THE ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE PROTECTION OF THE ENVIRONMENT

Francis Jacobs*

1. Introduction

The title of my lecture is obviously over ambitious. The case law of the European Court of Justice (ECJ) concerning environmental issues is quantitatively and qualitatively vast. On a rough estimate, it includes more than 700 judgments relating to over 50 different Community legislative acts that directly or indirectly regulate environmental matters, as well as national measures in the field, general principles and Treaty provisions. For these reasons, I focus on two topics.

The first area relates to what is perhaps the key task of the ECJ in this area: balancing the often conflicting requirements of market integration with those of environmental protection, both at national and at Community level. I discuss the most relevant decisions of the ECJ in this field to work out the pattern, if any, which emerges. From this case law, we may also be able to discover some of the key elements of the ECJ’s overall environmental stance.

I then move on to discuss some more general aspects of the ECJ’s functions and the special role of the ECJ in the enforcement of Community environmental policy.

2. Market Integration and Environmental Protection

It is perhaps not surprising that the original text of the EEC Treaty, signed nearly fifty years ago on 25 March 1957, did not contain any explicit provision regarding the protection of the environment. The only reference to environmental concerns (and that an indirect one) was the reference contained in the then Article 36 (today Article 30 EC) to ‘the protection of health and life of humans, animals or plants’. That lacuna may be explained by the fact that, first, the original Treaties were mainly concerned with the realisation of a common market, that is, market integration

* Professor of Law, Kings College, London, formerly Advocate General, European Court of Justice (francis.jacobs@kcl.ac.uk). This is the revised text of the first Journal of Environmental Law lecture delivered at University College London on 24 November 2005. I am most grateful to José María Fernández-Martín for his invaluable help in the preparation of the lecture. My thanks also to Anne Thies for her assistance with the production of the final text.
through the free circulation of factors of production and, second, at the time of their signature, environmental concerns did not constitute a priority in the political agenda.

The first significant Community political statement on environmental issues was the Commission’s communication on a Community environmental policy, adopted in 1971, on the basis of which the Member States reached a political agreement on the guiding principles of a Community environmental policy in 1972. At the same time, ecological activism was emerging. It was in that same year that Greenpeace was founded by a few activists and carried out its first protest action against the US underground nuclear testing at Amchitka, a tiny island off the west coast of Alaska.

By the mid-1980s, environmental issues had entered the mainstream political agenda and political institutions and looked set to stay. In 1983, the German Green Party coalition, a coalition founded in the late 1970s with the object of participating in the political process at the German federal level, became the first party of a major Member State in Europe to obtain significant representation in a national parliament with 28 seats at the Bundestag. They have managed to keep seats ever since. In the words of Patrick Moore, a founding member of Greenpeace, “by the mid-1980s, we had won over a majority of the public in the industrialised democracies. Presidents and Prime Ministers were talking about the environment on a daily basis”. At that time, ecological organisations started to make the transition from a strategy of confrontation to one of building consensus and using the political process to represent and defend their views. Again in the words of Mr Moore “when a majority of people agree with you it is probably time to stop hitting them over the head and sit down and talk to them about solutions”.

As a timely reflection of those social and political developments, the entry into force in 1987 of the Single European Act—the first major amendment to the EEC Treaty—provided the Community for the first time with an explicit legal basis on which to develop a Community environmental policy. Previously, environmental instruments could be adopted only on the basis of provisions providing for a general legal basis, such as the former Articles 235 and 100 of the Treaty, but those were heavily biased towards, if not dependent on, economic integration being the rationale for the legislation. The Single European Act added to the Treaty a new Title, Title VII, headed ‘Environment’, which set out for the first time, in Treaty form, the objectives of Community action relating to the environment and a specific Treaty basis for Community action.

The original provisions in the Single European Act were further fine-tuned and complemented by the subsequent Treaties of Maastricht, Amsterdam and Nice. Today, Article 2 EC, which is located in Part One of the EC Treaty entitled ‘Principles’, refers to the promotion of ‘a high level of protection and improvement of the quality of the environment’ as one of the Community’s tasks. Furthermore, in the words of Article 6 EC, also located in Part One, ‘Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities’, a provision which, according to the ECJ, emphasises the fundamental nature of the objective of environmental protection and its extension across the

range of those policies and activities. Finally, Articles 174 EC to 176 EC constitute the framework within which Community environmental policy must be carried out. In particular, Article 174(1) EC lists the objectives of the Community’s action on the environment, and Article 175 EC sets out the procedures to be followed to achieve those objectives.

What has been the role of the ECJ in that process? One has to note at the outset that the absence of an explicit legal basis in the Treaties has not always constituted an insurmountable obstacle for the ECJ, and things have proved no different in the field of environmental protection.

Thus, in February 1985, two years before the entry into force of the Single European Act, the ECJ delivered its judgment in the ADBHU case. In that case, a preliminary reference, the national court had put its finger on the spot and asked, inter alia, whether a Community directive regulating the disposal of waste oils was compatible with the principles of freedom of trade, free movement of goods and freedom of competition established by the Treaty of Rome.

The ECJ answered that the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are not ‘to be viewed in absolute terms but are subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantively impaired’. Environmental protection was even described by the ECJ as ‘one of the Community’s essential objectives’, by what might be termed a process of judicial anticipation. In that perspective, the ECJ ruled that the restrictions on trade and competition that the directive in issue might cause must nevertheless neither be discriminatory nor go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection. It found that the directive respected the principles of proportionality and non-discrimination and therefore was not contrary to the free-trade principles underpinning the Treaty of Rome.

That more flexible approach towards environmental protection considerations constitutes a departure from the general approach earlier defended by the ECJ, which emphasised the overriding nature of the objective of economic integration.

It is indeed noteworthy that in the ADBHU judgment, the ECJ, without any explicit legal basis—and in the context of a Treaty, one of whose main aims was the elimination of trade barriers—declared environmental protection to be one of the essential objectives of the Community which, in appropriate circumstances, could prevail over the main principles of free trade. The ECJ did not, moreover, deem it necessary to justify the introduction of such an essential objective—which was given a constitutional value—by reference to any external source or support (such as national constitutional traditions or international law). In this context, and by way of comparison, it is interesting to note that the ECJ’s recognition of human rights as general principles of Community law required far more elaboration and had to be supported by reference to the constitutions and constitutional traditions of the Member States and human rights treaties. The ECJ appears to have considered, in contrast, that environmental protection was so fundamental to the public interest that no explicit justification was required. In recognising the constitutional value of

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2 Case 240/83 Association de défense des brûleurs d’huiles usages (ADDBHU) [1985] ECR 531.
environmental protection, the ECJ was undoubtedly acting in accordance with the spirit of the times.

