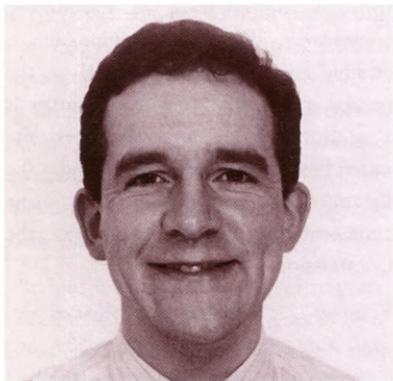


European Law

Regional development aid: challenging the Commission to protect the environment

by Brian Jack



Brian Jack

Much has been written about the role of the European Commission, for example under art. 169 of the EC Treaty, as the Community policeman working to protect the environment. Less consideration, however, has been given to the fact that, within the Community legal system, the Commission is also called upon to make administrative decisions which may have environmental consequences. This authority has been conferred upon the Commission by the EC Treaty itself (for example art. 93 concerning state aid) and by secondary legislation. Through such secondary legislation, the Commission has been authorised to make decisions relating to the allocation and supervision of regional development aid. The purpose of this article is to consider whether any course of action exists where such decisions prove to have an adverse environmental effect.

REGIONAL AID

Currently regional development aid accounts for approximately one third of all Community expenditure (*Eurostat Yearbook 1997*, at p. 423). This aid is available to member states through a number of funds, principally the guidance section of the European Agricultural Guidance and Guarantee Fund ('EAGGF'), the European Regional Development Fund ('ERDF') and the European Social Fund ('ESF'). The operation of these funds is currently

governed by Regulations 2052/88, OJ 1988 L185/9 (as amended by Regulation 2081/93, OJ 1993 L193/5) and 4253/88, OJ 1988 L374/1 (as amended by Regulation 2082/93, OJ 1993 L193/20). Regulation 24253/88, art.1 sets the following objectives for the co-ordinated operation of these funds:

- (1) promoting the development and structural adjustment of regions whose development is lagging behind;
- (2) converting regions ... seriously affected by industrial decline;
- (3) combating long-term unemployment and facilitating the integration into working life of young people and persons exposed to exclusion from the labour market;
- (4) facilitating the adaptation of workers of either sex to industrial changes and to changes in production systems;
- (5) promoting rural development by:
 - (a) speeding up the adjustment of agricultural structures in the framework of the reform of the common agricultural policy; and
 - (b) facilitating the development and structural adjustment of rural areas.

However, Regulation 2052/88, art. 7 specifically requires all measures financed by regional aid to conform with the Community treaties and with Community policies such as environmental protection. In this regard, art. 130(R)(2) of the EC Treaty provides that environmental protection requirements must be integrated into the definition and implementation of other Community policies. Whilst the European Court of Justice (ECJ) has declared environmental protection to be one of the Community's essential objectives (*Procureur de la République v Association de Défense des Brûleurs d'Huiles*

Usagées ('Waste Oils') (Case 240/83) [1985] ECR 531, at p. 548). Additionally, Regulation 4253/88, art. 24 authorises the Commission to withhold or recover payments where an investigation reveals evidence of a failure by member states to honour such commitments.

CHALLENGING REGIONAL AID PAYMENTS

Both the Court of First Instance (CFI) and the ECJ have now considered two cases in which individuals and environmental associations sought to challenge Commission decisions on regional aid, which they believed had taken insufficient account of Community environmental law. These were the cases:

- *An Taisce – The National Trust for Ireland and World Wide Fund for Nature UK (WWF(UK)) v EC Commission* (Case C-325/94P) order, [1996] ECR I-3727 (before the CFI: Case T-461/93; [1994] ECR II-733); and
- *Stichting Greenpeace Council (Greenpeace International) & Ors v EC Commission* (before the CFI: Case T-585/93) [1995] ECR II-2205; before the ECJ: Case C-321/95P [1998] 3 CMLR 1).

In both cases the applicants sought to mount their challenge through art. 173 of the EC Treaty.

Article 173 provides the ECJ with the power to review acts of Community institutions which have legal effect. Under art. 173(2), member states, the Council of Ministers and the Commission have unlimited standing to challenge such acts, whilst the European Parliament and the European Central Bank may do so in order to protect their prerogative powers. However, under art. 173(4) natural or legal persons only enjoy limited standing. Such persons may only challenge a decision which is addressed to them – either a regulation which is in the form of a decision or a decision which is addressed to someone else but is of direct and individual

concern to the applicant. The *An Taisce* and *Greenpeace* cases have revealed two principal problems in the application of this provision. These relate to whether a decision actually exists which is capable of review and also whether such a decision is of direct and individual concern to the applicant.

