect, C D Ehlermann, op cit., p. 369, according to whom the concept of an internal market 'implies the creation of conditions of competition which allow the free circulation of goods '; similarly, B Langeheine, op. cit., p. 350, who states that 'la creation du marché interieur ne s'epuise pas dans la suppression des frontières interieures mais englobe de façon nécessairement complémentaire un rapprochement des conditions de concurrence, afin de permettre une exploitation efficace et non discriminatoire des libertes fondamentales garanties par le traite'

11. Once it is established that both Article 100a and Article 130s are, in theory, relevant to the adoption of measures like the contested directive, it is then necessary to define the criteria according to which the relationship between those two provisions is to be regulated.

In that regard, the first hypothesis to consider is that of both provisions being applicable. That solution — which has not been advocated in the course of the proceedings — might be supported by the following considerations. First of all, recourse to a dual legal basis would be consistent with the practice followed before the Single European Act of relying on both Article 100 and Article 235 for the adoption of measures of that kind. The question might in fact be asked whether, after the Single European Act, Articles 100 and 235 should not merely be replaced by the new relevant provisions, namely Articles 100a and 130s respectively.

Moreover, this solution finds support in a previous decision in which the Court stated:

'where an institution's power is based on two provisions of the Treaty, it is bound to adopt the relevant measures on the basis of the two relevant provisions' (Case 165/87 *Commission* v *Council* [1988] ECR 5547, paragraph 11).

It must however be stated in that regard that that case concerned the relationship between two provisions, Articles 28 and 113, which could be applied together, merely by adopting the more rigorous

voting system, the unanimity required by Article 28 (before the Single Act) rather then the easier procedure, the qualified majority provided for in Article 113.

The same cannot be said of Articles 100a and 130s. The application of those two provisions gives rise to somewhat different procedural and substantive consequences. From the substantive point of view, the competence of the Community in matters of environmental policy is subject to limits which do not apply to harmonizing measures under Article 100a. The competence provided for in Article 130r et seq. is in fact purely subsidiary since, pursuant to Article 130r(4), it is to be exercised only if the objectives of environmental protection cannot be better achieved at national level, whilst the harmonizing measures under Article 100a clearly escape any such limitation and may be adopted whenever this proves necessary for attainment of the 'internal market'. Moreover, powers concerning environmental matters are minimal in character since, as provided in Article 130t, the Member States are entitled to depart from the common rules if they wish to adopt measures which provide an even higher level of protection; however, it is precisely that power to depart from the common rules which, in principle, is excluded in cases where harmonizing provisions have been adopted.

It therefore seems to me that, in that respect, Articles 100a and 130s are inspired by different, if not diametrically opposed, philosophies and it is therefore difficult to imagine that the two provisions might be used together for the adoption of the same measure.

But above all, with respect to the procedural aspect, it must be emphasized that the cooperation procedure, which is an essential feature of Article 100a, does not appear to be reconcilable with a legal basis that imposes the requirement of a unanimous vote. In those cases where the Council is required to act unanimously, the mechanisms which allow this complex procedure to bring about the close involvement of the Parliament in the decision-making process appear largely deprived of their effectiveness. In particular, the cooperation procedure presupposes that the Council can accept, by a qualified majority vote, the amendments made by the Parliament and taken up by the Commission in its reviewed proposal, whereas it must achieve unanimity in cases where it intends departing from the Commission's modified proposal (which may embody the Parliament's amendments) or where it intends considering a common position that the Parliament has rejected in its entirety. It thus seems to me that the inter-institutional dialectics which these mechanisms — perhaps somewhat intricate mechanisms — are intended to bring into play would be undermined if, as a result of the cumulative application of another legal basis, the Council were required, throughout the procedure, to vote unanimously.

Serious doubts thus exist as to whether Article 100a may be used together with another legal basis which, like Article 130s in this case, provides for unanimous voting, since that joint basis would seriously jeopardize the very functioning of the cooperation procedure. Furthermore, at the hearing, both the Commission and the Council appeared to me to agree on this point.

