

HARMONISING ENVIRONMENTAL STANDARDS FROM THE GUADALQUIVIR TO THE DANUBE DELTA

How can the Circle be Squared?

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1. INTRODUCTION

At first an obscure field in the 1970s, and having long remained the preserve of engineers and biologists, the environmental policy and the law which it gave rise have ended up asserting themselves both on public and private actors. Although it was not mentioned in the 1957 Treaty of Rome, environmental concerns have, through the various treaty reforms, gradually been able to establish themselves as one of the greatest values enshrined in the EU founding treaties. Environmental protection is not only a core objective of the Union; it has also been placed on equal footing with economic growth and the internal market.

However, the harmonisation process of environmental rules has been fraught with controversies since the inception of this policy. When it comes to decide which ecosystems and species to protect, which hazardous products to control or to ban, which factories to authorise, the thresholds for reuse and recycling waste, EU institutions and the Member States cross swords.

It is the aim of this chapter to explore some of the key issues arising in the harmonisation process of environmental rules. The discussion is structured in the following manner. The focus is firstly placed upon the drivers of the EU environmental policy and how they shaped that policy. In a second section, we shall contemplate the conundrum of legal bases upon which environmental measures can be adopted and the influence they exert on the nature of harmonisation. The third section addresses the numerous challenges faced by the protagonists of the European environmental policy and the hurdles to overcome in determining the common denominator among Member States.

2. GENERALITIES

2.1. THE ENVIRONMENTAL CRISIS

The scales and rates of the changes induced by human activities on ecosystems have been so significant on a geological time scale that it comes as no surprise that we are entering a new geological epoch, the Anthropocene. Indeed, overwhelming scientific evidence highlights the extent to which Earth's atmosphere (destruction of the ozone layer, emission of greenhouse gas (GHGs), etc.), lithosphere (e.g., quarrying, landscaping, urban sprawl, soil erosion, etc.), hydrosphere (pollution of water, salinisation, anthropologically induced floods and droughts, sedimentation of lakes and rivers, rising of sea level, etc.) and biosphere (changes in the vegetational character of major ecosystems, Earth's sixth major extinction, etc.) as well as other earth system processes (nutrient cycles, etc.) are now altered

by human activities.¹ The environmental crisis underpinning these changes has become a critical issue confronting all of humanity.

What's more, the less visible but potentially drastic threats are manifold (climate change, health impairment resulting from exposure to chemical substances, microplastic waste, nanotechnology, etc.).

What about Europe? Thanks to EU environmental law and proper enforcement, much has been achieved over these last thirty years in the EU: a ban on lead in petroleum products; phasing out ozone depleting substances; reduction of nitrogen oxide emissions from road transport; improvement of waste water treatment and water quality; streamlining waste; reduction of acidification; and improvement of some aspects of air quality.² This significant progress demonstrates that environmental policy and law function properly, provided the Member States are committed to enforcing international rules as well as EU harmonised measures.

However, despite these achievements, the results of both the EU and the domestic environmental policies have at the very least been muted.³

Firstly, environmental degradation is manifest everywhere given that our continent has been significantly transformed by industrial, urban, transport, mining, agricultural and forestry activities. In addition, increasingly fragmented by transport infrastructures, subject to intensive urbanisation, cultivation or cattle grazing, polluted and eutrophised, the aquatic and terrestrial ecosystems sink to the lowest common denominator, losing both their cultural and natural specificity.⁴ For animal and plant species, this results in a fragmentation and isolation of their habitats, constituting one of the most serious threats to their long-term survival. On account of the degradation of their habitats (urban sprawl, intensification of agricultural practices, etc.), which is only exacerbated by additional threats (excessive hunting, poaching, disturbances inflicted by tourism, etc.), wild species are suffering an unprecedented rate of extinction. Global warming and the depletion of the ozone layer are likely to precipitate much more profound changes to the distribution, structure and functions of European ecosystems.

Secondly, to make matters worse, every step forward – such as reductions in industrial pollution – appears to be cancelled out by the appearance of new phenomena, such as mass consumption and more diffuse sources of pollution proving more difficult to control (light pollution, air pollution, etc.), or unforeseen risks (biotechnology, nanotechnology, endocrine disruptors, etc.).

