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The Court of Justice of the European Union and the High Level of Environmental Protection: Transforming a Policy Objective into a Concept Amenable to Judicial Review

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A Introduction

Among the new conceptual developments that broaden the range of possible avenues for advancing the effectiveness of environmental law, the objective of a 'high level of environmental protection', as far as it governs the environmental competence of the European Union (EU), is certainly worth consideration. The notion is deeply enshrined into the EU Treaties but, for a long time, remained in a sort of shadow zone. It is only quite recently that it stepped up into the limelight of the European case-law scene, by virtue of various – not always coherent – developments in which the Court of Justice of the European Union (CJEU) plays a paramount role.

It is already well known that the CJEU[1] has the capacity, through adjudication, to consolidate the legitimacy and the legality of European legislation and regulatory measures that opt for a strong message, as far as environmental protection is concerned. This is how, back in 1985, environmental protection was acknowledged as being one of the European Community's essential objectives – one that could impact the principle of freedom of trade – and that even before any official insertion of that dimension into the Treaty of Rome.[2] The Court's decision was a decisive trigger factor in

[1] The Court of Justice of the European Union, which has its seat in Luxembourg, consists of two courts: the Court of Justice (ECJ) and the General Court. The Court constitutes the judicial authority of the European Union and, in cooperation with the courts and tribunals of the Member States, it ensures the uniform application and interpretation of European Union law. All cases are available online at: http://curia.europa.eu

[2] Treaty of Rome of 25 March 1957 establishing the European Economic Community.

formalizing the incorporation of an environmental dimension into the European integration process.[3]

In terms of judicial control, as far as environmental measures are concerned, the Court is now fundamentally supported by various primary law requirements, for which a certain capacity has now been firmly proven: that of acting as a shield in order to strengthen the legality of EU acts or to reinforce their interpretation towards a stricter protection of the environment. Among these requirements, the precautionary principle, the 'polluter pays' principle and the '*effet utile*' doctrine have already notoriously been pinpointed.[4]

But the effect of the 'high-level of protection' objective, which, as the reader may know, the European Treaties[5] ascribe to the way in which the environment should be protected under EU law, still remains quite confidentially discussed in scholarship, while the ECJ already welcomes the requirement both as a possible ground for judicial review and as a convenient rhetorical boost to its interpretations.[6]

In a recent Opinion, dated 8 September 2016, Advocate General Kokott stipulates that various provisions mentioning that objective 'are not to be interpreted or examined independently of each other', as 'they give expression to the common principle of a high level of environmental protection, to which particular importance must be attached given the number of provisions of EU law in which it is enshrined'.[7]

The policy space that is being occupied by the requirement is indeed quite vast. It is firmly embedded in various Treaty provisions – the

[3] Case 240/83 *Procureur de la Republique* v. *ADBHU* [1985] ECR 531.

[4] See, for instance: R. Macrory (ed.), *Principles of European Environmental Law, Europa law Publishing*, Avosetta series (2004), p. 256; N. de Sadeleer, *Environmental Principles: From Slogans to Political Rules* (Oxford: OUP, 2003), p. 482.

[5] Treaty on European Union (TEU), Treaty on the Functioning of the European Union (TFEU) and Charter of Fundamental Rights.

[6] On the high level of protection requirement in EU law, see D. Misonne, *Droit européen de l'environnement et de la santé. L'ambition d'un niveau élevé de protection* (Limal: Anthemis, 2011), p. 450; A. Aragao, 'Le fondement européen de la prohibition de la régression : le niveau élevé de protection de l'environnement' in M. Prieur and G. Sozzo (ed.), *La non régression en droit de l'environnement* (Bruylant, 2012), pp. 347–364; N. de Sadeleer, 'The Principle of a High Level of Environmental Protection in EU Law: Policy Principle or General Principle of Law?' in *Mijörättsliga Perspektiv Och Tankevändor* (Iustus Förlag, 2013), pp. 447–65; D. Misonne, 'The Importance of Setting a Target – The EU Ambition of a High Level of Protection' in *Transnational Environmental Law*, vol. 4/1 (Cambridge, April 2015), pp. 11–36; A. Sikora, 'The Principle of a High Level of Protection as a Source of Enforceable Rights', *Cahiers de droit européen* (2016), 1, 399–418

[7] Opinion of A.G. Kokott, Case 444/15, *Associazione Italia Nostra Onlus* v. *Comune di Venezi* ECLI:EU:C:2016:665, 24–25.

highest level in the hierarchy of norms under EU law – such as Article 3 of the TEU ('The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment'), Article 114 ('The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective'), Article 168 ('A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities') and Article 191 ('Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay') of the TFEU and Article 37 ('A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development') of the Charter of Fundamental Rights.

The purpose of the present chapter is to highlight and explain the decisive role that the CJEU is performing in granting more weight to a notion that has long been inactive.

It also recalls and briefly explains the legitimacy of such an ambition, when one understands that a high level of ambition can lead to restrictions on other rights and interests.

Our intention is to pay attention to the attitude of the Court, when faced with issues testing the legality of environmental measures that could have a strong economic impact on private interests – for example, banning a substance. The assessment of the degree of balance between environmental protection and corporate interests can turn out to be quite different, depending on the courts and tribunals involved, even if they control the same type of regulation. Much depends on the dimensions that the said institutions are in charge of verifying – the impact on an investment, for instance. This is also reflected in the type of claims that are allowed to be brought before the ECJ.

The context and field of this chapter is the EU. The Union has been conferred the 'shared' competence[8] to adopt environmental legislation that shall be applicable to the territory of the 28 (soon to be 27) Member States. By virtue of the principle of primacy, the Member States must abide by such legislation and do not benefit from a generic possibility of opting out. Under some circumstances – for instance, when the main purpose of the proposed measure is environmental protection – Member States always have the power to strengthen the harmonized scheme.[9] But this is not the case when the main objective of the measure is to ease the integration of the internal market; such integration has the opposite effect, imposing that differentiation is made much more difficult. In all circumstances, so-called 'secondary legislation', which can be either a Regulation (directly applicable) or a Directive (imposing an implementation process within each Member State), must comply with 'primary law' – which refers to the European Treaties that govern the functioning of EU institutions and the adoption of their acts.