Three years later, in 1988, the ECJ delivered its well-known ruling in the *Danish Bottles* case. Unlike *ADBHU*, which concerned the validity of a Community measure, *Danish Bottles* was a direct action brought by the Commission against a national regulation. Under that regulation, the marketing of beer and soft drinks in Denmark was authorised only in reusable containers, and it required manufacturers and importers alike to establish a deposit-and-return system for empty containers.

The ECJ examined the national measure under Article 28 EC pursuant to the classic *Cassis de Dijon* judgment of 1979 which introduced the so-called mandatory requirements test. According to that test, in the absence of common rules at Community level relating to the marketing of the products in question, goods lawfully produced in any Member State could in general be imported into any other State; however, obstacles to free movement resulting from disparities between the national laws must be accepted provided that such rules are

- First, applicable to domestic and imported products without distinction,
- Second, necessary to satisfy certain mandatory requirements recognised by Community law—but in fact identified by the ECJ for the first time in the *Cassis de Dijon* judgment and
- Third, proportionate to the aim in view, that is, they constitute a measure which least restricts the free movement of goods.

The mandatory requirements identified by the ECJ at that time were those relating to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the protection of the consumer.

In *Danish Bottles*, the ECJ confirmed its statement in *ADBHU* that the protection of the environment constitutes one of the Community’s essential objectives and moreover held that therefore it also constituted one of the acceptable ‘mandatory requirements’ which national authorities could rely on under the *Cassis de Dijon* case law to restrict the entry of goods from other Member States. It accordingly upheld the national legislation, apart from the requirement that only prescribed types of containers could be used, which the ECJ considered to fall foul of the principle of proportionality.

In reaching its decision, the ECJ referred, albeit briefly, to the new environmental policy provisions in the Single European Act to support its reasoning.

This judgment is interesting in many respects. Not only did it confirm environmental protection as one of the essential objectives of the Community but it added for the first time a new mandatory requirement to the *Cassis de Dijon* list, thus demonstrating that such list was not meant to be exhaustive but open ended. *Danish Bottles* also made it clear that the mandatory requirement of environmental protection was not to be equated to the exception contained in Article 30 EC concerning the protection of health and life of humans, animals or plants. There was an important consequence: environmental protection could, in principle, serve as justification only for national measures applicable without distinction, whereas discriminatory measures, on the contrary, were to be justifiable only on the basis of Article 30 EC.

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Later case law further distinguished environmental protection from other possible mandatory requirement justifications. That case law starts with the *Walloon Waste* case, continues with *Dusseldorp* and *Aher-Waggon* and culminates with *PreussenElektra*. (It so happened that, in three of those cases, I was the Advocate General.) Let us examine them individually.

The *Walloon Waste* case, decided in July 1992, was a direct infringement action brought by the Commission against Belgium in which the ECJ examined, *inter alia*, the lawfulness of national rules prohibiting the storage, tipping or dumping in Wallonia of waste originating in another Member State or in a region of Belgium other than Wallonia. Thus, any non-Wallonian waste was prevented from entering Wallonia.

The ECJ, after finding that all waste, recyclable or not (and hence even if it had in effect a negative value), was to be regarded as ‘goods’ within the meaning of Article 28 EC—a vexed issue in itself—then dealt with the environmental protection justification.

It agreed that accumulation of waste constituted a danger to the environment. It therefore concluded that the contested measures were justified by mandatory requirements of environmental protection.

The Commission had argued, in my view rightly, that mandatory requirements could not be relied upon by Belgium given that the measures in question clearly discriminated against waste originating in other Member States.

The ECJ acknowledged that mandatory requirements could be taken into account only in the case of measures which applied without distinction to both domestic and imported products. However, the ECJ went on to hold that in assessing whether a barrier was discriminatory, account had to be taken of the particular nature of waste, of the Treaty principle that environmental damage should be remedied at source and of the principles of self-sufficiency and proximity set out in the Basle Convention on the control of transboundary movements of hazardous wastes and their disposal. The Court did not however stress the impact of the measure on imports, which a conventional analysis might regard as among the most important factors to be taken into account. Having regard to the differences between waste produced in different places and to the connection of waste with its place of production, the ECJ held that the measure in issue could not be regarded as discriminatory.

That decision was remarkable, because the measure constituted an outright ban on imports of waste produced in other Member States, and the ECJ’s finding that it was not discriminatory is widely regarded as unconvincing; indeed, the measure was directly discriminatory. Nonetheless, the judgment might be taken as an indication of the lengths to which the ECJ was prepared to go to save what it regarded as an environmental friendly measure, contrasting starkly with its generally very strict approach to restrictions on trade.

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8 Because the Court ruled that by virtue of Directive 84/631, Member States could not ban the movement of hazardous waste covered by that Convention, the paradoxical result of the decision was that the prohibition was upheld exclusively in relation to non-hazardous waste.
That decision was followed in 1998 by two hardly less surprising judgments, those in the *Dusseldorp* and *Aher-Waggon* cases.

*Dusseldorp*, a preliminary reference originating in the Netherlands, concerned a national plan for the disposal of hazardous waste, which seriously restricted the export from the Netherlands of waste for recovery. The referring court asked, *inter alia*, whether such a measure fell within the notion of measures having equivalent effect to a restriction on exports prohibited by Article 29 (then Article 34) EC and, if so, whether there was any justification for it.

In my view, it was quite plain that the measure had the effect of restricting exports and benefiting national production and therefore, being discriminatory, fell within the prohibition of Article 29 EC. The ECJ however sidestepped this hurdle by not even considering whether the measure was discriminatory. Instead, it went straight on to examine whether it could be justified on environmental protection grounds. That could only mean an implicit acceptance either that the measure was not discriminatory, an unlikely prospect, or that, in the case of the mandatory requirement of environmental protection, the discriminatory nature of the measures is of no relevance.

On the facts of the case, the ECJ found that the reasons put forward by the Netherlands government to justify the measure were related more to economic than to environmental considerations and that therefore they could not be accepted. The Court’s tolerant approach to restrictions on exports is however striking.

*Aher-Waggon*, delivered only a month after *Dusseldorp*, was a preliminary reference under Article 234 EC, questioning the compatibility with Community law of a German measure making registration of aircraft in Germany conditional upon compliance with noise limits. That measure also appeared to discriminate directly between domestic aircraft and imported aircraft in that aircraft previously registered in another Member State could not be registered in Germany even though aircraft of the same construction which had already obtained German registration before the German measure was adopted could retain that registration.