¹ K.T. Pickering and L.O. Owen, *An Introduction to Global Environmental Issues*, 2nd. ed., (London-N.Y., Routledge, 1997), xxv.

² EEA, *The European Environment. State and Outlook* (Copenhagen, 2005), 19.

³ OECD, *Environmental Outlook to 2050* (Paris, 2012).

⁴ N. de Sadeleer, "The State of Biodiversity in Europe", in Michael I. Jeffery, Karen Bubna-Litic (ed.), *Biodiversity Conservation, Law and Livelihoods: Bridging the North-South Divide*, IUCN Academy of Environmental Law Research Studies, 2007, 181–192.

It comes thus as no surprise that the Member States are facing a daunting agenda of unfinished business, as well as a swathe of new challenges. By way of illustration, air pollution still significantly reduces life expectancy,⁵ major rivers are still heavily polluted, the 2010 biodiversity conservation targets have not been met,⁶ and the amount of waste increases in spite of recycling policies. As regard new challenges, the most pressing is climate change, whose impacts are becoming ever more frequent. Indeed, the overarching target to limit climate change to temperature increases below 2° C globally during this century⁷ is unlikely to be met, in part because of GHGs from other parts of the world.⁸ A closer look at GHG emissions within the EU reveals mixed trends: whereas emissions from large point sources have been reduced, at the same time emissions from some mobile and diffuse sources, especially transport-related, have increased substantially.⁹

The environmental impacts are closely linked to other challenges, such as unsustainable consumption patterns, economic growth¹⁰ and others. As environmental challenges become more complex in a more populated and wealthy Europe, the uncertainties and the risks associated with them have increased.¹¹ Against this background, the European Environment Agency (EEA) is of the view that Europe points towards a number of systemic environmental risks ‘which can be triggered by sudden events or built up over time, with the impact often being large and possibly catastrophic.’¹² Whatever the causes, the environmental crisis is perceived as a serious problem in Europe, because ecosystems provide a wide array of services that are usually taken for granted until they have gone missing.

2.2. THE ATTEMPT TO DEFINE THE CONCEPT OF ENVIRONMENT AT EU LEVEL

As far as EU treaty law is concerned, the concept of environment appears in several provisions of the Treaty on the European Union (TEU) and the

⁵ EEA, *Air Quality in Europe – 2019*, Report 10/2019, p. 66.

⁶ EEA, *State of the Nature in Europe*, Report 10/2020.

⁷ Article 2(1) a of the Paris Agreement under the United Nations Framework Convention on Climate Change.

⁸ EEA, *Trends and Projections in Europe 2020. Tracking progress towards Europe’s climate and energy targets*, Report 13/2020, p. 6.

⁹ EEA, *The European Environment – State and Outlook 2010* (Copenhagen, 2010), 34.

¹⁰ The relationship between that sort of economic integration and environmental protection has always been fraught with controversies. On the one hand, trade liberalisation and free competition increase the wealth of trading nations so they could afford to carry out an environmental policy. On the other hand, economic growth at all costs may result in greater pressures on ecosystems.

¹¹ EEA, *The European Environment – State and Outlook 2010*, above, p. 20.

¹² *Ibid.* p. 20.

Treaty on the Functioning of the European Union (TFEU) (i.e. Articles 3(3) and 21(2)(d)–(f) TEU, Articles 11, 114(3), (4), and (5), 191–193, and 194(1) TFEU), without, however, being defined, no doubt out of fear of circumscribing its scope to overly specific areas. Likewise, EU secondary law pays little attention to defining what is meant by the term ‘environment’. Attempts to define its boundaries often involve its enumeration through examples.

What is meant by the concept of environment is ripe for discussion. Although everyone is agreed on the core of what is meant by this open concept, disputes arise about the boundaries surrounding its core content.