In that kind of scenario, one of the main roles of the CJEU is to review the legality of EU legislative acts and of the legality of delegated acts, when adopted by the European Commission on the basis of a mandate provided for by the legislator. If the action is founded, the Court is to declare the act concerned to be void.[10] The Court also has jurisdiction to give a preliminary ruling concerning the interpretation of the Treaties and the validity and interpretation of the acts of the institutions that make up the Union,[11] including when Member States question the meaning or scope of such acts in their implementation processes.

B Fit for Judicial Review?

A close observation of recent European case law demonstrates that the CJEU welcomes the 'high level of protection' ('HLP') requirement as a possible ground for judicial review and as a convenient boost to its interpretations. This stands in contrast to the long-lasting total

[8] 'When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence': Art. 2. 2. TFEU.

[9] Art. 193 TFEU.

[10] Art. 264 TFEU.

[11] Art. 267 TFEU.

indifference – or at most scepticism – of scholarship towards that dimension, which was thought of as being far too simplistic or intrusive on the decision-maker's margin of discretion, especially when one knows how difficult a negotiation process can be.[12]

Still, case law has now evolved sufficiently to consider that the concept has grown some teeth, in relation to the judicial control of the EU's environmentally related acts, and that it could even grow more.

For the sake of clarity, I divide my observations into two categories. The first category of cases, to which I refer via the image of a shield, reveals the potential as well as the limits of the high level of protection requirement as a means of insulating European acts from legal challenge. In contrast, the image of a 'sword' then characterizes a second category of cases in which the HLP requirement is used as a direct ground to petition the annulment of a legal measure, or to contest the legitimacy of the measure. Importantly, the Court considers that the argument is admissible for judicial review, but it rarely finds it to have sufficient merit. Still, these cases are important as they clarify what constitutes a high level of protection.

1 *The Shield*

I observe that the HLP requirement will more easily be deployed to affirm EU authority than to dismantle it, as far as legislative acts are concerned. This is mostly due to what I call 'a special alchemy'.

a) The Special Alchemy

It is when three specific ingredients meet and melt that the full potential of the HLP requirement can crystallize before the Court, when applied to the judicial control of EU legislative acts and in relation to a very specific question: 'Does this legislation goes too far in favour of environmental protection?'

This alchemy occurs via a combination of three dimensions, all linked to the specificity of the concept of an HLP in its condition of 'target' – understood as the target of either a legislative measure or of the whole EU

[12] P. Pescatore, 'Some Critical Remarks on the Single European Act', *Common Market Law Review*, 9 (1986), 18; H. J. Glaesner, 'L'Acte Unique Européen', *Revue du Marché Commun*, (1986), 238, 312. L. Krämer, *EC Environmental Law*, 5th edn. (Thomson-Sweet & Maxwell, 2003), p. 12: '(The) institutions use the formula of a high level in its reversed order: whatever is proposed or adopted is considered to be a high level of environmental protection.'

policy at large: a) the marginal control, b) the pivotal element of the proportionality test and c) the teleological approach.

i) The Marginal Control In environmental- or health-related issues, and similarly in agricultural matters, the ECJ often considers that the EU legislature must be allowed a broad discretion in an area that entails complex political, economic and social choices on its part.[13] The Court shall, as a consequence, adopt a self-restraining attitude and limits its review to the question whether a manifest error of appraisal has been committed.[14] In that configuration, challenging the legality of an EU legislative act that entails an ambitious protection of the environment means controlling whether a manifest error of appraisal has been committed, and this often takes place through the use of a proportionality test.

ii) The Target is the Pivotal Element of the Proportionality Test When applying the proportionality principle, which is one of the general principles of Community law, the Court tends to consider that the legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate with regard to the objective that the competent institutions are seeking to pursue;[15] when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.[16]

It is worth highlighting that the pivotal element of that specific configuration of the proportionality test is very explicitly 'the aims pursued', 'the objective', the target of the measure at stake. The objectives or aims pursued are truly deciding factors in the review of proportionality; they are the steady elements, like beacons in a sea of various possibilities, against which the acceptability of restrictive measures shall be tested.

In that regard, being associated with that aim is being on the right side, especially when judicial review is limited to the search of measures that

[13] Case C-425/08 *Enviro Tech (Europe)* [2009] ECR, para. 47.

[14] Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301; Case C-341/95 *Bettati* [1998] ECR I-4355. Case C-444/15, *Associazione Italia Nostra Onlus,* [2016],para 46; Case C-549/15 *E.ON Biofor* [2017], para. 50.

[15] Case C-549/15 *E.ON Biofor* [2017],para. 50; Case C-444/15, *Associazione Italia Nostra Onlus,* [2016],para. 46.

[16] Case C-343/09 *Afton Chemical* [2010] ECR I-7027, para. 45; Case C-189/01 *Jippes and Others* [2001] ECR I-5689, para. 81; Case C-558/07 *S.P.C.M. and Others* [2009] ECR, para. 41; and Joined Cases C-379/08 and C-380/08 *ERG and Others* [2010] ECR, para. 86.

are manifestly inappropriate with regard to the objective pursued. F. Jacobs considers it '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'.[17]

iii) **The Teleological Approach** As expressed by Advocate General Bot in 2003,[18] both the Lisbon Treaty and the Charter of Fundamental Rights[19] raise the general interest of a high level of environmental protection to the status of an EU target. The target of a piece of legislation or of a policy is a decisive factor in a European jurisprudence that is very keen on teleological interpretations, a purpose-driven interpretation. The target – of a specific provision but also of the whole EU order – very often guides the reasoning of the judge in order to avoid diluting interpretations that would weaken the strength of EU law, or in appreciating limits to delegations stemming from a basic act, by helping to highlight the essential elements which are the realm of the legislature.[20] In that regard, mentioning an ambitious target to environmental protection in all important parts of primary law is not devoid of consequences.