EXISTENCE OF A REVIEWABLE DECISION

In many cases, rather than seeking regional aid for specific projects, member states seek to put into place multi-annual programmes. This approach is authorised by Regulation 2052/88, art. 5. Such programmes may set out the strategy which the member state will follow and that member state's objectives over future years. However, they are not required to give details of the individual projects which the member state may intend to undertake within that period. This creates the problem that a member state may subsequently announce an intention to conduct a specific project which in some way violates Community environmental law.

This is essentially what occurred in the *An Taisce* case. In this case the Irish government submitted regional development plans to the Commission in March and May 1989. These plans included a multi-annual operational programme for tourism, which was approved by the Commission in December 1989. The programme, however, did not outline the specific projects which were to be conducted. Subsequently, on 22 April 1991, the Irish government announced a plan to construct an interpretative centre for visitors, at Mullaghmore, County Clare. This was within an area known as the Burren, whose limestone grasslands and pavements are an important wildlife habitat. WWF(UK) lodged a complaint, with the Commission, against the project. *An Taisce* subsequently joined in this complaint. The Commission initially wrote to the Irish Permanent Representative in Brussels, informing him that the Commission intended to institute proceedings against the Republic of Ireland, under art. 169 of the EC Treaty. Subsequently, in October 1992, they issued a press release reversing that decision. In the press release, the Commission indicated its conclusion that the proposed work

complied with Community environmental law.

The ECJ has confirmed that it is generally not possible to use art. 173 to review a Commission decision not to commence art. 169 proceedings (see, e.g. *Bundesverband der Bilanzbuchhalter eV v EC Commission* (Case C-107/95P) [1997] ECR I-947). Additionally, there is likely to be little point in seeking to utilise art. 173 to challenge the Commission's decision authorising the initial operational programme. For example, in the *An Taisce* case, the Commission decision in December 1991 approving the Irish government's operational programme for tourism was fully in accordance with Community law. Regulation 2052/88 authorised the Commission to approve such multi-annual programmes. Secondly art. 173 requires that proceedings should be initiated within two months of the publication of the contested act. Often, that period will have expired before member states announce details of the projects through which they intend to implement their operational programmes. For example, in the *An Taisce* case, a period of fifteen months spanned the Commission decision and the announcement of the contested project by the Irish government.

In the *An Taisce* case, the applicants WWF(UK) and *An Taisce* adopted a different approach. They alleged that the fact that the Commission had taken a decision not to institute art. 169 proceedings implied that the Commission had also taken a decision not to suspend or recover payments to the Irish government, as they would have been entitled to have done under Regulation 4253/88, art. 24. They then sought to challenge this alleged decision. Both the CFI and the ECJ rejected the applicant's contention. Both courts found that the adoption of a decision under art. 169 was distinct from the adoption of a decision under the regulation. The mere fact that the Commission had decided not to institute art. 169 proceedings did not imply that a separate decision had been taken under the regulation. Therefore both courts rejected the application.

Also in the *An Taisce* case, the Commission argued that once the Commission had approved a general operational programme, the member

states had competence to build projects of their choice. They therefore argued that only decisions of the member states should then be of concern, not those of the Commission. However, this appears to overlook the fact that the implementation of programmes assisted by regional aid is subject to a monitoring system. Regulation 4253/88, art. 25 provides for this system to operate through the creation of monitoring committees. Whilst the Commission is entitled to delegate representatives, the precise composition of each committee is a matter of agreement between the individual member state and the Commission. However, one commentator notes that, in practice, the Commission:

'asserts ... "a non negotiable right of veto", with a view of ensuring, inter alia, the conformity of operations financed by [the EC] with Community environmental law and policy.' (J Scott, *EC Environmental Law* (1998), Longman (London), at p.137)

This shows continued Commission involvement in the application of Community structural funds. However, it is unclear whether the operation of these monitoring committees would be open to review. As Scott points out, it cannot be assumed that a positive decision by a monitoring committee, inferring that the Commission representative did not exercise the veto, will be interpreted as evidence of a Commission decision to approve the project.