In English, the notion of environment has been defined as ‘The set of circumstances or conditions, esp. physical conditions, in which a person or community lives. Also, physical conditions viewed to the possibility of life’,¹³ let alone ‘the natural world, as a whole or in a particular geographical area, esp. as affected by human activity’.¹⁴ In French, the concept, which appeared in 1972, is defined as: ‘Ensemble des conditions naturelles (physiques, chimiques, biologiques) et culturelles (sociologiques) dans lesquelles les organismes vivants (en particulier l’homme), se développent’.¹⁵ The CNRS defines it as ‘l’ensemble des éléments physiques qui environnent un organisme vivant, qui se trouvent autour de lui’.¹⁶ In German, *umwelt* is defined as ‘Umgebung eines Lebewesen die auf es einwirkt u. seine lebenbedingungen beeinflusst’,¹⁷ whereas the concept of *milieu* in Dutch is defined as ‘het geheel van uitwendige omstandigheden die van invloed zijn op de leefomstandigheden, het welzijn van de planten, dieren en mensen in een gebied of in het algemeen, zoals de toestand van de atmosfeer, van het water, van de bodem, enz’.¹⁸ Needless to say, these very broad dictionary definitions are testament to the heterogeneous nature of the concept. If there is a catch-all concept, then this is it.

Immune to all efforts at legal classification, this chameleon-like concept may be limited under a narrow reading to NIMBY (not in my back yard) factors, whilst read more broadly it may be coterminous with the biosphere. Furthermore, it continuously overlaps with other concepts, such as ecology, nature, biodiversity, public health, worker protection, land use, living surroundings and sustainable development, which nevertheless have not succeeded in taking its place. In the 21st century, environmental issues cover questions that were ignored until a short time ago, such as global warming, genetically modified organisms (GMOs), product life-cycle analysis and electromagnetic radiation. Last, but not least, given that natural habitats are shrinking, sea levels are rising, glaciers are

¹³ Shorter Oxford English Dictionary, 5th ed., (Oxford, OUP, 2004).

¹⁴ New Oxford American Dictionary, (Oxford, OUP).

¹⁵ Le Nouveau Petit Robert de la Langue française (Paris, 2009).

¹⁶ CNRS, Trésor de la langue française (Paris, 1979).

¹⁷ Duden (Mannheim, 1981).

¹⁸ Van Dale (Utrecht, Antwerpen, 1999).

melting, fish stocks are fished outside safe biological limits¹⁹ and rare natural resources are depleted, new issues gather momentum.

Taking things to extremes, one might say that there is, on the one hand, an objective dimension based on scientific criteria (state of species conservation,²⁰ pollution thresholds, ecosystem approach,²¹ sustainable yields, total allowable catches, etc.), which seeks to protect the biosphere per se. Thresholds have been established pursuant to scientific analysis classifying ecological risk. Clearly, nature protection law as well as most of water law aim to protect ecosystems as such.²² This scientific approach stands in opposition to a subjective or an anthropocentric vision of relations between humankind and our surroundings (including economic, aesthetic, cultural and recreational aspects), which focuses more on the quality-of-life dimension than the conditions favourable for life. Consequently, a species may be protected not by virtue of the role it plays within an ecosystem, but on the account of its appeal to a broader public or its economic value. As a result, the protection of the biosphere is justified as a function of the interests of humankind. In this respect, it should be pointed out that measures aiming to reduce noise, odours and air pollutants, as well as radiation, aim chiefly at improving the quality of human life.

Leaving aside this latent tension between two opposing viewpoints, one could ask what is still natural about a heavily ‘artificialised’ world. How can we distinguish the environment from nature, from ecology or from biology? Given that nature is totally subsumed by humans, we are, as consumers, surrounded by the artefacts of a commoditised nature.²³ Anxious to consume natural products, the uninitiated will fall into the depths of confusion on reading some of the judgments handed down by the CJEU in that regard. For instance, the use in most Member States of the term ‘bio’ for goods produced from organic agriculture (in French *biologique*, in Italian *biologico*, in Dutch *biologisch*) did not prevent the Spanish authorities from using the term *ecológico* in the indications of food products referring to the organic production method. As a result, the term *bio*

¹⁹ EC, Communication ‘Towards more sustainable fishing in the EU: state of play and orientations for 2021’, COM(2020) 248 final, p. 6.

²⁰ Article 2 (i) of Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora.

²¹ CDB COP V, Decision V/6 on the ecosystem approach; Article 1(3) Marine Strategy Framework Directive 2008/56/EC.

²² Article 11(3)(l) Directive 2000/60/EC establishing a framework for Community action in the field of water policy.