In that threefold configuration, dismantling the legality of an EU act – due to its being too unbalanced or too far reaching regarding its impact on economic interests – becomes a less straightforward avenue. Still, it will remain necessary to ascertain whether, in exercising its discretion, the EU legislature attempted to achieve a degree of balance between, on the one hand, environmental protection, and, on the other hand, the economic interests of traders, and this 'while pursuing the objective assigned to it by the Treaty to ensure a high level of health and environmental protection'.[21]

b) An Interpretation Guide

There is quite an extensive body of case law demonstrating that the HLP functions as an interpretative tool that can consolidate the ambition of EU acts, without always necessarily endorsing a true attempt to reach a higher level of protection. It is, of course, already well known that

[17] F. Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment', *Journal of Environmental Law*, 18-2 (2006), 195–205, 195.
[18] Opinion in Case C-195/12 *Bois de Vielsam* [2013], para. 82.
[19] Article 191 TFEU and even Art. 37 of the Charter
[20] Case C-303/94 *Parliament* v. *Council* [1996] ECR I-2943, paras. 25–31.
[21] Case C-343/09, *Afton* [2010] ECR I-07027, para. 56.

a Directive or a Regulation must be interpreted in the light of its objective and in such a way as to ensure that it is fully effective (the '*effet utile*' doctrine). Still, the HLP dimension further helps to fend off attempts to dilute the stringency of some EU requirements, as it insists on the need to pursue a certain degree of ambition in the area of environmental protection. Altogether, where precaution and the HLP requirement both deal with ambition (what level of protection to pursue), precaution under EU law always implies situations in which risks and uncertainty are combined,[22] where this is not intrinsic to the HLP requirement. The peculiarity of the HLP concept lies rather in its bold questioning of the ambition as such, with no necessary link to issues of scientific uncertainty.

The HLP requirement proves to be useful as a shield in enhancing the legitimacy of EU acts and defending them against a wide array of claims. It has contributed to the inclusion of quails, partridges, pigeons[23] and gilts[24] within the scope of the Directive on Integrated Pollution Prevention and Control (IPPC). It consolidated the right to bring an action to prevent pollution, including the availability of an injunction against a permit as a remedy, where necessary.[25] It helped to ward off attempts made by Member States to narrow the scope of the Strategic Environmental Assessment Directive[26] and of the Waste Framework Directive.[27] It helped to firm up the threshold of compliance: if a legislative act pursues an HLP, a Member State (and its industrial installations) must comply with it fully.[28]

[22] 'Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective': Case C-333/08 *Commission* v. *France* [2010] ECR, paras. 92–93.
[23] Case C-473/07 *Association nationale pour la protection des eaux et rivières and OABA* [2009] ECR I-319, paras. 25–27.
[24] Case C-585/10 *Møller* [2011] ECR, paras. 29 and 33.
[25] Case C-416/10 *Križan and Others* [2013] ECR, paras. 108–109.
[26] Case C-567/10 *Inter-Environnement Bruxelles et al.* v. *Région de Bruxelles-Capitale* [2012] ECR I-159, para. 30: an interpretation of the scope of the Directive, which would exclude plans and programmes whose adoption is regulated by national legislative or regulatory provisions, 'by appreciably restricting the directive's scope, would compromise, in part, the practical effect of the directive, having regard to its objective, *which consists in providing for a high level of protection of the environment*'. This was recently confirmed in Case C-290/15 *Patrice D'Oultremont*, [2016], para. 40.
[27] Case C-270/03 *Commission* v. *Italy* [2005] ECR I-5233, paras. 19–22.
[28] Case C-158/12, *Commission* v. *Ireland* [2013], not yet reported (electronic only), para. 22.

In the cases just mentioned, the ECJ's references to the HLP emanate directly from the wording of the secondary legislation under scrutiny. However, if the HLP requirement is not expressly mentioned in the Directive or Regulation at issue, the Court will introduce it by directly invoking the Treaty and affirming the HLP in relation to the legal basis or even to the fundamental objectives of the Treaty. In such cases, it is the aim governing the policy itself, as laid down in the TFEU, that helps to avoid restrictive interpretations.

The process is decisive in a consistent series of cases[29] that deal with the concept of waste and, particularly, what it means to 'discard' an item. That is so even if the reference is enshrined in a package of provisions that also often includes the precautionary principle. The HLP is also a key element when assessing room for manoeuvre for the Member States regarding the power to restrict movements of waste and keep them on their territory, should they consider that recovery in the state of destination could harm human health and the environment.[30] It plays an important role in the Court's refusal to accept weak interpretations of the Waste Water Directive[31] and in its confirmation that treatment is an obligation for all urban waste water, and not only for water that is directly discharged into a sensitive area.[32]

But the trend is not fully consistent, and may still evolve in a range of different directions. In some cases, the HLP wording could have reinforced or even changed interpretations in favour of a stricter environmental protection framework, but it was not even mentioned.[33] In other cases, the requirement plays the role of a convenient tiebreaker that helps to close difficult debates without any attempt to enhance environmental goals, using peremptory statements such as 'this means that the measure is not capable of compromising the objective of a high level of protection'.[34]

[29] Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, para. 39; Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, para. 23; Case C-1/03 *Van de Walle and Others* [2004] ECR I-7613, para. 45.

[30] Case C-277/02 *EU-Wood-Trading* [2004] ECR I-11957, para. 47.

[31] Directive 91/271/EC concerning urban waste-water treatment [1991] OJ L135/40.

[32] Case C-396/00 *Commission* v. *Italy* [2002] ECR I-3949, paras. 29–32; Case C-335/07 *Commission* v. *Finland* [2009] ECR I-9459, para. 29; Case C-438/07 *Commission* v. *Sweden* [2009] ECR I-9517, para. 30.

[33] Case C-237/07 *Janecek* [2008] ECR I-6221, para. 46.

[34] Case C-358/11 *Lapin* [2013] ECR, paras. 31 and 62.

2 *The Sword*

a The Systemic Approach

The second category of cases – the 'sword' one, – includes cases in which the HLP requirement is used as a direct ground to petition the annulment of a legal measure, or to contest the legitimacy of the measure. These cases demonstrate that the Court is much less equipped for contesting the legitimacy of EU measures that would impose a low level of protection, except where the authority commits a manifest error of assessment, where it blatantly exceeds its powers or, due to other reasons, public health issues are at stake.