Here again, however, the ECJ held, without assessing whether the measure was directly discriminatory, that a barrier of that type could be justified by considerations of public health and environmental protection. The ECJ then analysed the measure in question in the light of the proportionality principle and was able to find it proportionate to the aim of environmental protection.

Finally, *PreussenElektra*, decided in March 2001, was a preliminary reference on a national regime for encouraging the supply of green electricity, in which the referring court asked, among other questions, whether a German measure obliging German network operators to purchase electricity produced from renewable sources within their area of supply at fixed (and possibly uneconomic) minimum prices constituted a measure having equivalent effect within the meaning of Article 28 EC, because the measure benefited only domestically produced electricity.9

It was not disputed that the German measure pursued environmental objectives of considerable importance, namely the production of electricity from renewable sources. However, the measure, which in effect imposed a ‘buy local’ obligation—which is

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9 Electricity had previously been held to be ‘goods’ within the meaning of Article 28 EC in Case C-393/92 Almelo [1994] ECR I-1477.
anathema in the context of the free movement of goods in an internal market—was discriminatory to the extent that renewable energy produced in other Member States was not eligible for the scheme. As a result, that restriction on imports could not be justified as a mandatory requirement on environmental grounds, because such a justification could apply only to measures applicable without distinction. Furthermore, that restriction could not be justified under Article 30 EC either, because the protection of the environment is not included among the interests protected by that article.

The ECJ, in what can perhaps be described as an original exercise in dialectical analysis, found otherwise. Similar ‘buy local’ obligations had, the ECJ itself pointed out, been found in previous case law to be discriminatory. However, before reaching a conclusion on its compatibility with Article 28, the ECJ decided to look for redeeming features, which it found, first, in the aim of the provision in question and, second, in the particular features of the electricity market. From that twofold analysis, the ECJ reached the surprising conclusion that the measure was not discriminatory.

First, according to the ECJ, the aim of promoting the use of renewable energy sources for producing electricity was useful for protecting the environment insofar, as it contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States had pledged to combat. Growth in the use of renewable energy is amongst the priority objectives that the Community and its Member States aim to pursue in implementing the obligations that they contracted by virtue of the United Nations Framework Convention on Climate Change and by virtue of the 1997 Kyoto Protocol.

The ECJ also interestingly noted, possibly to cover all angles, that that policy was also designed to protect the health and life of humans, animals and plants, all of them grounds for exception under Article 30 EC.

The ECJ further referred to what is today Article 6 EC, which requires, as part of the Principles of the EC Treaty after Amsterdam, environmental protection requirements to be integrated into the definition and implementation of other Community policies and activities. (This seems to be the first occasion on which the ECJ invoked Article 6 to support the lawfulness of national legislation; I had done so in my Opinion but in the specific context of explicitly justifying directly discriminatory measures.)

Second, as regards the nature of electricity, the ECJ held that the nature of the product is such that, once it has been allowed into the transmission or distribution system, it is difficult to determine its origin and in particular the source of energy from which it was produced. This contrasts with its approach in Outokumpu,\(^\text{10}\) where the ECJ rejected the same argument adduced by Finland, and which seemed to me to have some merit, in the context of differential taxation contrary to Article 90 EC.

The ECJ, in something of a logical leap, concluded from those elements that, in the current state of Community law concerning the electricity market, the German measure was not incompatible with Article 28 of the Treaty.

No analysis of whether the provision had a discriminatory character or whether it was disproportionate to its objective was applied. In fact, as regards the proportionality test, it is difficult to see why electricity from renewable sources produced in

\(^{10}\) Case C-213/96 \([1998]\) ECR I-1777.
another Member State would not contribute to the reduction of gas emissions in Germany to the same extent as electricity from renewable sources produced in Germany. In both the cases, the domestic production of electricity from conventional sources, and the attendant pollution, would be reduced to the same extent. In that respect, the limitation of the purchase obligation to electricity produced in Germany does not seem proportionate.

In those four cases, the national measures examined were in my view not applicable without distinction to domestic and foreign goods. As a result, according to well-established case law, environmental protection, a mandatory requirement under *Cassis de Dijon*, could not be invoked by way of justification.

The ECJ succeeded nevertheless in applying that ground of justification either by finding, on the basis of rather tortuous reasoning, that the measures were not discriminatory or by simply avoiding that issue.

In my view, the question whether a measure applies without distinction to domestic and imported products is from a logical point of view a preliminary and neutral one, a necessary first step. The only function under the ECJ’s case law of the analysis of whether a national measure is applicable without distinction or not is to determine which grounds of justification are available. In assessing whether a measure is directly discriminatory, regard cannot be had to whether the measure is appropriate or desirable for policy reasons.

I am not criticising the outcome of the ECJ’s case law, namely, enhancing environmental protection but rather questioning the means by which the ECJ gets there. Even if one shares, as I do, the laudable enthusiasm of the ECJ to assess measures aiming at the protection of the environment favourably, that should not come at the price of damaging legal certainty. Environmental protection aims should indeed be given the greatest weight, and it may indeed be desirable that even directly discriminatory measures should be capable of justification on grounds of environmental protection. However, in view of the fundamental importance for the analysis of Article 28 EC of the question whether directly discriminatory measures can be justified by mandatory requirements, the ECJ should clarify its position to provide the necessary legal certainty.

Either it should explicitly extend the *Cassis de Dijon* mandatory requirements’ exceptions generally to discriminatory national measures or it should explicitly apply a more favourable treatment to the mandatory requirement of environmental protection, setting it apart from all others.

In my opinion in *PreussenElektra*, I suggested two possible reasons that could be invoked in favour of a more flexible approach in respect specifically of the mandatory requirement of environmental protection.

I referred in the first place to the amendments to the Treaties agreed in Amsterdam, which show a heightened concern for the environment (even though Article 30 EC itself was not amended to include environmental protection as a ground for exceptions to the free movement of goods), in particular, Article 6 EC which, as its wording shows, is not merely programmatic but imposes legal obligations; it provides that the requirements of environmental protection must be integrated into the definition and implementation of all policies and activities of the Community. From this new legal framework, it follows that special account must be taken of environmental concerns in interpreting the Treaty provisions on the free movement of goods.
In the same vein, I also argued that harm to the environment, even where it does not immediately threaten, as it often does, the health and life of humans, animals and plants protected by Article 30 EC, may pose a more substantial, if longer term, threat to the ecosystem as a whole.