²³ B. McKibben, *The End of Nature* (New York, Anchor, 1989); C. and R. Larrere, *Du bon usage de la nature, Pour une philosophie de l’environnement* (Alto Aubier, Paris, 1997) 159; Ph. Roqueplo, *Climats sous surveillance. Limites et conditions de l’expertise scientifique* (Paris, Economica, 1993) 266.

has been customarily and continuously used on the grounds that term bears no relation to the organic method of production of that food. The Court of Justice of the EU (CJEU) agreed with the Spanish authorities in ruling that the term ‘bio’ must not be accorded specific protection in all Member States and in all languages. Accordingly, the term ‘ecológico’ was not likely to mislead Spanish consumers, since goods produced from this type of agriculture are in general referred to using the term *ecológico*.²⁴ Similarly, notwithstanding the presence of traces of lead, cadmium and pesticides, the term ‘naturally pure’ used on jars of jam will not be misleading for Austrian consumers.²⁵ In addition, the accidental presence of material derived from certain GMOs not exceeding a particular level in baby food is not subject to specific labelling requirements.²⁶

2.3. DOES ENVIRONMENTAL PROTECTION REALLY MATTER AT THE EU LEVEL?

No other issue has produced as much controversy as does the EU environmental policy. Indeed, every environmental issue gives rise to conflicting opinions. Must the water quality be the same for a Swedish and a Bulgarian person? Should a Flemish person have easier access to nature than a Carpathian person, or vice versa? Do we have to breathe the same air in Madrid, London and Brussels as in Luleå? Should the sea sponges of the Black Sea be afforded better protection than the ones from the Irish Sea? Are the Greeks forced to comply with the same waste packaging recycling targets than an industrialised nation such as the Netherlands? Should an inhabitant of Molenbeek have the same life expectancy as a reindeer raiser from Pohjois-Pohjanmaa? Do the Cyprus Wheatear (*Oenanthe cyprica*) or the Canarian Pine Tree (*Pinus Canariensis*) deserve EU protection although these endemic species are encountered at the outskirts of the continent and are likely to interest but a few naturalists? In other words, does environmental protection really matter? And in particular, is the EU – whose institutions are located in one of the most polluted area on the continent – much better placed to deal with the ‘ecological’, ‘environmental’, ‘recreational’, ‘cultural’ and ‘ethical’ expectations than a myriad of national political bodies? Ultimately, the answers to these questions may depend on one’s cultural, ethnic, religious and historic background.

²⁴ Case C-135/03 *Commission v Spain* [2005] ECR I-6906, paras. 36–41.

²⁵ Case C-465/98 *Adolf Darbo* [2000] ECR I-2321, para. 33.

²⁶ Case C-132/03 *Cadocons* [2005] ECR I-4167.

3. LEGAL CONUNDRUM

3.1. HOW CAN ONE DRAW THE DIVIDING LINE BETWEEN THE INTERNAL MARKET AND A GENUINE ENVIRONMENTAL POLICY?

Each piece of EU legislation must be rooted in one or more legal bases set out either in the TEU or in the TFEU. The determination of the relevant legal base is required in light of the principle of the allocation of powers, the duty to preserve the prerogatives of the EU institutions, the obligation to state reasons and the requirement of legal certainty.²⁷ Needless to say, the choice of legal basis of pieces of legislation aiming at protecting the quality of the environment represents a critical juncture in relations between institutions, as well as the relations between the Member States and the EU. Firstly, in defining the scope of the EU's intervention, the legal basis enables the EU to exercise its regulatory competence in such a field.²⁸ Moreover, the basis chosen determines not only which institution has the responsibility to take the action but also the procedure to follow and the objective pursued. Furthermore, it also determines the types of acts that can be adopted. Just as the powers of the Commission, the Parliament and the Council are capable of varying considerably depending on the procedure applied, they can also end up expressing contradicting preferences as regards the choice to be made between the different legal bases provided for.

It is not the case that every single provision even remotely relating to environmental issues must have been adopted under the only chapter of the treaty dedicated to environmental policy (chapter 19).²⁹ Regarding the EU environmental secondary legislation, it is possible to trace out the dividing line between the treaty provisions governing the internal market and the environment, respectively.

3.2. THE PREVALENCE OF MARKET INTEGRATION UNDER ARTICLE 114 TFEU

The rise of environmental policy was undeniably born out of the concern to avoid distortions of competition between undertakings. To give the national authorities free rein to enact unilateral product standards would have entailed the risk of fragmenting the internal market and hindering the free movement

²⁷ Case C-370/07 *Commission v Council* [2009] ECR I-8917, paras. 37, 39, 46, and 48.