'DIRECT AND INDIVIDUAL CONCERN'

Even where there is proven to be a reviewable Commission decision, applicants must additionally show that that decision is of direct and individual concern to them. This was an issue considered by both the CFI and ECJ in the *Greenpeace* case. In that case, Greenpeace International, two Canary Island based environmental associations (*Tagoror Ecologista Alternativo* and *Comisión Canaria contra la Contaminación*) and sixteen Canary Islands' residents sought to challenge an

alleged Commission decision addressed to Spain. This alleged decision concerned continued funding under the ERDF for the construction of two power stations. The applicants alleged that the Commission had taken a decision to continue this project even though it had received a number of complaints from local residents. These complaints alleged that Spain had commenced construction of the power stations without conducting a full assessment of their environmental impact, as required by Directive 85/337 on the assessment the effects of certain public and private projects on the environment (OJ 1985 L175/40). This directive also gave individuals the right to participate in the assessment.

In previous litigation concerning art. 173, the ECJ has found decisions to be of direct concern to applicants where they confer no discretion upon the person to whom they are addressed. If that addressee has a discretion as to whether to implement the decision, then applicants affected by that decision will not be held to be directly concerned (*SA Alcan Aluminium Raeren v EC Commission* (Case 69/69) [1970] ECR 385). Alternatively, a decision which does confer such a discretion upon the addressee may also be found to be of direct concern to the applicant where the possibility of the addressee not implementing it is only theoretical (*Piraiiki-Patraiki Cotton Industry v EC Commission* (Case 11/82) [1985] ECR 207). This will depend upon the circumstances of the particular case.

Perhaps more importantly, the ECJ has held, with regard to the requirement of individual concern, that:

'persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.' (*Plaumann v EEC Commission* (Case 25/62) [1963] ECR 95)).

In applying this provision, the ECJ has held that applicants must belong to a closed and individually identifiable class of persons who, like the addressee, are more substantially affected by the decision than others (*Toepfer v EEC*

Commission (Joined Cases 106 and 107/63) [1965] ECR).

The court adopted a similar approach in respect of applications brought under art. 173 by associations formed to represent the interests of individual members. Such associations will not be afforded standing to challenge measures which affect the general interests of their members (*Fédération Nationale de la Boucherie en Gros et du Commerce en Gros des Viandes v EEC Council* (Joined Cases 19–22/62) [1962] ECR 491). However, an individual who does not comply with these criteria may still be awarded standing where that individual was actively involved in the procedures which culminated in the Community institution concerned adopting the disputed decision (*Timex Corp v EC Council and Commission* (Case 264/82) [1985] ECR 849). Similarly, associations which would otherwise be unable to assert that a decision is of direct and individual concern to them may also acquire standing on this basis (*Kwekerij Gebroeders van der Kooy BV v EC Commission* (Joined Cases 67, 68 and 70/85) [1988] ECR 219; [1989] 2 CEC 593).

In the *Greenpeace* case, the applicants sought to convince the court that these previous decisions had evolved in the context of specific identifiable legal interests. In contrast, environmental damage often does not infringe any particular individual legal interest. All Community citizens share a general interest in the protection of the environment. As such, therefore, under existing law no closed class could exist for the purpose of obtaining standing.

In the ECJ, Advocate General Comas was sympathetic to this argument. He found that the member states and Community institutions had a responsibility to protect a 'Community public interest' in the protection of the environment. He also asserted that the Commission's obligation to integrate environmental protection requirements into other policies, under art. 130(R)(2) of the EC Treaty, was capable of direct effect. Therefore individuals affected by a Commission decision had a legal interest in ensuring that that decision complied with this obligation. In defining those 'affected' the Advocate General rejected calls for environmental associations to be granted general standing to protect the environment in situations where their

members, individually, would not have standing. He felt that such a right could be abused. However, he did consider that it might be possible to identify a closed class of persons, who could have standing, within an otherwise open class who could not. Amongst individual applicants, such a closed class could consist of persons who lived in close proximity to the source of the alleged environmental damage. However, as no evidence was given on this point, he was unable to pursue this argument.