Again, the concrete level of ambition deemed acceptable for society in a specific EU act, in areas such as the environment or health protection, results from a complex political choice, which lies with the competent authority and not with the Court. Judicial review of the substance is therefore often confined to examining whether the authority's exercise of its powers is vitiated by an evident error of assessment, or whether it exceeded the limits of discretion.

As a consequence, establishing that an institution did not commit an evident error or exceed its powers is easier than establishing the inverse scenario. The 'sword' path is not conclusively barred, but it must be used selectively. The ECJ case law shows that at least two avenues are worth considering.

The first avenue involves a conformity testing of the relationship between a basic act (a Directive or a Regulation, adopted by the Council and Parliament) and its delegations or executory measures, often made in favour of the European Commission. When a mandate has been given, the delegate's margin of discretion is necessarily limited: delegated acts must remain in conformity with the essential elements of a basic act, including the aims thereof. In this regard, the HLP dimension has already proven useful for annulling Commission decisions[35] or revealing a breach of an obligation to act.[36] 'In determining the level of risk deemed unacceptable for society, the institutions are bound by their obligation to ensure a high level of protection of public health, safety and the environment in order to be compatible with the Treaty.'[37]

[35] Case T-229/04 *Sweden* v. *Commission* [2007] ECR II-2437, para. 54; Joined Cases C-14/06 and C-295/06 *Parliament* v. *Commission* [2008] ECR I-1649, paras. 75–76.

[36] Case T-521/14 *Sweden* v. *Commission* [2016], not yet reported, paras. 71–77.

[37] Mentioning here the health provisions; Case T-31/07 *Du Pont de Nemours* [2013].

The second avenue relates to the harmonization of measures based on Article 114 TFEU, the Treaty legal basis for all measures that aim to build the internal market further. Here, the HLP requirement can be interpreted as a specific duty that limits the discretion of the decision-maker, especially where the harmonization deals with health issues. This needs some explanation, bound to institutional reasons.

According to the Treaties, in health matters, the EU can only 'complement' but not 'harmonize' national legislation, except in a few limited areas.[38] Notwithstanding this restriction, the ECJ has used two tools that expand the potential for EU harmonization. First, the Court referred to the integration principle, as expressed in the health policy chapter,[39] according to which a high level of human health protection *is to be ensured* in the definition and implementation of all EU policies and activities. Secondly, the Court read Article 114 TFEU expansively and interpreted it to mean that the Article *explicitly* requires that a high level of protection of human health 'is to be ensured'[40] or 'should be guaranteed'[41] in achieving harmonization. This is not the exact wording of the Treaty.[42] The Court considers that because a high level of human health protection is to be ensured in the definition and implementation of all EU policies and activities, one can safely say that Article 114-based proposals encompass that dimension just as one can accept the possibility of harmonization in health-related areas.[43]

Such logic certainly entails that 'a manifest neglect to address the protective quality of the harmonized rule or a manifest error of appraisal regarding the applicable conditions would provide a basis for annulment of an adopted act'.[44] Generalising the lowest level of protection, or

[38] Art.168 TFEU.
[39] Ibid.
[40] Case C-376/98 *Germany* v. *Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419, para. 88 (italics added).
[41] Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, para. 62.
[42] The exact wording of today's Art. 114 TFEU is: 'The Commission, in its proposals envisaged in para. 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.'
[43] Case C-434/02 *Arnold André* [2004] ECR I-11825, para. 32; Case C-210/03 *Swedish Match* [2004] ECR I-11893, para. 32; and Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, para. 30.
[44] S. Weatherill, 'Union Legislation Relating to the Free Movement of Goods' in P. Oliver (ed.), *Oliver on Free Movement of Goods in the European Union* (Hart Publishing, 2010), p.441.

adopting a standard that would result in a real reduction of protection at Union level may well be an indicator of such a manifest neglect or error of appraisal. Admittedly, this would impact on only the most obvious situations.

Paradoxically, challenging the legality of the level of protection of an EU act adopted on the basis of the environmental chapter of the TFEU[45] is a near dead-end, except for testing whether and how far that EU policy objective is amenable to judicial review. This is because the possibility of correction towards of a higher level of protection afforded in Article 193 TFEU.

That specific chapter creates a 'system' in achieving the target of the EU environmental policy, by combining, on the one hand, the protection that the harmonized rule crystallizes and, on the other hand, the broad and generic possibility left to the Member States to strengthen that protection. In this area, legally speaking, the possibility is always left to Member States to reinforce the standard of protection,[46] even if this is not an easy political choice.[47]

The criterion against which the compatibility of an individual act of EU legislation with the level of environmental protection required under Article 191(2) TFEU must be reviewed was defined by the Court in two old judgments – *Safety Hi-Tech* and *Bettati*[48] concerning bans on the use of substances harmful to the ozone layer – that have very recently been confirmed, in 2016, in a case concerning the lagoon of Venice: 'whilst it is undisputed that Article 191(2) TFEU requires EU policy in environmental matters to aim for a high level of protection, such a level of protection, to be compatible with that provision, does not necessarily have to be the highest that is technically possible. Article 193 TFEU authorises the

[45] Art. 193 TFEU.
[46] Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301; Case C-341/95 *Bettati* [1998] ECR I-4355 ; *Fornasar and Others*, para. 46; Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, para. 27.
[47] P. Pagh, 'The Battle on Environmental Policy Competences; Challenging the Stricter Approach; Stricter Might Lead to Weaker Protection' in R. Macrory (ed.), *Reflections on 30 Years of EU Environmental Law: a High Level of Protection?* (Europa Law Publishing, 2005), pp. 1–16; J. H. Jans, 'Minimum Harmonisation and the Role of the Principle of Proportionality' in M. Führ, R. Wahl and P. von Wilmowsky (eds.), *Umweltrecht und Umweltwissenschaft; Festschrift für Eckard Rehbinder* (Erich Schmidt Verlag, 2007), pp. 705–717. On that dimension of 'gold-plating', see J. H. Jans et al., 'Gold Plating of Environmental Measures?', *Journal of European Environment and Planning Law*, 6(4) (2009), 417–435.
[48] Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301; Case C-341/95 *Bettati* [1998] ECR I-4355

Member States to maintain or introduce more stringent protective measures'.[49]

The justification is important: if the level of protection needs not necessarily be the highest that is technically possible, it is because, as a result of the specific provisions of the environmental chapter on which the measure is based, Member States may always introduce more stringent protective measures. The broad possibility of correction towards a higher level of protection that characterizes the environmental chapter of the EU Treaty must be read into the objective of the policy. If the EU does not necessarily need to opt for the highest possible level of protection, technically, it is because the Treaty allows Member States to go even further and raise the level of protection as they wish. Although slightly contrived, the logic makes sense. In this manner, the Court avoids creating a sword of Damocles that might have jeopardized any European environmental legislation that does not meet the most stringent standards possible.