It would be hard to justify, in these circumstances, giving a lesser degree of protection to the environment than to the interests recognised in trade treaties concluded many decades ago and taken over into the text of Article 30 EC, itself unchanged since 1957. Legal rules, and especially treaty provisions which of their nature are more difficult to amend, should be interpreted, as far as possible, as a living and evolving text that needs to be adapted to a changing context. In this sense, inspiration could be drawn from the European Court of Human Rights, which in its case law explicitly interprets the Convention as what it has called ‘a living instrument’. And indeed, in other contexts, the ECJ has approached the EC Treaty in a similar way.

The second reason I suggested for distinguishing environmental protection from all other mandatory requirements was that to hold that environmental measures could be justified only where they are applicable without distinction would risk defeating the very purpose of the measures. National measures for the protection of the environment are inherently liable to differentiate on the basis of the nature and origin of the cause of harm and are therefore liable to be found discriminatory, precisely because they are based on such accepted principles as that according to which environmental damage should, as a priority, be rectified at source [Article 174(2) EC]. Where such measures necessarily have a discriminatory impact of that kind, the possibility that they may be justified should not be excluded.

The ECJ has not, unfortunately, reconsidered its position in subsequent case law, although it had in fact a good opportunity to do so in a very recent judgment. The case of Commission v Austria concerned an Austrian ban on grounds of environmental protection of heavy lorries on a particular section of a motorway. The Commission argued, inter alia, that the measure was indirectly discriminatory, as 80% of the affected undertakings were non-Austrians. It challenged the use of the environmental protection justification by the Austrian authorities. I shall discuss the case in more detail later. In the present context, I note that Advocate General Geelhoed, in his Opinion in that case, after a thorough review of the same case law just mentioned, concluded by sharing the views I expressed PreussenElektra and joined my call for clarification of the case law. He argued that, because of the new provisions on the environment introduced in the Treaty since the Single European Act and the inherently ‘discriminatory’ features in national measures seeking effective environmental protection, even discriminatory national measures should be susceptible of justification on grounds of environmental protection.

11 In two judgments delivered on 14 December 2004 and concerning the same national measures relating to deposit and return of empty container requirements—one case was a preliminary reference (Case C-309/02 Radlberger [2004] ECR I-11763) and the other a direct infringement action (C-365/01 Commission v Germany [2004] ECR I-11705)—the Court, when examining those measures under Article 28 EC, applied the traditional Cassis de Dijon approach and began its reasoning by finding that the national measures were applicable without distinction. It then went on, in the classic fashion, to examine whether there were overriding requirements relating to protection of the environment that could justify the contested measures and whether they were proportionate. It concluded that the measures, even though intended to protect the environment, failed under the proportionality test and were precluded by Article 28 EC.
12 Case C-320/03, judgment delivered on 15 November 2005.
The ECJ was thus urged by the Opinion of another Advocate General to put some clarity into its reasoning.

In its judgment, however, the ECJ decided, no doubt with due deliberation, to sidestep the issue once again. The ECJ started its reasoning by finding that the ban on heavy lorries did—obviously—constitute an obstacle to the free movement of goods but refused to enter into the analysis of whether it was discriminatory or not. It simply went on to examine the ground for justification put forward by the Austrian authorities, that of environmental protection, and, repeating its previous case law, found it to be an essential objective of the Community and therefore an acceptable mandatory requirement. The measures, however, were found, as we shall see later, to be disproportionate and therefore unlawful on that ground.

To summarise so far, environmental protection as a public interest value was given a constitutional status by the ECJ even before a specific environmental legal basis existed in the Treaty. It was defined as an essential objective of the Community to which, in certain circumstances and under certain conditions, the principles of free trade must defer. The constitutional status of environmental protection was enhanced by the new Treaty provisions concerning the environment, which were introduced by the Single European Act and complemented in subsequent Treaty modifications.

Such an approach has been applied to both Community and national measures on environmental protection.

As regards national measures, in its case law concerning environmental protection as a mandatory requirement, one may safely conclude that the ECJ has, not without effort, departed from the constraints imposed by its traditional analysis of the *Cassis de Dijon* mandatory requirements to assess and, in most cases, uphold national measures seeking aims of environmental protection which were at least indirectly discriminatory. This indicates that environmental protection is subject to a treatment differing from that reserved to other mandatory requirements. In developing its case law, the ECJ has in my view failed to provide consistent reasoning for such a differentiated approach.

In this respect, I am of the view that the ECJ can only be found to have environmental friendly credentials but to have failed to provide an adequate conceptual basis for its approach.

3. The Standard of Environmental Protection and the Proportionality Test

However, to hold environmental protection to be a value of constitutional status is a solemn but potentially empty statement. I say empty, because there are many possible degrees of environmental protection; the question of what specific degree of environmental protection that value can or should embody in the context of the EC economic integration objectives remains to be answered.

That question implies discussing the issue of proportionality. Clearly, whether a measure is proportionate to achieve a certain objective, environmental or other, depends, first and foremost, on the standard set by the objective to be achieved. The standard applied to measures required to achieve, let us say, zero *Escherichia coli*
bacterial presence in bathing waters within a short period of time will necessarily be more strict than that required by a less stringent objective. But that in turn poses the prior question whether the objective of zero \textit{E. coli} bacterial presence is in itself a valid objective.

Thus, when examining measures relating to environmental protection, any court, be it national court or the ECJ, needs to perform a two-tier evaluation.

- First, is the objective of environmental protection sought by the measure acceptable under the applicable rules? and
- Second, if that objective is acceptable, are the measures adopted proportionate, that is, are they the most effective to achieve that objective while the least harmful to other interests and values? At Community level that means, as the ECJ stated in \textit{ADBHU}, checking whether restrictions on free trade and competition caused by Community measures go beyond the inevitable restrictions which are justified by the pursuit of the objective of environmental protection.

For present purposes, I think it is safe to say that if the set objective involves a high level of protection, the restraints will inevitably be also higher. So, endorsing higher levels implies a readiness to accept more restrictive measures, as that is the very nature of proportionality.

Let us briefly discuss those two tiers in the context of Community and national measures.

At Community level, as things stand at present, environmental protection is, in my view, more likely than not to prevail over free-trade considerations when the Community legislature performs the balancing act between both values. Articles 174–176 of the Treaty grant the Community powers to define its own environmental policy and therefore its own standards.