²⁸ In accordance with the principle of conferral (Article 5(1) TEU), the legal base occupies centre stage inasmuch as it identifies the competence under which EU institutions act.

²⁹ N. de Sadeleer, 'Environmental Governance and the Legal Bases Conundrum' (2012) *Oxford Yearbook of European Law*, 31(1): 1–29.

of goods within that market.³⁰ Against this backdrop, a significant number of product-oriented directives and regulations which have a direct impact on the internal market, and in particular those which lay down product standards, were adopted on the base of Article 100A EC, Article 95 EC and since December 2009, Article 114 TFEU, provisions empowering the EU institutions to enact all measures affecting the establishment and the functioning of the internal market, including those relating to environmental protection. It must be noted that this provision expressly refers, in the first, third and fourth paragraphs, to the protection of the environment. Moreover, in virtue of Article 3 TEU, the UE aims ‘to promote ... the well-being of its peoples’ and, in particular, ‘a high level of protection and improvement of the quality of the environment’. It must be noted that environmental objectives must also be taken into account in virtue of Article 11 TFEU³¹ and Article 37 EUCR³² within the context the internal market.

Article 114 TFEU has thus been selected as the genuine legal base for the harmonisation of the rules relating to products impairing the environment. Although this provision does not give EU lawmakers any general competence to harmonise national rules on health or environmental matters,³³ it has been applied for harmonising environmental pollution and risk issues ranging from vehicle exhaust emissions (Directive 70/220/EEC), GMOs (Directive 2008/1),³⁴ biocides (Regulation (EU) 528/2012),³⁵ pesticides (Regulation (EC) 1107/2009)³⁶ and chemicals (1907/2006 REACH regulation³⁷ and 1272/2008 CLP regulation³⁸). That being said, the determination of the relevant level of protection can be dogged by controversies. In the *DecaDBE* case, the CJEU held

³⁰ N. de Sadeleer, ‘Trade v Environment in EU Law’ 13:5 (2016) *US-China Law Review* 365–381.

³¹ The General Court stressed that in requiring that a high level of protection of the environment be maintained, Regulation No 1107/2009 on pesticides is applying both Article 114(3) TFEU and Article 11 TFEU that provides the integration of environmental protection requirements into the definition and implementation of the European Union’s policies and activities, in particular with a view to promoting sustainable development. Case T-584/13 *BASF Agro v. Commission* [2018] T:2018:279, paras. 55.

³² Case C-444/15 *Associazione Italia Nostra Onlus* [2016] C:2016:978, paras. 61–63.

³³ C-300/89 *Commission v Council* [1991] ECR I-2867; C-155/91 *Commission v Council* [1993] ECR I-939.

³⁴ N. de Sadeleer, ‘Marketing and Cultivation of GMOs in the EU. An Uncertain Balance between Centrifugal and Centripetal Forces’ (2015)(4) *EJRR* 532–558.

³⁵ Regulation (EC) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocides.

³⁶ Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market.

³⁷ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency (REACH).

³⁸ Regulation (EC) No 1272/2008 on the classification, labelling and packaging of substances and mixtures (CLP Regulation).

that the prohibition on the use of certain hazardous substances in electrical and electronic equipment implies, in accordance with the requirement for a high level of protection, that the European Commission may 'grant exemptions only in accordance with carefully defined conditions' and that the conditions for exemption be interpreted strictly.³⁹ In this case, the fact that the directive had been enacted on the basis of Article 95 EC (Article 114 TFEU) did not have the effect of exempting the European Commission from the requirement to respect the obligation for a high level of protection under Articles 152 and 174 EC (Articles 168 and 191(1) TFEU). On another note, the difficulties of achieving a consensus within the European Commission can lead to belated decisions. By way of illustration, the General Court declared that the European Commission, by failing to adopt delegated acts to specify scientific criteria for the determination of endocrine-disrupting properties, has failed to fulfil its obligations under Regulation (EU) No 528/2012 on biocidal products.⁴⁰

From an economic perspective, differentiated policies could be a source for distortions to competition. Due to their implementation in a disorderly fashion, national initiatives also risk turning out to be largely ineffective, as pollution does not respect international borders. In sharp contrast to Article 193 TFEU, Article 114 restricts Member States' powers to enact derogating provisions. By authorising the maintenance or adoption of more binding measures with the endorsement of the European Commission, Article 114 TFEU avoids the spectre of the creation of a multi-speed Europe on environmental questions.⁴¹

It is fair to say that against this backdrop, the Member States are not too willing to enact more stringent standards than the ones adopted by the EU within the framework of the internal market policy.