However, that does not seem to me to be the decisive issue. Perhaps precisely because of the difficulty of reconciling two provisions that give rise to such divergent legal consequences, the Member States expressly regulated the relationship between the new provision on the approximation of laws and the new environmental provisions, precisely by stating that the requirements of environmental protection form an integral part of the harmonizing process directed towards attainment of the internal market.

In the first place, Article 130r(2) provides that 'environmental protection requirements shall be a component of the Community's other policies'; and although on the one hand that means that in the exercise of the powers entrusted to them the Community institutions may not disregard considerations of environmental protection, it implies, on the other, that measures which reflect those considerations may also be adopted in the exercise of powers other than those provided for in Article 130r et seq. and, in particular, in the exercise of the powers relating to attainment of the internal market.

The 'principle of integration' of environmental action in other Community policies or action is specifically confirmed in Article 100a(3) where it is stated that the Commission, in its proposals concerning 'environmental protection . . . will take as a base a high level of protection'. It follows from that provision that Article 100a was regarded as an adequate basis for harmonizing measures concerning the environment, subject of course to fulfilment of the preconditions for the application of that provision and therefore to the requirement that the harmonizing legislation contribute functionally to the attainment of the internal market.

In short, if the interpretation of these textual aspects is correct, it follows that if Article 100a can be regarded as appropriate — as in the case of the contested directive — recourse to Article 130s may be regarded as superfluous.

12. Naturally, the result of this construction of the relationship between Article 100a and Article 130s is that the application of the latter is limited solely to measures which are not already based on some other provision of the Treaty. It seems to me that that very result is confirmed by the decisions of the Court on Article 130s. In paragraphs 19 and 20 of its judgment in Case 62/88, above, it stated that:

'19. Articles 130r and 130s are intended to confer powers on the Community to undertake specific action on environmental matters. However, those articles leave intact the powers held by the Community under other provisions of the Treaty, even if the measures to be taken under the latter provisions pursue at the same time any of the objectives of environmental protection.

20. Moreover, that interpretation is confirmed by the second sentence of Article 130r(2), pursuant to which "environmental

protection requirements shall be a component of the Community's other policies". That provision, which reflects the principle whereby all Community measures must satisfy the requirements of environmental protection, implies that a Community measure cannot be part of Community action on environmental matters merely because it takes account of those requirements.'

Those observations, which were made by the Court concerning the relationship between Article 130s and Article 113, apply also, it seems to me, to the powers vested in the Community by Article 100a; indeed, I would say that they apply with greater force in the case of Article 100a, in view of the fact that paragraph 3 of that article expressly, and significantly, provides that harmonizing measures directed towards attainment of the internal market include measures 'concerning . . . environmental protection'.

In conclusion, I am of the opinion that:

harmonizing measures of the same kind as the contested directive relate functionally both to environmental protection and to attainment of the internal market;

legislation of that kind can nevertheless be adopted under the procedure provided for in Article 100a alone since the Treaty expressly provides that environmental protection requirements may also be pursued in the exercise of other Community powers and in particular within the scope of the harmonizing powers provided for in Article 100a.

13. That concludes the textual analysis. But I must emphasize that that interpretation — which extends the scope of Article 100a and thereby necessarily cuts down that of Article 130s — appears to be fully consistent with the fundamental objectives of the reforms pursued by the Single Act.

In the first place, it is well known that the more important innovations introduced by the Single European Act include the extension of majority voting by the Council and reinforcement of the Parliament's participation in the Community decision-making process, by means of the cooperation procedure. These innovations rank as principles since they are intended, respectively, to accelerate the process of Community integration and to strengthen the democratic safeguards attached to the legislative process.

It is also well known that the new provision on the approximation of national laws, Article 100a, represents, by virtue of its central importance to the attainment of the internal market, perhaps the most significant case in which majority voting and the cooperation procedure are applicable.

It follows that a restrictive interpretation of Article 100a — as advocated by the Council — would have the effect of reducing, in a particularly delicate area (that of harmonization relating to the environment), the scope of those two essential procedural innovations.