In such a system, identifying a breach of the high level of protection objective becomes quite difficult. There are some narrow possibilities – at the interface with international law, for instance. As observed by Advocate General Kokott, a level of environmental protection must be considered 'high' when it exceeds the EU's obligations under international environmental law,[50] – so, does it mean that the level is (too) low when it does not comply with the EU's obligations under international environmental law?

The Court did not follow Advocate General Kokott when she asserted, in 2016, that the objective of EU environmental policy does not stop at exceeding external standards and that 'rather, it requires continuous efforts to be made to increase and improve environmental protection,

[49] Case C-444/15 *Associazione Italia Nostra Onlus* [2016], para. 44.

[50] Opinion of Advocate General Kokott in Case 444/15 *Associazione Italia Nostra Onlus v. Comune di Venezi* [2016], paras. 24–25, by reference to the two old cases *Bettati* and *Safety*. The link to international law is also observed in 'shield cases', such as Case C-366/10 *ATAA*, [2011], para. 128: 'It must be pointed out that, as European Union policy on the environment seeks to ensure a high level of protection in accordance with Article 191(2) TFEU, the European Union legislature may in principle choose to permit a commercial activity, in this instance air transport, to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfil the environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the European Union is a signatory, such as the Framework Convention and the Kyoto Protocol.'

even if there is no higher level of protection available internationally . . . After all, a level of protection ceases to be high in any event if an even higher level is readily achievable – a fact which must not, of course, be confused with the requirement to achieve the highest level of environmental protection technically possible, whatever the circumstances. The foregoing imposes on the EU legislature the requirement, when formulating environmental legislation, to improve environmental protection at least in areas where this can be accomplished with a reasonable degree of effort and is not precluded by any legitimate interests'.[51]

b The Limits to Delegation

As already mentioned, the HLP requirement plays a part in assessing the bounds of the executive power and in questioning measures adopted by the European Commission that would lead to mitigate the protected standards decided by the legislature, 'this without it being necessary to rule on the extent of the Commission's discretion'. It is worth highlighting, in that regard, that a clear divide exists between the judicial review of the ambition of a basic legislative act and the judicial review of the ambition of an executive or delegated act. The intensity of the review is considerably higher in the latter than in the former scenario, as it is at the level of the legislator that the proper balancing of opposite interests is being made.

In a recent case on the adoption of a list of scientific criteria allowing the identification of substances that must be classified as endocrine disruptors, the powers of the Commission, in its decision not to adopt a delegated act, were harshly reframed by the Tribunal, in a diatribe in which the 'high level of protection' objective of the basic act is central. Given that the legislative act, a Regulation on biocides, had already struck the balance between the objective of an HLP and the necessity to protect

[51] Opinion of Advocate General Kokott in Case 444/15 *Associazione Italia Nostra Onlus v. Comune di Venezi* [2016], para. 32; Case C-444/15 *Associazione Italia Nostra Onlus*, [2016],paras. 44 et al. The Court does not follow her, either, when she breaks new ground in concluding that, in combination with the marginal control limitation that is a necessity in the appraisal of environmental measures, and viewed in conjunction with the variety of objectives that the EU legislature may legitimately pursue when making provisions for environmental protection: 'the principle of a high level of protection laid down in Article 191(2) TFEU is therefore clearly infringed where there is nothing to indicate the existence of legitimate interests precluding a higher level of protection. It should be noted in this regard that, in accordance with the general EU-law principle of proportionality, "precluding" interests include those the weight of which is disproportionate to any potential improvement in the level of protection' (para. 34).

the internal market, the Commission was not permitted to use the argument of additional free market-related objections in order to reach a decision not to adopt the list within the set deadline. Further claims according to which the pre-existing level of protection was already high enough were to no avail.[52]

3 *Judicial Review of National Measures*

Another question is whether the HLP plays a role in assessing the legality of national measures related to environmental protection and adopted in the European territory. Here, also, we can proceed in two categories.

The first one is very obvious and brings us back to some our above-mentioned 'shield' cases. They concern the manner in which Member States interpret harmonized EU legislation. That interpretation must take due consideration of the objective being pursued by such legislation. Manifold cases raise issues on the way in which Member States implement EU law, in which one finds blunt assertions of the type: 'such a (high) level of protection could, however, be seriously jeopardised if classification as biocidal products were to be reserved solely for those products containing, etc.'[53]

But the interesting question is rather to identify how far that objective of an HLP, which is mentioned in Article 3 TEU, can govern the acceptability of national measures that would, outside any harmonized framework, impact some Treaty provisions – such as one of the four freedoms, among which we find the free movement of goods.