3.3. A GENUINE ENVIRONMENTAL POLICY UNDER ARTICLE 192 TFEU

On the other side of the dividing line, the genuine environmental legal base, Article 192 TFEU, embraces all acts for which an analysis of the aim and the content of the measure shows that they seek to achieve a high level of environmental protection and that they at most affect the establishment of the internal market on an ancillary base. The harmonisation pursued under that policy has to achieve a high level of environmental protection.

Here, since environmental objectives are predominant, considerations regarding the internal market become secondary. Despite their indirect or

³⁹ Cases C-14/06 and 295/06 *Parliament and Denmark v. Commission* [2008] ECR I-1649, paras. 74 and 75.

⁴⁰ Case T-521/14 *Sweden v. Commission* [2007] T:2015:976.

⁴¹ I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market* (Cheltenham, Edward Elgar, 2013).

potential impact on the functioning of the internal market,⁴² the vast majority of the EU directives aimed at protecting wildlife, different ecosystems, soils, marine environments, underground as well as surface water, air and the climate, procedural rights, environmental auditing and liability for environmental damage have been adopted on the basis of Article 192 TFEU.⁴³ In addition, the acts regulating the pollution emitted by listed installations and waste management⁴⁴ have also been adopted on the basis of this provision.

3.4. MUST MARKET INTEGRATION PREVAIL OVER ENVIRONMENTAL CONCERNS?

In spite of this clear theoretical differentiation, it is hardly easy to sketch out the dividing line between Articles 114 and 192 TFEU. In spite of their impact on the functioning of the internal market, several acts, which regulate the placing on the market of products, end up falling within the fold of environmental policy.⁴⁵ In fact, the choice remains a delicate one. Is environmental protection best assured through the adoption of uniform legislation? Or is it necessary to guarantee this protection through minimum harmonisation rules relying on Article 192 TFEU? One might answer these questions by stating that since they are reached on the basis of a consensus among Member States, maximum harmonisation rules adopted pursuant to Article 114 TFEU do not authorise the states to seek an absolute level of protection, even though in the wake of the Treaty of Amsterdam, the Council and the Parliament must endeavour to attain a high level of protection. In contrast, through the mediation of minimum harmonisation rules, Article 192 TFEU leaves untouched the Member States' powers to adopt a higher level of protection than that set by the EU harmonisation rule,⁴⁶ even where this mechanism may result in the emergence of European

⁴² Case C-155/91 *Commission v Council*, above; and Case C-187/93 *European Parliament v Council* [1994] ECR I-2857, paras. 24–26.

⁴³ For an overview of the different acts founded on Article 192 TFEU, see *L. Krämer*, EU Environmental Law, 8th ed. (London, Sweet & Maxwell, 2016) 54–56; *D. Langlet and S. Mahmoudi*, EU Environmental Law and Policy (Oxford, OUP, 2016) 97; *N. de Sadeleer*, Commentaire Mégret. Environnement et marché intérieur (Brussels, ULB, 2010) 247–329.

⁴⁴ However, product-related waste standards – packaging, hazardous substances in technical equipment – are based on Article 114 TFEU.

⁴⁵ Directive 1999/94/EC relating to the availability of consumer information on fuel economy and CO₂ emissions in respect of the marketing of new passenger cars [1999] OJ L12/16; European Parliament and Council Regulation (EC) 443/2009 setting emission performance standards for new passenger cars as part of the community's integrated approach to reduce CO₂ emissions from light-duty vehicles [2009] OJ L 140/1.