The Commission has claimed in its guidelines on the application of the precautionary principle that the Community has a right to decide on the level of environmental protection that it deems appropriate. In addition, Article 2 EC refers to the promotion of ‘a high level of protection and improvement of the quality of the environment’, Article 174(2) EC requires Community environmental policy to aim at a high level of protection and, finally, Article 6 EC imposes the integration of environmental protection requirements into the definition and implementation of other Community policies and activities. On the basis of those provisions, one may expect the Community legislature to lay down high standards of environmental protection.

It now seems highly unlikely that the ECJ will hold the standard chosen by the Community legislature to be contrary to the principles of free trade unless that standard is patently unreasonable.

Indeed, even outside the field of environmental law, it is settled case law that the Community legislature enjoys a wide margin of discretion when adopting legislative measures that involve complex political and economic choices.

Even though the exercise of that discretion is subject to scrutiny by the ECJ, such scrutiny is limited to checking whether the decision-making bodies have not acted in a manner which is completely arbitrary or otherwise contrary to the provisions of the Treaty or the general principles of law, such as equality and proportionality. The ECJ

\footnote{Guidelines of the Commission on how to apply the precautionary principle, COM (2000) 1.}
however applies a marginal review of the compatibility of Community measures with the principle of proportionality. Its control is limited to assessing whether the measures adopted are manifestly inappropriate for achieving the objective pursued. Otherwise, the ECJ considers it would ‘substitute its assessment for that of the [Community legislature] as the choice of the most appropriate measures’ thereby overriding its wide discretion.14

In addition, the ECJ’s own approach so far, as illustrated by many decisions in addition to those already discussed, for example Leybucht Dykes15 and Santoña Marshes,16 shows that environmental protection values will be treated favourably. That trend seems unlikely to change in the short term.

With respect to national measures, in the absence of Community harmonisation, the ECJ has left Member States free to choose the level of their environmental protection standards. Moreover, Article 176 EC provides that even when protective measures are adopted at Community level pursuant to Article 175 EC, Member States shall not be prevented from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaty and must be notified to the Commission. It follows that the ECJ will, in the absence of Community harmonisation, accept national standards as legitimate policy choices.

That brings us to the second tier, that is, the issue of proportionality. That issue is best examined in the light of the case law of the ECJ on national measures, because, first, there are few cases in which the ECJ has applied the proportionality test to Community environmental protection measures and, second, it seems that a similar proportionality standard is, as I shall argue, applied to both national and Community measures in the case of environmental protection.

The length to which the ECJ will go in applying the proportionality test to national measures might seem to depend on whether the issue comes before the ECJ by way of a direct infringement action initiated by the Commission under Article 226 EC or via a request for a preliminary ruling introduced by a national court under Article 234 EC.

As you know, the ECJ may only fully consider the contested national measures and rule on their compatibility with Community law in the framework of direct infringement actions lodged by the Commission. In the context of Article 234 preliminary references, based on a distinction between the interpretation of EC law—a matter for the ECJ—and its application—reserved to the national court—it might be thought that the ECJ must limit itself to interpreting the relevant rules of Community law and leave to the national courts the application of those rules to the facts of the main proceedings. This would mean that it is up to national courts in the light of the ECJ’s ruling to decide on the facts of the case whether the contested measures are proportionate.

But even though that might be so in theory, in practice, the ECJ has often engaged in a detailed analysis of the national measures in question even when deciding under the preliminary reference procedure, leaving little margin of manoeuvre to the national courts, as judgments such as Aher-Waggon show.

Indeed there is in my view often no substantial difference in the approach adopted by the ECJ to national measures under one or the other procedure, although sometimes on a reference the ECJ will leave the final appraisal to the national court.

As for the nature of the ECJ’s analysis, it seems that the depth and consistency of the analysis when the ECJ applies the proportionality test to national measures has varied from one case to another.

Whereas, in some cases, proportionality has been applied with a great deal of detail (such as in the Danish Bottles case, a direct action, and in Aher-Waggon, a preliminary reference), on other occasions, the analysis is rather superficial if not completely lacking as in PreussenElektra.

True proportionality is a flexible tool and, by its very nature, can be assessed only on a case-by-case basis in the light of the specific circumstances, arguments and possibly also scientific and other evidence submitted by the parties. Clearly, where the submissions are insufficient, serious scrutiny is not possible. It is perhaps in part for that reason that a reliable pattern cannot be deduced from the ECJ’s case law, be it from its decisions on national measures under Article 226 or 234 or from the few decisions involving Community measures.

Nonetheless, the ECJ often seems ready to accept any consequential effects on trade, however severe, that may be caused by measures relating to environmental protection, if those measures are shown to pursue a genuine environmental aim and to constitute effective means to achieve that aim.

Even if the ECJ repeats its classic enunciation of the proportionality test (if it actually reaches that point in its reasoning, which as we have seen is not always the case) according to which the crucial question is whether the aim pursued may be achieved as effectively by measures less restrictive of intra-Community trade, when it comes to the application of the test, the ECJ appears to assess the contested measures favourably in the light of that principle when they have an environmental protection aim.

This ‘green’ approach is moreover applied whether national or Community measures are involved.

As regards national measures, in addition to Aher-Waggon where the German legislation on noise control was found proportionate, in Toolex, a national measure imposing a total ban on the industrial use of a particular carcinogenic substance was also found proportionate to the aim of protecting public health and, implicitly, the environment. In Danish Bees, a national measure imposing a total ban on the importation of a certain species of bees was held to be proportionate to the aim of protecting biodiversity.

A similar approach is applied in examining a Community measure, for example in the Safety Hi-Tech case, which concerned a Community regulation prohibiting the use of hydrochlorofluorocarbons. After an examination of its provisions in the light

20 Those cases were decided on the basis of Article 30 EC derogations, but the Court also referred to the protection of the environment.
of the proportionality principle, the ECJ found the regulation proportionate to its aim of protecting the ozone layer. Again, in *Omega Air*, the ECJ found a Community regulation aiming at a reduction of noise pollution caused by re-certificated civil subsonic jet aeroplanes proportionate to its aim.

Arguably, the standard of review was similar in all of those cases.

If that perception is correct, it illustrates another instance in which the ECJ accords environmental protection a privileged treatment. In other fields, the ECJ has in the past been criticised for subjecting Community measures to a more lenient scrutiny under the proportionality principle than that applied to national measures. This may generally be true but perhaps for good reasons; national measures are likely to disrupt trade in the pursuance of national interests, whereas Community measures are often intended, by harmonisation or otherwise, to remove obstructions to the internal market and to operate in the Community interest. There may therefore be very good grounds for scrutinising national measures, when applying the proportionality principle, more rigorously than Community measures. However, in assessing environmental justifications for restrictions on trade under the proportionality principle, the ECJ seems to apply a standard to national measures which is perhaps no more strict than the standard applied to Community measures.