Various steps have already been taken in that regard, in the area of health protection and education, with an impact on the burden of proof and the assessment of proportionality. National measures that have an impact on the freedom of establishment or equal access to education may be justified if they meet a certain threshold. According to the ECJ, proactive national measures that restrict the freedom of establishment may indeed be justified, in so far as they satisfy a new criterion – that of making a 'contribution to achieving a high level of protection' of health,[54] without going beyond what is necessary to attain that goal.[55] Moreover,

[52] Case T-521/14 *Sweden* v. *Commission* [2016], paras. 72–78.
[53] Case C-420/10 *Söll* v. *Tetra* [2012], not reported, para. 27.
[54] Case C-169/07 *Hartlauer* [2009] ECR, para. 47; Case C-73/08 *Bressol and Others* [2010] ECR I-2735, para. 62.
[55] With reference to Case C-158/96 *Kohll* [1998] ECR I-1931, para. 50; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, para. 74; Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509, para. 67; Case C-372/04 *Watts* [2006] ECR I-4325, para. 105.

any difference in access to education that could be indirectly discriminatory on the basis of nationality may also be justified by the objective of maintaining a balanced, high-quality medical service open to all, 'in so far as it contributes to achieving a high level of protection of health'.[56]

Along the same lines, one could wonder whether the HLP requirement might also soften, in the future, the acceptance of national measures having an impact on the free movement of goods, in so far as environmental protection is concerned, and in situations in which the Member States are not implementing a specific EU legislation but are acting upon their own initiative. This might help to reverse the presumption. Instead of considering that the proposed national measures are suspect *per se* – for they would necessarily be incompatible with the specific provisions of primary law expounding the essentials of free movement, and that in contrast to the way in which national measures in the area of moral values or public health are taken on –[57] such measures would rather be viewed through the more serene prism of the global EU project to ensure a high level of environmental protection. This would, of course, not circumvent the review of the proportionality of these national measures, which is generally much tougher than the test applied to EU acts,[58] but might slightly ease the burden of proof resting on Member States, on the basis of the consideration that such national measures do indeed contribute to the overall EU objective of 'ensuring a high level of protection' and are proposed pursuant to the principle of sincere cooperation, as imposed by Article 4 TEU, in order to facilitate the achievement of other equally important Union tasks and objectives.

[56] Bressol and Others, para. 62.
[57] This is indeed the fate of most environmental initiatives of the Member States, in contrast with measures in the field of public morals or even health protection that, without prejudice to the difficult questions linked to the scientific evidence regarding health issues, are usually welcomed by the phrase 'in the absence of harmonisation, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected'. See, among others, Case C-42/07 Liga Portuguesa de Futebol [2009] ECR I-7633, para. 57; Case C-333/08 *Commission* v. *France* [2010] ECR, para. 85.
[58] The proportionality test is not a uniform test but an open-textured principle that is used in different contexts to protect different interests, and it entails different degrees of scrutiny, as expressed by T. Tridimas, 'Proportionality in European Community Law : Searching for the Appropriate Standard of Scrutiny' in *The Principle of Proportionality in the Laws of Europe* (Hart Publishing, 1999), pp. 65–84. On the proportionality of national measures, see: J. Jans, 'Proportionality revisited', *Legal Issues of Economic Integration*, 27 (3) (2000), pp. 239–265.

A recent case demonstrates that the trend might be on the move. In *Canadian Oil*, where the question raised was to know whether Sweden could impose complementary registration requirements on top of the procedures that are already imposed on importers and producers by the REACH Regulation, the Court explained

> that the registration required by national legislation such as that at issue in the main proceedings seeks to obtain data which, on the one hand, are essentially complementary to those falling within the relevant scope of the REACH Regulation and which, on the other, contribute, in the Member State concerned, particularly to the implementation of a control system for safe management of the chemical products covered by that regulation and to the evaluation of that management in order, in particular, to propose any useful improvements to it at EU level.

It therefore decides, without any further ado, that 'such an objective linked to that of the regulation, which seeks to ensure a high level of protection of human health and the environment, *is capable of justifying any hindrance to the free movement of goods*'.[59]

C The Importance of the Target

While not discussed so frequently, the status of being a 'target' is very significant under EU law – for various reasons.

For instance, as shown in the analysis of the 'shield' case law above, the target of a legislative act or of a policy is a decisive factor where case law embraces teleological interpretations: the target often guides the reasoning of the judge in order to avoid diluting interpretations that would weaken EU law.[60]

The target is also decisive in appreciating limits to the delegation stemming from a basic act: the target helps to distinguish what is essential from what is not, and therefore what can or cannot be lawfully delegated.[61] The target of the basic act helps in determining the margin

[59] Case C-472/14, *Canadian Oil Company Sweden AB, Anders Rantén* v. *Riksåklagaren* [2016], para. 46. The French translation is, however, more moderate, in the sense of the acceptance of possible hindrance ('est susceptible de justifier d'éventuelles entraves à la libre circulation des marchandises').

[60] This teleological method leading to a creative jurisprudence has proponents but also detractors. See, among others, G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press, 2012); A. Albors Llorens, 'The European Court of Justice, More Than a Teleological Court' in *The Cambridge Yearbook of European Legal Studies* (Hart Publishing, 2000), pp. 373–398.

[61] See *Parliament* v. *Council*, paras. 25–31.See also nn. 62 and 68 above.

of discretion of the delegate, and curtails discretion when the basic act directly fixes a mandate that, because of the aim pursued, must be interpreted strictly.

Additionally, as already mentioned, the target is a decisive pivotal element in the review of proportionality of EU legislation. Extremely often, even if not always, EU acts are expected to be proportionate to the aim that they pursue. They must not exceed the limits of what is appropriate and necessary to attain their objectives.[62]

Furthermore, in other types of discussion, the objective of a measure also plays a crucial role in the justification of possible restrictions to protected rights, such as the right to property, as far as it corresponds to the general interest and as far as the measure impairs the very substance of the right.

A target is nonetheless rarely isolated and must often be read in combination with another. Still, concurrent targets are not necessarily conflicting; they can reinforce each other.[63] The Court sometimes organizes targets hierarchically and gives precedence to the protection of health and the environment, as it did with regard to the REACH Regulation on chemical substances.[64] Even when the Court decided that it was necessary to ascertain whether, in exercising its discretion, the EU legislature had attempted to achieve a degree of balance between the protection of health, the environment and the consumer on the one hand and the economic interests of traders on the other, the Court clarified that such a balance must be struck 'while pursuing the objective assigned to it by the Treaty to ensure a high level of protection of health and environmental protection', therefore adding particular weight to the last dimension.[65]

[62] C-379/08 and C-380/08 *ERG and Others* EU:C:2010:127, para. 80

[63] Case C-558/07 *SPCM and Others* [2009] ECR, paras. 44–45.