⁴⁶ Case C-194/01 *Commission v Austria* [2004] ECR I-4579, Case C-322/00 *Commission v Netherlands* [2003] ECR I-11267, Case C-184/97 *Commission v Germany* [1999] ECR I-7837, Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753; C-534/13 *Fipa Group* [2014] C:2014:2393; Cases C-378/08, C-379/08 and C-380/08, *ERG* [2015] EU:C:2010:126.

environmental law *à la carte*. It follows that air, water and soil emission standards are likely to differ from one Member State to another or from one region to another. Moreover, Member States with a low environmental profile are likely to argue for the adoption of EU harmonisation standards lacking vigour, arguing that more ambitious Member States could always reckon upon more stringent standards in accordance with Article 193 TFEU.⁴⁷

This all begs a number of questions. Are the fears that economic cohesion may be undermined by more stringent national standards overstated? Should we conceive the environmental policy exclusively in terms of market unity, or in terms of ecosystem services? Does the importance of ecological challenges not imply, by contrast, that the Member States may move forward by adopting, if necessary, more stringent standards than the one provided for under the EU harmonisation rule?

Ultimately, perhaps this is simply just a false dichotomy. The choice of Article 114 TFEU as a legal basis for environmental measure does not mean that the internal market shall prevail over environmental considerations. Indeed, the court has recognised, on the basis of Article 11 and Article 114(3) TFEU, that in the context of the application of Regulation No 1107/2009 on pesticides, ‘the protection of the environment takes precedence over economic considerations, with the result that it may justify adverse economic consequences, even those which are substantial, for certain traders.’⁴⁸ In spite of this weighing of interests, whenever the internal market measure aims at implementing the precautionary principle,⁴⁹ the EU institutions are called on to carry out an economic assessment of the economic and social effects to which the measure may lead.⁵⁰ Furthermore, one might be inclined to agree with this, where one considers that the Member States are merely transposing directives adopted on the basis of Article 192 TFEU, without seeking, however, to apply reinforced protection measures.⁵¹

3.5. OTHER LEGAL BASES

In addition, owing to the cross-cutting character of environmental policy, an array of other EU policies do integrate, in accordance with Article 11 TFEU, the requirements stemming from the environmental policy. It follows that environmental issues encompass a broad range of measures ranging from green

⁴⁷ L. Krämer, *EC Environmental Law*, 6th ed. (Thomson, Sweet & Maxwell, 2007), 87.

⁴⁸ Case T-475/07 *Dow AgroSciences and Others v Commission* [2011] EU:T:2011:445, para. 143; case T-483/11 *Sepro Europe v Commission*, [2013] T:2013:407, para. 85; and of 12 December 2014, Case T-269/11 *Xeda International v Commission* [2014] T:2014:1069, para. 138; Case T-584/13 *BASF Agro v. Commission* [2018] T:2018:279, para. 55.

⁴⁹ N. de Sadeleer, *Environmental Principles*, 2nd ed. (Oxford, OUP, 2020), 135–361.

⁵⁰ Case T-584/13 *BASF Agro v. Commission* [2018] T:2018:279, paras. 162 to 170.

⁵¹ J.H. Jans, ‘Gold plating of European Environmental Measures?’ 6:4 (2009), *JEEPL* 417–435.

energy, regulation of fisheries, cross-compliance in agriculture, product-policy and waste management or wildlife conservancy.

By way of illustration, Directive 2000/59/EC on port reception facilities for ship-generated waste and cargo residues – whose aim is to reduce the discharges of ship-generated waste and cargo residues into the sea by improving the availability waste facilities for ship-generated waste in harbours – is based upon Article 100 TFEU regarding transport policy. Directive 2010/31/EU on the energy performance of buildings was adopted, pursuant to Article 194(2) TFEU, as part of the energy policy.

The CJEU ruled that one regulation, which limited the use of driftnets, and another regulation on agricultural production methods, which were adopted on the common agricultural policy (CAP) legal basis, were rightly covered by the CAP.⁵²

Likewise, the choice of the relevant legal bases for acts regulating radioactive materials has been embroiled with controversies. In *Greek Chernobyl I*, a case concerning the conditions for importing agricultural products originating in third countries following the nuclear accident at Chernobyl, the CJEU confirmed the applicability of the common commercial policy legal base when adopting a regulation governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power station.⁵³ By the same token, though a measure relating to radioactive substances could be considered as enhancing human health within the meaning of Article 191(1) TFEU, the CJEU ruled that Directive 2013/51/Euratom regarding the protection of human health against the dangers of radioactive substances in waters intended for human consumption was legitimately adopted on the basis of Article 31 EAEC Treaty.⁵⁴

To sum up, given their transversal nature, environmental issues are likely to be regulated at the EU level within the framework of different policies.