To summarise, because the standard of environmental protection set either at Community or at national level is likely to be high and unlikely to be the object of judicial scrutiny, unless patently inadequate, the key issue seems to be the application of the proportionality test.

Even though no totally consistent pattern can be discerned from existing case law, as the solution seems to differ depending on the circumstances of each case, the overall trend of the ECJ is to treat favourably under that principle measures, whether adopted at national or Community level, which genuinely seek an environmental (or indeed a public health) aim. Indeed, with regard to national environmental measures which, as permitted by Article 176 EC, are more stringent than Community protective measures, the ECJ, while accepting that the national measures implementing the Community measure concerned should be appropriate and necessary in relation to the objectives pursued (the classic formulation of the proportionality test), has ruled that, provided that other Treaty provisions are not involved, ‘the Community-law principle of proportionality is not applicable so far as concerns more stringent protective measures of domestic law adopted by virtue of Article 176 EC’.23

A good way to illustrate the points I have sought to make so far is by returning to the recent judgment in *Commission v Austria* case which I mentioned earlier.

It concerned a direct action against Austria in which the Commission challenged a regulation of the First Minister of the Austrian province of Tirol prohibiting on grounds of environmental protection the movement of certain heavy lorries transporting certain types of goods on a section of the A12 Motorway as from August 2003. The section in question is part of the motorway which links, through Austria, Germany and Italy and which constitutes one of the main north–south road axes in the Community. Moreover, it appears that there are, for the time being, no real road

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22 Joined Cases C-77/00 and 122/00 [2002] ECR I-2569.
23 Case C-6/03 *Deponisieweckverband Eiterköpfe*, judgment of 14 April 2005, operative part; see also paras 57–64.
transport alternatives to that route. The object of the prohibition was the reduction of nitrogen dioxide emissions of heavy lorries in view of the fact that the maximum limits established by the national legislation, in application of Community directives in the field, are often breached in the area concerned.

The contested Austrian regulation, which seeks to promote the alternative use of railways, was adopted on the basis of the Austrian Emission Control Act, which transposes the Community’s directives on ambient air quality into Austrian law.

As mentioned already, the ECJ acknowledged, as was indeed inevitable, that the contested ban on traffic clearly constituted an obstacle to the free movement of goods but gracefully avoided, despite the Opinion of Advocate General Geelhoed and the Commission’s pleas, any discussion of its discriminatory nature. It went straight on to consider the environmental justification and accepted it as a valid mandatory requirement on the facts of the case. It then referred to its previous case law in which it declared that environmental protection was an essential objective of the Community and to, \textit{inter alia}, Articles 2 and 6 EC to support its conclusion. When it came to consider the traffic ban in the light of Article 28 EC, it applied the proportionality test. The ECJ accepted the need for national measures to reduce the nitrogen dioxide emissions but held the traffic ban to be disproportionate.

Such a finding is a relatively unusual phenomenon in the environmental field, but interestingly, the ECJ did not condemn Austria, because the measure was outright disproportionate but because Austria had not carefully examined the possibility for alternative less restrictive means before adopting such ‘a radical measure’ which cut off to certain type of traffic ‘a vital communication link between certain Member States’.

The ECJ indicated that Austria could lawfully have adopted the contested measure if it had previously ‘clearly established’, after careful consideration, that no alternative means were adequate to achieve the reduction of the levels of nitrogen dioxide pollution sought.\footnote{Para 87 of the judgment.}

The ECJ found in particular that Austria should have ensured that alternative transport by rail was available in a sufficient and adequate manner before adopting the contested measure. Finally, the ECJ found that the transitional period of two months between the enactment and the entry into force of the traffic ban was patently insufficient to allow the parties affected to adapt to the new circumstances. For those reasons, the Austrian regulation failed the proportionality test.

The judgment gives rise to some comments.

First of all, the ECJ did not question the level of protection sought by the national measure but rather the fact that no alternative had been properly considered. The ECJ seemed to indicate, in line with previous case law, that if the responsible authorities manage to provide evidence that the measures at stake are the only ones to effectively ensure the attainment of the environmental protection level, free movement will defer to environmental protection, even if that means such radical measures as the ones at issue.

Thus, Austria seems to have failed more because of its lack of diligence in giving serious consideration to alternative measures than because it adopted a ban on traffic which radically affected the free movement of goods.
However, the decision also illustrates the difficulties in balancing environmental and economic interests. In performing such a balance, the ECJ appears to argue that whereas environmental protection may prevail, it must do so in a reasonable, well-thought-out and gradual manner so as to allow all parties involved a reasonable time to adapt to the new circumstances and to minimise, as far as possible, the negative effects on free movement. This follows the ECJ’s approach in *Radlberger*, where it ruled that Article 28 EC precluded a Member State from replacing a global system for the collection of packaging waste with a deposit and return system without giving the producers and distributors concerned a reasonable transitional period to adapt thereto.

In that context, it is worth mentioning that in the Austrian motorway case, the Advocate General referred to the obligation of loyal cooperation under Article 10 EC to find that Austria should have consulted the Commission before unilaterally putting into place a measure with such far-reaching ‘structural consequences for the transport of goods over Austrian territory, necessitating drastic adaptations by the sectors affected’. The ECJ did not however take up that suggestion, although in his order granting interim measures, requiring Austria provisionally to suspend the implementation of the ban, the President of the ECJ had called on the parties involved in the case to reach a compromise on the balancing of the interests in cause.

It seems logical to me that the balancing of two conflicting values is better dealt with in the decision-making process rather than in the judicial context.

Member States may be free to set higher environmental protection standards than those provided for in Community harmonisation measures but should nonetheless actively cooperate with each other and the Commission to cause the minimum disruption possible to the free-trade principles of the Community.

The same applies to Community measures, which should, ideally, represent a reasonable compromise between environmental and free-trade concerns.

4. The Enforcement of Community Environmental Policy

I turn finally to the issue of enforcement of environmental law. A recent judgment, concerning enforcement by criminal sanctions, caused a storm of protest in the British press. Before discussing that, some general comments on enforcement may be useful to put the matter in its context.