[64] Regulation 1907/2008 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), [2006] OJ L396/1.

[65] *Afton Chemical*, para. 56: 'The objectives of the REACH Regulation, set out in Article 1 thereof, are to "ensure a high level of protection of human health and the environment [...] as well as the free circulation of substances on the internal market while enhancing competitiveness and innovation". However, regard being had to Recital 16 in the preamble to the REACH Regulation, it must be stated that the Community legislature established, as the main purpose of the obligation to register laid down in Article 6(3) thereof, the first of those three objectives, namely to ensure a high level of protection of human health and the environment.'

It is also settled case law that although some freedoms and rights form part of the general tenets of EU law, such as the freedom to pursue a trade or a business and the right to own property, they do not amount to unfettered prerogatives but must be seen in the light of their social functions. Consequently, they may be restricted, provided that these restrictions correspond in fact to objectives of general interest pursued by the EU.[66] In that regard also, the target that is being pursued by the restrictive measure plays a crucial role. Where it often happens that the ECJ, when confronted with conflicting rights or freedoms of equal value, considers that the interests involved must be weighed with regard to all the circumstances of the case in order to determine whether a fair balance was struck,[67] one cannot find such an explicit review of a 'fair balance' in situations where the ECJ observes, on the contrary, that the '*the importance of the objective pursued* by the disputed regulation may justify adverse consequences, even substantial adverse consequences, for certain traders'.

The Court, in notorious cases such as *Fedesa* (hormones) or *Arcelor* (emissions trading),[68] affirms that the importance of the public interest objectives pursued, including health and environmental protection, is such that it justifies even substantial negative economic consequences for certain operators. This remains applicable even if it has also been made clear that the EU legislature's exercising of discretion must not produce results that are 'manifestly less appropriate than those that would be produced by other measures that were also suitable for those objectives',[69] or must pursue a 'certain balance', as in the *Afton* case.[70]

The fact that a disputed regulation entails serious economic consequences therefore does not suffice to conclude that it is disproportionate or unbalanced for the purpose of judicial review.

[66] Case 44/79 *Hauer* [1979] ECR 3727, para. 23; Case 265/87 *Schräder* [1989] ECR 2237, para. 15; Case C-293/97 *Standley and Others* [1999] ECR I-2603, para. 54; Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat International Foundation* v. *Council and Commission* [2008] ECR I-6351, para. 355.

[67] Case C-112/00 *Schmidberger* [2003] ECR I-5659, para. 81.

[68] See, to that effect, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paras.15-17; *United Kingdom* v. *Commission*, para. 93; Case C-183/95 *Affish* [1997] ECR I-4315, para. 42; *Industrias Químicas del Vallés* v. *Commission*, para. 134; *Pfizer Animal Health* v. *Council*, paras. 456 and 457; Case C-86/03 *Greece* v. *Commission* [2005] ECR I-10979, para. 96; Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, para. 57.

[69] *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, para. 57.

[70] As mentioned in *Afton*.

The General Court recently linked this quite radical statement to the HLP *target*, at least in relation to the public health dimension of the TFEU: By requiring the maintenance of a high level of human health protection, Directive 91/414 applies Article 152(1) EC, which provides that a high level of human health protection is to be ensured in the definition and implementation of all Community policies and activities. That protection of human health takes precedence over economic considerations, with the result that it may justify adverse economic consequences, even those which are substantial, for certain traders.[71]

D Added Value

The assessment of the degree of balance between environmental protection and corporate interests can turn out to be quite different, indeed, when made by other courts or tribunals in charge of the verification of other dimensions, even if controlling the same type of rules. This is also reflected in the type of claims that are allowed to be brought before the ECJ. The *Afton* case,[72] already mentioned above, can be referred to in that light, in comparison with an old Ethyl arbitration attempt which took place in the 1990s, under the North American Free Trade Agreement (NAFTA).

In a preliminary ruling released in 2010, the ECJ was asked to assess the legality of regulatory limits that are being imposed under EU law, on the use of a specific metallic additive in fuel(the so-called MMT) in order to protect human health and the environment. The company claimed a breach of the proportionality principle. The Court recalled that the EU legislature must be allowed a broad discretion in an area that entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. The legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective that the competent institutions are seeking to pursue.[73] The Court stated that the objectives of protection of health, environmental protection and consumer protection are referred to both in Article 114 TFEU, under which the legislature is to take as a base a high level of protection, taking account, in particular, of any new developments based on scientific facts, and in Article 191 TFEU,

[71] Case T-31/07 *Du Pont de Nemours* [2013], paras. 131-132.

[72] Case C-343/09 *Afton* v. *Secretary of State for Transport* [2010].

[73] Case C-558/07 *SPCM and Others* [2009] ECR, para. 42.

which provides that the Community policy on the environment is to be based on, inter alia, the precautionary principle. As a consequence, the Court decided that the setting of a limit for the presence of MMT in fuel that makes it possible thereby to reduce the quantities of that substance that might potentially damage health, was not manifestly inappropriate for attaining the objectives of protection of health and environmental protection pursued by the EU legislature. However, it also decided to verify that the legislature had not gone beyond what was necessary to attain those objectives but concluded that the EU could justifiably take the view that the appropriate manner of reconciling the *high level of health and environmental protection* and the economic interests of producers of MMT was to limit the content of MMT in fuel on a declining scale while providing for the possibility, in Article 8a(3) of Directive 98/70, of revising those limits on the basis of the results of future assessment.

So far, nothing unusual: the judgment remained within the classical canons of European jurisprudence.

However, there are other entries in the same type of subject matter, revealing the importance of the paradigm, such as were observed in former approaches to investment protection.

On the occasion of a claim submitted before an arbitration tribunal, alleging that Canada breached its obligations under Chapter Eleven of NATFA as a result of introducing legislation banning the importation of and interprovincial trade in MMT,[74] the outcome turned out to be radically different. This even though it concerned the same kind of ban, the same substance (MMT), the same link to public health issues, and even related companies (Ethyl and Afton are parent companies), but fifteen years earlier.