It is clear that such a result is in sharp conflict with the fundamental reasons underlying the Single European Act: renewed integration through greater recourse to faster decision-making procedures and the enhancement of democratic guarantees through more effective involvement of the Parliament in the legislative process.

And it is precisely this point of principle, to which I referred earlier, that prompts me to reject the restrictive interpretation of Article 100a which has been postulated and, in particular, to agree with those who claim that the scope of that provision is not limited merely to harmonization of the rules relating to products but also extends to the harmonization of conditions of competition between undertakings within the Community.

14. There is another factor which finally convinces me that that solution is correct. The application of Article 100a to the product at issue here, and in general to the harmonization of environmental measures relating to industrial installations, has absolutely no prejudicial effect either on the effectiveness of Article 130s or, still less so, on the effectiveness of the Communities' environmental policy.

Within its own sphere, Article 130s is and continues to be applicable to all environmental matters *provided that they do not involve harmonization* of national requirements relating to production processes or products resulting from them and therefore do not regulate (through harmonization) either the movement of goods or the conditions of competition within the Community. Essentially, the measures in question — as stated repeatedly — are essentially measures which, before the Single Act, were based exclusively on Article 235.

Numerous examples are to be found in practice. Among those adopted prior to the entry into force of the Single European Act and based specifically on Article 130s I would mention, among the many, Council Directive 90/313/EEC on freedom of access to information on the environment, Council Regulation No 1210/90 on the establishment of the European Environmental Agency and the European environment information and observation network, Council Decision 90/150/EEC on the adoption of the Commission work programme concerning an experimental project for gathering, coordinating and ensuring the consistency of information on the state of the environment and natural resources of the Community, Council Directives 89/429/EEC and 89/369/EEC concerning air pollution from municipal waste-incineration plants and Council Regulation No 2242/87 on action by the Community relating to the environment.

On another point, it should be emphasized that the fact that measures like the contested directive are adopted under Article 100a and not Article 130s appears consistent not only with the objective of full attainment of the internal market but also with development of the Community environmental policy. That policy can only benefit from the fact that the measures in question are adopted by a majority rather than unanimously and with more effective involvement of the Parliament.

Finally, I consider that the solution outlined here does not involve any real sacrifice of the Member States' interests. No interests of an economic nature are adversely affected since the legislation in question does not impose any burdens on them but merely has an impact on the production costs of undertakings, precisely by ensuring that those costs do not vary from one country to another.

Moreover — and above all — environmental interests are not in any way undermined. Naturally, in that respect, the interest worthy of protection may be perceived only in the need to ensure that the environment is effectively safeguarded. However, it is clear that that need is felt particularly strongly by the Member States, and by some of them in particular. There is no doubt, therefore, that adequate protection in that regard must be assured.

Having said that, I must, however, stress that those preoccupations are not in themselves sufficient to prevent the Community from adopting harmonizing measures under Article 100a in cases where the conditions for the application of that provision are all fulfilled. That is so simply because Article 100a too contains more than adequate safeguards to protect the interests of the Member States which are more alert to environmental problems. Article 100a(3) in fact requires the Commission to 'take as a base a high level of protection' in that area; Article 100a thus appears perhaps to be even more protective than the specific environmental rules which, as evidenced by Article 130t, tend rather to take their inspiration from the philosophy of minimum protection. Article 100a(3), favoured, as is well known, particularly by Germany and Denmark, is specifically intended to ensure that harmonizing measures adopted (inter alia) in relation to the environment do not adopt a level of protection which is too low in relation to certain national systems.

To this specific guarantee are then added the safeguard clauses provided for in Article 100a(4) and (5). In particular, Article 100a(4) guarantees — albeit only in the context of a review carried out in the last instance by the Court of Justice — that a Member State which found itself in a minority when a harmonizing measure was adopted can apply national provisions which are justified by important needs relating to environmental protection.

Conclusion

In the light of the foregoing considerations, I consider that the contested directive was adopted on an incorrect basis and should therefore be annulled. I therefore propose that the application be upheld and that the Council be ordered to pay the costs.