First, I think that the judicial system of the EU is, among all international and transnational courts, unique in its effectiveness. This is in the first place because of the direct effect of Community law, which enables persons affected—or indeed environmental organisations subject only to national rules on standing—to get a remedy in their own national courts. Next, it is because of the system of references by national courts for preliminary rulings. Usually where judgment is given by an international court—the International Court of Justice, the European Court of Human Rights or others—it will be necessary for the State concerned to be allowed time to take any necessary measures, including the enactment of any necessary legislation to comply

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with the court’s judgment. The individuals whose claims may have given rise to the proceedings may not have a remedy, and any implementing legislation may be only prospective. This is not usually the case with the ECJ. Judgments given by way of preliminary rulings will be immediately enforceable. Where, as is very often the case, the Community measure has direct effect, its application, in the sense laid down by the ECJ, will be immediate, in the very proceedings which gave rise to the reference to the ECJ. Moreover, the ECJ’s ruling will be binding on all courts in the EU in which the same question arises. Even where the Community provision does not have direct effect, the national court will be required to do everything it can to construe its own national legislation so as to give full effect to the Community provision. Where that is not possible, the Member State will of course be obliged to amend its legislation, but in addition, the person seeking to rely on the Community provision may have a remedy which anticipates that amendment; he may immediately be able, under the ECJ’s case law, to claim damages in his own courts from the Member State for compensation for any loss suffered.

Then of course there is the well-known enforcement procedure available to the Commission under Article 226 of the EC Treaty. A high proportion of these infringement cases—currently approaching one-third of all such cases—relate to the environment. Moreover, environmental cases have led to a new development in the procedure: the Court has recently accepted that the Commission can bring a case of a more general character, without having to establish each specific infringement.26

Where judgment is given against Member States in infringement proceedings taken by the Commission, there is also a unique system of enforcement of judgments, because there is now provision for sanctions if they do not comply with judgments of the ECJ. This is because the Maastricht Treaty—responding to concerns of, especially, the United Kingdom, to ensure that ECJ judgments would be complied with—introduced provision for fines and periodical penalty payments to be imposed on Member States in such circumstances. The first such penalty was in fact imposed in an environmental case, against Greece, concerning the dumping of waste in Crete. There the Commission brought an action under the new enforcement provisions seeking, first, a declaration that Greece had failed to comply with a judgment delivered five years earlier,27 in which the ECJ had condemned Greece for having failed properly to implement two 1970s directives designed to protect human health and safeguard the environment against harmful effects caused by the collection, carriage, treatment, storage and tipping of waste and, second, an order requiring Greece to pay to the Commission a penalty payment of ECU 24,600 for each day of delay in implementing the measures necessary to comply with the said judgment (from notification of the new judgment). The United Kingdom intervened in the action in support of the Commission; it is unusual for a Member State to intervene in support of the Commission in infringement proceedings brought by the Commission against another Member State.

The ECJ found that the failure to comply with the obligation resulting from the waste disposal directives could, by the very nature of that obligation, endanger human health directly and harm the environment and must be regarded as particularly

serious. It therefore condemned Greece to a penalty payment of EUR 20,000 for each day of delay in implementing the measures necessary to comply with the 1992 judgment from delivery of the later judgment until full compliance.

The procedure for fines and penalty payments has proved so effective that, although proceedings have not infrequently been launched, there have been very few cases in which fines have been imposed; perhaps the most remarkable was the recent judgment against France for over fishing, in which the ECJ appears to have adopted stringent measures in response to serious and long-running violations of Community law.28

I turn finally to the judgment of 13 September 200529 in which the Commission, supported by the European Parliament, challenged the legal basis on which the Council had adopted its Framework Decision on the protection of the environment through criminal law.30

The judgment, which the British Government called ‘disappointing’, was according to an editorial in The Times,31 ‘as ominous as it is deluded’ and a ‘transparent attempt at empire-building beyond the boundaries laid down for Europe’s bureaucrats’. It was also branded a ‘lamentable judgement’ which ‘strikes at the heart of national sovereignty and Britain’s ability to decide the law for itself’. The editorial concluded that ‘democracy yesterday suffered a grievous defeat in a court whose contempt for sovereignty verges on the criminal’. However, on arrival today from Luxembourg to give this lecture, I am glad to say that I was not arrested on charges of high treason.

Let us see whether such criticisms of the judgment are indeed warranted.

The facts can be summarised as follows. In 2001, the Commission had proposed a directive based on the environmental provisions of the EC Treaty, in particular Article 175(1) EC Treaty, that is, under the so-called first pillar (or the ‘Community pillar’). The directive would have required Member States to ensure that a range of environmentally harmful activities—already outlawed by existing EC legislation—would be deemed to be criminal offences when committed intentionally or with serious negligence.

However, the Council was not in a position to adopt that proposal. The necessary qualified majority required by the co-decision procedure under Article 251 EC, the decision-making procedure to which Article 175(1) EC refers, could not be attained. As you know, the co-decision procedure requires, ultimately, an agreement between the Council and the European Parliament. But for the procedure to be activated, the Commission’s proposal needs first to be approved by the Council by a qualified majority.

The majority of the Member States however considered that the proposal went beyond the powers attributed to the Community by the Treaty establishing the European Community. The Council opted instead for a Framework Decision under

29 Case C-176/03. The Council was supported before the Court by 10 intervening Member States (Denmark, Germany, Greece, Spain, France, Ireland, the Netherlands, Portugal, Finland, Sweden and United Kingdom). For a full text of the judgment and commentary by Dr Ludwig Kramer, see the Case Analysis section of this issue.
31 ‘Legal trespass: the European Court has gravely undermined the sovereignty of EU states’, The Times; Editorial of 14 September 2005 at 19.
Article 34 in Title VI of the Treaty on European Union, the so-called third pillar of the EU Treaty, which governs police and judicial cooperation in criminal matters.\footnote{Article 34(1)(b) in conjunction with Article 31(1)(e) of the EU Treaty.} Contrary to the supranational character of the first pillar, the third pillar operates under the principle of intergovernmental cooperation, and decisions adopted thereunder require unanimity and only a limited participation of the Community institutions.

Against this choice of the legal basis, which was meant to place the Framework Decision outside the scope of the EC Treaty, the Commission brought an action for annulment against the Council.\footnote{The action was brought under Article 35 of the EU Treaty which gives the Court jurisdiction over the decisions made by the Council under the third pillar.}

The Framework Decision constituted, according to its preamble, the instrument by which the European Union intends to respond with concerted action to ‘the disturbing increase in offences posing a threat to the environment’. It incorporated a number of substantive provisions contained in the proposed directive, in particular those defining environmental offences which Member States were required to establish as criminal offences subject to criminal penalties under their domestic law. Penalties thus laid down had to be ‘effective, proportionate and dissuasive’ including, ‘at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition’. Criminal penalties could ‘be accompanied by other penalties or measures’.