In that action brought in 1996 against Canada, the legal grounds are not identical to those tested in the European arena. They relate to the protection of Ethyl property as an investor. The industry believes that the Canadian ban is to be assimilated to an indirect expropriation of its investment: the production activity of the substance (produced in the United States but imported to Canada in order to be mixed with gasoline), but also the profits to be expected and even its reputation (due to debates in Parliament on the dangerousness of the substance) were all imperilled. The industry claimed significant compensation of about US$251 million. The story ended in Ethyl's favour without ever being

[74] Available at: www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ethyl.aspx?lang=eng

heard by that arbitration court, except for a preliminary decision on the competence of the tribunal. Canada withdrew its restrictive measure, issued a statement about the safety of the substance and is said to have paid US$13 million to the company. The threat impacted a measure that had been discussed and decided in Parliament.[75]

Such a threat would be of no avail under current EU law (the possible impact of CETA is not being discussed here).[76] As regards infringement of the right to property, the Court has consistently held that, while the right to property forms part of the general principles of Community law, it is not an absolute right and it must be viewed in relation to its social function. Consequently, its exercise can be restricted, provided that those restrictions correspond to objectives of general interest pursued by the EU and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.[77] As regards the objectives of general interest referred to above, established case-law shows that the protection of the environment – I add: streamlined

[75] J. A. Soloway, 'Environmental Trade Barriers Under Nafta : the MMT Fuel Controversy', *Minn. J.Global Trade*, 8 (1999), pp. 55–95; A. Aslam, Corporations Use Trade Pact to Sue Countries, *Global Policy Forum*, September 1998, available at: www.globalpolicy.org/component/content/article/221/47001.html

[76] We are not assessing here the application of the brand-new Comprehensive Economic and Trade Agreement (CETA) that entered into force provisionally (without awaiting the agreement of Parliaments) in July 2017, with the exception of some of its provisions, between the EU and Canada. CETA is a sort of junction point between different worlds – or legal orders: the trade and investment law sphere versus the environmental law sphere – that for a long time evolved in a compartmentalized manner but find there a fresh opportunity to intersect with each other. In order to prevent possible conflicts between investment protection and environmental protection, the Parties insert a guarantee, in Art. 8.9.1., that they, for the purpose of that chapter only, '*reaffirm their right to regulate within their territories*'.(See, for instance, L. Wandahl Mouyal, *International Investment Law and the Right to Regulate* (Routledge, 2016), pp. 1–264, p. 231). Furthermore, an Art. 8.9.2 states that, for the purpose of the section on investment protection only, that 'the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section' and a remote Annex 8.A even adds that 'For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations'.

[77] Case C-379/08 and C-380/08, *ERG and Others* [2010] ECR I-127, para. 80; Case 44/79 *Hauer* [1979] ECR 3727, para. 23; Case 265/87 *Schräder HS Kraftfutter* [1989] ECR 2237, para. 15; Case C-293/97 *Standley and Others* [1999] ECR I-2603, para. 54; and Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat International Foundation v. Council and Commission* [2008] ECR I-6351, para. 355.

towards its target to achieve a high level of protection – is certainly one of those objectives.[78]

E Prospects

The origin and developments of the HLP requirements are closely linked to the process of European integration. They were germinated not in serenity but in fear – fear of the lowering of pre-existing levels of protection. Neither do they do emanate from prior or parallel developments that occurred at the international level and that could keep up their dynamism. They are deeply linked to the conferral of competences from the national to the transnational – in this case, European, level – and to the questions regarding harmonization and the appropriate standard of protection that emerged through this process.

HLP requirements were at first not solid enough to exist as autonomous principles that emerge 'beyond the texts',[79] but recent developments demonstrate that the dimension is resolutely 'on the move'. Advocate General Kokott states that these various provisions give expression to the common *principle* of a high level of environmental protection, 'to which particular importance must be attached given the number of provisions of EU law in which it is enshrined'.[80]

The importance to be given to that concept or principle remains for now tethered to the Treaties and, as a consequence, could still quite easily be jeopardized, were it not to be maintained explicitly in primary EU law. Such a removal would raise important questions on the legitimacy of EU powers regarding environmental protection. Bringing such requirements into light – and there are actually even others to mention, such as the fresh boost given by the Court to the requirement of an HLP, as inserted in Article 37 of the Charter of Fundamental Rights of the European Union, which it inserts into the category of 'rights',[81] or its possible

[78] Case 240/83 ADBHU [1985] ECR 531, para. 13; Case C-302/86 *Commission* v. *Denmark* [1988] ECR 4607, para. 8; and Case C-213/96 *Outokumpu* [1998] ECR 1-1777, para. 32.

[79] D. Misonne, *Droit européen de l'environnement et de la santé: L'ambition d'un niveau élevé de protection* (Anthemis, 2011), pp. 286–287; N. de Sadeleer, 'The Principle of a High Level of Environmental Protection in EU Law: Policy Principle or General Principle of Law?' in *Mijörättsliga Perspektiv Och Tankevändor* (Iustus Förlag, 2013), pp. 447–465, p. 450.

[80] Case 444/15 *Associazione Italia Nostra Onlus* v. *Comune di Venezi* [2016], 24–25.

[81] Case 444/15 *Associazione Italia Nostra Onlus* v. *Comune di Venezi* [2016], 62: 'In that regard, it must be pointed out that Article 52(2) of the Charter provides that rights recognised by the Charter for which provision is made in the Treaties are to be exercised

relation to the dynamics of an emerging principle of 'no-regression'[82] – helps to consolidate and develop their potential and relevance, should one care to give flesh to new conceptual developments that broaden the range of possible avenues for advancing the effectiveness of environmental law, in the framework of substantial large-scale legislative and regulatory integration.

under the conditions and within the limits defined by those Treaties. Such is the case with Article 37 of the Charter.' The Court explicitly inserts Art. 37 into the category of 'rights', and not in that of 'principles', as suggested by the text of the Charter itself.

[82] D. Misonne and I. Hachez, 'Simplifier Le droit européen de l'environnement : un processus liberé de toute exigence de non-régression?' in I. Doussan, *Les futurs du droit de l'environnement* (Bruylant: Bruxelles, 2016).