However, in defining standing, the ECJ, as had previously the CFI, refused to redefine its existing case law. The individual applicants were not affected by the project in any different way to other Canary Islands' residents. Therefore no closed class existed which might have standing under art. 173(4). The ECJ made no reference to the Advocate General's views on proximity. Additionally, they held that the fact that three applicants had lodged complaints with the Commission and that Greenpeace had corresponded with and met Commission officials did not constitute active involvement in the process which culminated in the adoption of the contested decision. Therefore again standing was denied. Even more fundamentally, the ECJ also failed to adopt the Advocate General's interpretation of the applicant's legal interests. Rather than finding any Community interest in the protection of the environment, the court held that the applicant's legal interests were limited to any particular interests which they might be granted under Community secondary legislation. In the context of the *Greenpeace* case, these were merely a right to participate in the preparation of an environmental impact assessment, under Directive 85/337. The court then declared that these rights were fully protected by the right to bring proceedings against national authorities in national courts. The court declared that, in this context, the national court could then challenge the legality of an alleged Commission through a preliminary reference.

CONCLUSION

The applicants in the *An Taisce* case observed that most projects financed by Community structural funds would not have been conducted by the member

states without that aid. In this position, therefore, the Commission must be expected to ensure that such projects are not likely to have effects which are contrary to Community environmental law. However, the *An Taisce* and *Greenpeace* cases show that in reality it is often very difficult to challenge the Commission's management of regional aid. It may often be unclear whether in fact a Commission decision, or indeed any legal act, exists which is challengeable under art. 173. Even where such a decision can be identified, it would appear virtually impossible for individuals or environmental associations to obtain standing to challenge that decision.

It might be objected that, in this situation, the member states or other Community institutions will have standing to supervise the Commission. However, in reality, political considerations are very likely to dissuade these parties from adopting such a stance. Conversely, individuals living in areas affected by these projects and environmental associations have much greater incentive to pursue such actions. Contrary to the opinion of the ECJ, such litigants will not receive adequate remedies in national courts. For example, in the *Greenpeace* case, where the national proceedings concerned rights of participation in the conduct of

environmental impact assessments, the national court has little reason to seek a preliminary reference on a very separate issue: the validity of Community funding for the project.

Overall, in practical terms it would appear that those most affected by the Commission's management of regional aid have most difficulty in holding the Commission to account. Ⓜ

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Insolvency

Insolvency proceedings: when are the directors not the company?

by P Goldenberg, S Maffey and N Buchanan



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A company is in dire financial trouble. Its directors meet. They take advice, as they must, from a licensed insolvency practitioner. They decide, by formal resolution, to petition for administration or liquidation. Is the petition that of the company or of the directors? The purpose of this article is to review the law, analyse the confusion and suggest a solution.

BACKGROUND

In *Re Emmadart Limited* ([1979] 1 ALL ER 599), a receiver, in the name of the company and as its agent, presented a petition for the compulsory winding-up of the company with the object of gaining a rating exemption. It was held by Ratingman J that the receiver had no

power to present the petition as the company's agent because, unless the articles conferred on the board of directors power to present the winding-up petition, the board had no power to present a petition without a resolution of the company in general meeting.

INSOLVENCY ACT 1986

It was partially to avoid the problems of *Emmadart* that s. 9(1) of the *Insolvency Act 1986* in relation to applications to the court for administration orders, and s. 124(1) of that Act in relation to applications to the court for winding up, both provide, so far as material, that such an application 'shall be by petition presented either by the company or the directors'.

However, both the intention of this wording, and its consequences, are unclear. There are two possibilities. First, that in order to avoid the *Emmadart* problem, and without any specific delegation in a company's articles of association, the directors stand in place of the shareholders and have a specific power, acting corporately, to present a petition. Secondly, that the directors have an entirely separate power of petition, even where (hypothetically) the shareholders might disagree, because of the potential personal exposure of the

directors in the event of wrongful trading.

RECENT CASES

Two cases following the introduction of the *Insolvency Act* have contemplated this conundrum. In *Re Instrumentation Electrical Services Limited* ([1988] 4 BCC 301), it was held by Mervyn Davis J that s. 124(1) permitted a petition to be presented only by *all* the directors, because:

- (a) first, 'the directors' in that subsection could not be read as meaning 'some of the directors' or 'a majority of the directors';
- (b) secondly, the sub-section permitted a petition to be presented by 'any creditor or creditors ... contributory or contributories' (those phrases were to be contrasted with 'the directors'); and
- (c) thirdly, the words at the end of the sub-section 'by all or any of those parties, together or separately' could not refer back to 'the directors' so as to allow 'the directors' to be read as 'some directors'.

In the subsequent case of *Re Equitcorp International plc* ([1989] BCLC 597), Millett J held that, once a resolution of