The Court found in favour of the Commission.

The Court stated that under the relevant Treaty rules\footnote{Articles 47 and the first paragraph of Article 29 EU Treaty provide that nothing in the Treaty on European Union is to affect the EC Treaty.}, it was its task to ensure that acts which, according to the Council, fall within the scope of the Treaty on European Union do not encroach upon the powers conferred by the EC Treaty on the Community. This meant that it was necessary to ascertain whether the Framework Decision affected the powers of the Community under Article 175 EC in that it could have been adopted on the basis of that article.

The Court repeated its ‘mantra’ that the protection of the environment constitutes one of the essential objectives of the Community and referred in that regard to, \textit{inter alia}, Articles 2 and 6 EC and Articles 174–176 EC.\footnote{The Court then referred to the three indents of the first subparagraph of Article 175(2) EC which, as already established in previous case law, imply the involvement of the Community institutions in areas such as fiscal policy, energy policy or town and country planning policy, in which, apart from Community policy on the environment, either the Community has no legislative powers or unanimity within the Council is required.}

The Court then went on to examine the aim and the content of the measure to determine whether the Framework Decision fell within the environmental policy of the Community. From this examination, the Court concluded that

- as regards its aim, it was clear both from its title and from its first three recitals that the objective of the Framework Decision was the protection of the environment. The Council was concerned ‘at the rise in environmental offences and their effects which are increasingly extending beyond the borders of the States in which the offences are committed’ and, having found that those offences constitute ‘a threat to the environment’ and ‘a problem jointly faced by the Member States’, concluded that ‘a tough response’ and ‘concerted action to protect the environment under criminal law’ were called for.
as to its content, the Court admitted that parts of the Framework Decision entailed partial harmonisation of the criminal laws of the Member States, in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment and that, as a general rule, neither criminal law nor the rules of criminal procedure fell within the Community’s competence.

However, according to the Court, that did not prevent the Community legislature, ‘when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective’ (para 48).

The Court stressed that although the Framework Decision determined that certain conduct which is particularly detrimental to the environment is to be criminal, Member States were left the choice of the criminal penalties to apply, provided the penalties were effective, proportionate and dissuasive.

The Court also referred to the fact that it was ‘apparent from the first three recitals to the Framework Decision that the Council took the view that criminal penalties were essential for combating serious offences against the environment’ (para 50).

The Court concluded that, on account of both its aim and its content, the Framework Decision was to be regarded as having as its main purpose the protection of the environment and, as such, could have been adopted on the basis of Article 175 EC. The Framework Decision was therefore annulled.

The Court’s judgment might be regarded as a landmark decision in that it explicitly recognises for the first time a general competence of the Community to require from Member States the imposition of criminal sanctions to ensure full effectiveness of Community rules at national level and, in doing so, to harmonise, at least to a certain extent, national criminal laws. It might seem a daring judgment if one considers that the adoption and enforcement of criminal laws represent one of the most exclusive and exceptional prerogatives of the State.

But I am not sure that the judgment is as radical as it may seem. In the first place, the Court’s conclusion was in my view already implicit in its previous case law on the principle of effectiveness of Community law in general and, in particular, the earlier case law requiring Member States to provide ‘effective, dissuasive and proportionate’ sanctions under national law for breaches of measures implementing Community law; those sanctions must also be equivalent to those which Member States provide for comparable breaches of purely national law. That obligation of Member States already encroached on their criminal law jurisdiction in that Member States were required, where necessary, to alter their criminal law accordingly.

Even though the judgment may have wider repercussions, it is perhaps not surprising that the Court’s conclusion was reached in the field of environmental protection. There is no need to stress the importance now attached to the protection of the environment because of increasing evidence of environmental deterioration. Such social concern has filtered through to political institutions and has materialised into the need to ensure effective means of enforcement, which in turn means the adoption of sanctions; indeed, measures which are in substance penalties, whatever their precise form, are the only means of enforcement likely to be effective.
In reaching its conclusion, the Court rightly attached importance to the fact that criminal sanctions have come to be seen as necessary means to ensure effective environmental protection. Thus, the Court made a point of stressing that in adopting the Framework Decision, Member States themselves had explicitly accepted the need for criminal penalties to ensure respect for the rules on environmental protection. In the face of such general recognition, it was difficult not to conclude that criminal sanctions have become a necessary, or at least instrumental, aspect of environmental protection policy (what is a policy without enforcement?) and, in consequence, also an aspect of Community environmental policy.

In any event, the judgment confirms the wide-ranging nature of the powers of the Community as regards environmental policy. Those powers cover not only the powers to define and set a high standard of environmental protection, which arise from the EC treaty provisions themselves, but also, on the enforcement side, the power to require criminal sanctions from Member States. But here again, on a careful reading of the judgment, that power is not granted without restrictions.

The Court stressed that whereas the Framework Decision determined which conduct was to be criminal, Member States were still left the choice of the criminal penalties to apply, provided the penalties were effective, proportionate and dissuasive. Thus, the Court appeared to attach some importance to the fact that Community harmonisation was restricted to the definition of the conduct that can be typified as criminal but did not extend to the definition of the actual criminal sanction.

Finally, I comment on the alleged democratic failures arising from the Court’s judgment. As to that, it is sufficient to point out what is overlooked by the criticism: that any measure would have to be adopted, not by ‘bureaucrats’ but by a qualified majority of the Member States, acting through their democratically elected governments, responsible to their national parliaments, and with the agreement of the democratically elected European Parliament.

The reception accorded to this judgment (and, in the past, other judgments) by sections of the English Press suggests a more general reflection. The constant misrepresentation of the EU in some of the English media raises more serious issues than the judgments themselves. Their chronic Europhobia risks distorting the entire public perception of the EU and its institutions to a point where the United Kingdom’s own interests are likely to be seriously harmed, especially where those interests depend vitally upon constructive engagement with the EU.

The environment is a good example. Effective action is often possible only at the EU level, because threats to the environment do not respect national frontiers. And on the global level, threats such as climate change which risk becoming a truly global crisis can be met only with strong action from global players such as the EU.

I have three conclusions. First, that the Court has performed a difficult task, if not always coherently, nevertheless imaginatively, boldly and with broadly satisfactory results. Second, that the Court’s case law is exceptionally and perhaps uniquely effective in terms of enforcement. Third, that because the protection of the environment may require more, rather than less, action on the EU level, it seems that on that front the United Kingdom both faces and presents a serious problem.