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From The Board

Proportionality – Once Again

As some of you might know, the proportionality principle is one of my 'hobbyhorses'. This journal alone has published two of my contributions on the topic.[1] Therefore, it may be suitable to devote my final editorial to the recent judgment of the Court of Justice in the *Deponiezweckverband Eiterköpfe* case, in which the Court decided that national measures exceeding the minimum level of protection as provided in EC environmental legislation do not need to be reviewed in light of the principle of proportionality.[2] *Deponiezweckverband Eiterköpfe* concerned the compatibility with Community law, in particular the Directive on the landfill of waste, of German legislation on waste. The German implementing legislation contained more 'stringent' environmental rules than the Directive. The legal basis of the Directive is Article 175 EC, which means that Article 176 EC also applies. The latter Article allows for 'maintaining or introducing more stringent protective measures' by the Member States. Before the Court of Justice, the question rose whether the principle of proportionality has any influence on the assessment of the more stringent national legislation. The Court discussed the potential role of the principle of proportionality in relation to such stricter measures by the German legislator as follows:

> 61 It is clear from the broad logic of Article 176 EC that, in adopting stricter measures, Member States still exercise powers governed by Community law, given that such measures must in any case be compatible with the Treaty. Nevertheless, it falls to the Member States to define the extent of the protection to be achieved.
> 62 In that context, in so far as it is a matter of ensuring that the minimum requirements laid down by the Directive are enforced, the Community principle of proportionality demands that measures of domestic law should be appropriate and necessary in relation to the objectives pursued.
> 63 In contrast, and inasmuch as other provisions of the Treaty are not involved, that principle is no longer applicable so far as concerns more stringent protective measures of domestic law adopted by virtue of Article 176 EC and going beyond the minimum requirements laid down by the Directive.

1. 'Proportionality Revisited' LIEI 2000/3, p. 239-265 and 'Is it really necessary?' *LIEI* 2000/2, p. 115-117.
2. Case C-6/03 *Deponiezweckverband Eiterköpfe*, ECR 2005, I-2753.

> 64 As a result, the reply to the second question has to be that 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 and going beyond the minimum requirements laid down by a Community directive in the sphere of the environment, inasmuch as other provisions of the Treaty are not involved."

The conclusion is clear: more stringent national legislation adopted on the basis of Article 176 EC does not have to be reviewed in the light of the Community principle of proportionality.[3] This conclusion is relevant not only for the interpretation of Article 176 EC, but also seems to be significant for all other cases of minimum harmonisation. In my view, this judgment is remarkable.

First of all, it must be noted – as appears from paragraph 61 of *Deponiezweckverband* – that when the Member States take more stringent environmental measures, they are exercising a competence which 'is governed' by Community law. The term 'governed' in paragraph 61 raises the question of how this relates to another, but similar, expression in European law. The Court of Justice stated in the *ERT* case that national legislation must be reviewed in the light of the general principles of Community law as far as this national law falls 'within the scope of Community law'.[4] If the adoption of more stringent measures is 'governed' by Community law in the sense of *Deponiezweckverband,* should it then also be assumed that such measures must be considered to fall 'within the scope of Community law' as intended in the *ERT* case?[5] If this question is answered positively – and at first glance, I cannot see why it would be answered negatively – then it is remarkable that in *Deponiezweckverband* the national legislation does *not* have to be reviewed in the light of the principle of proportionality. The principle of proportionality, with its Treaty basis in the third paragraph of Article 5 EC Treaty, seems to me without doubt also to be considered as a general principle of Community law. In light of the Court's considerations in *ERT,* it is surprising that the more stringent German environmental measures in *Deponiezweckverband* do not have to be reviewed in the light of the principle of proportionality.

One of the main arguments leading to the Court's conclusion that the stricter German standards do not have to be reviewed in the light of the principle of proportionality is to be found also in paragraph 61 of *Deponiezweckverband*. Here the Court mentioned that the extent of the protection to be achieved when adopting more stringent measures on the basis of Article 176 EC is left to the Member States. In itself, this is correct. However, I wonder

3. *See* also Case C-2/97 *Società italiana petroli* ECR1998, I-8597.
4. Case C-260/89 *ERT* ECR 1991, I-2925.
5. Case C-260/89 *ERT* ECR 1991, I-2925, in particular paras 42-44.

whether the Court's finding provides a sufficient basis for the final conclusion of the Court, namely, that stricter measures pursuant to Article 176 EC do not have to be reviewed in the light of the principle of proportionality.

From the case law on the compatibility of national measures with the internal market freedoms, the following can be concluded. In the first place, the national measure must be suitable; it must be 'capable' of actually protecting the interest that needs to be protected. In the second place, the principle of proportionality implies that the measure is *indispensable* and therefore necessary, which means that there is no available alternative, which is equally effective for realising the objective to be achieved, but which is less restrictive for the intra-Community trade. This is, in short, the criterion of the 'least restrictive alternative'. The third element of the principle of proportionality generally is identified in the literature as the principle of proportionality '*sensu stricto*'.[6] This implies that a measure is disproportionate if the restriction of intra-Community trade that it has brought about is not in proportion with the objective pursued or with the result it has caused. To summarize, the principle of proportionality concerns the suitability, the necessity, and the proportionality of the measure. The fact that in *Deponiezweckverband* (paragraph 62) the Court of Justice only referred to the first two aspects is not surprising, since the third aspect – which involves an actual balancing of interests – is only used by the Court very exceptionally when assessing national measures on their proportionality.[7] In paragraph 61 of *Deponiezweckverband,* the Court of Justice stated in so many words that it appeared from Article 176 EC that the degree of environmental protection is left up to the Member States to decide. That may be so, but at most, it can only offer an explanation for not reviewing the third aspect of the principle of proportionality. In reviewing the suitability and the necessity of the measure, the Court of Justice, or any other court, does not have to discuss the question of the desired degree of protection at all.[8]

The lessons learned from this case law also can be applied to more stringent environmental measures based on Article 176 EC and other cases of minimum harmonisation. In reviewing the proportionality of stricter national standards, there is no need to call in to question the level of protection as desired by the Member State. Nevertheless, it is not convincing why, by taking the level of protection desired by the Member State as a starting point, there cannot be a review as to whether the more stringent standards are in fact suitable for achieving this, and whether this protection could have been achieved by means

6. Cf. for example Walter Van Gerven, 'The Effect of Proportionality on the Actions of Member States of the European Community: National Viewpoints from Continental Europe', in *The principle of proportionality in the laws of Europe*, Evelyn Ellis (Ed.). Oxford 1999, p. 38.
7. The best known example is Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council* v. *B & Q Plc* ECR1992, I-6635.
8. The judgment of the Court of Justice which most clearly illustrates this statement is that in *Läärä*; Case C-124/97 *Läärä and others* ECR1999, I-6067.

of less restrictive measures. It is not evident why restrained judicial review in light of the first (suitability) and even the second aspect (necessity) of the principle of proportionality is not possible. Such a review could prevent Member States from abusing their power to adopt and implement stricter national standards. By categorically ruling out any form of review, the Court ignored the different gradations of the principle of proportionality.

Proportionality is needed, but by whom, when and how, remains a complex matter.

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