4. THE CHALLENGE OF HARMONISING ENVIRONMENTAL STANDARDS

4.1. SUBSIDIARITY AND HARMONISATION OF ENVIRONMENTAL STANDARDS

The EU has no exclusive competence for protecting the environment. Pursuant to Article 4(2)(e) TFEU, the environment has been classified among the 11

⁵² Case C-405/92 *Mondiet* [1993] ECR I-6133, paras. 25–27; and Case C-336/00 *Huber* [2002] ECR I-7699, paras. 25–27.

⁵³ Case C-62/88 *Greece v. Council* (Chernobyl I) [1990] ECR I-1527.

⁵⁴ Case C-48/14 *European Parliament v Council* [2015] C:2015:9, para. 39.

shared competences alongside the internal market, consumers protection and transports, *inter alia*. Accordingly, in virtue of Article 2(2) TFEU, the EU has the power to legislate and to adopt legally binding acts in the environmental area. Since environmental policy is not vested exclusively in the EU, the principle of subsidiarity enshrined in Article 5(3) TEU applies.⁵⁵ Moreover, subsidiarity comes much more to the fore in the environmental field than in other policies such as the internal market. Indeed, in sharp contrast to the harmonisation of the internal market, where Member States are usually unable to achieve the economic goals pursued by harmonisation,⁵⁶ environment policy entails constantly cooperation between all institutional players.

One needs to address the following question: which environmental issues are likely to be harmonised?

Firstly, there is no doubt as to the Member States' inability to solve environmental issues having a trans-boundary nature, such as ozone depletion, climate change, biodiversity, air and water pollution, among others. As a result, regulating these issues should be a matter for the EU and not chiefly for the Member States. Account must also be made of the fact that a number of EU environmental measures have cross-frontier elements. For instance, contaminated land, a rather localised form of pollution, is excluded from EU waste legislation⁵⁷ whereas contaminated land remediation must be tackled exclusively in accordance with Directive 2010/75 on industrial emissions and with Regulation 1013/2016 regarding their trans-frontier movements (when the contaminated land is treated abroad).⁵⁸ That being said, the directives do cover a number of plants and installations that do not have any trans-frontier impacts, such as landfills.⁵⁹ By the same token, Directive 2007/60/EC on the assessment and management of flood risks is covering all types of floods irrespective of whether the river basin encompasses more than one Member State.⁶⁰

Secondly, given the significant discrepancies among the Member States regarding the stringency of their environmental policies, EU harmonisation ensures that a common playing field will apply in all Member States in a way that ensures a high level of environmental protection. In the absence of such a common regulatory approach, the efforts made by the most zealous Member

⁵⁵ Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725, para. 56.

⁵⁶ Case C-58/08 *Vodafone* [2010] ECR I-4999, paras. 77 and 78.

⁵⁷ Article 2(1) (b) and (c) Directive 2008/98. See also Case C-1/03 *van de Walle* [2004] ECR I-7613, annotated by N. de Sadeleer (2008)3 CMLR 16.

⁵⁸ Article 22 of Directive 2010/75/EU of 24 November 2010 on industrial emissions; and Regulation 1013/2016 on shipment of waste.

⁵⁹ Directive 1999/31/EC of 26 April 1999 on the *landfill* of waste.

⁶⁰ L. Krämer, EU Environmental Law, 8th ed. (Thomson, Sweet & Maxwell, 2016) 3.

States would easily be frustrated by the passivity of the others. This common playing field makes sense on the account that environmental policy entails significant costs. Accordingly, as a matter of solidarity, each Member State should commit itself to investing in environmental infrastructures (water treatment plants,⁶¹ waste treatment plants,⁶² etc.). Our view is that the absence of common standards amounts to a serious economic flaw. Tougher harmonised regulations on products, renewables, nature conservation and energy efficiency are not only good for the environment, but also for the competitiveness of the Member States economies. By the same token, several authorities complain that the Natura 2000 network hinders economic development, a statement that has never been supported by any serious economic studies. However, these criticisms are leaving aside the economic benefits – ecotourism, rural development and ecosystemic services, among others – of such a nature conservation policy. In order to be viable, tomorrow's economy should definitively be green.

Thirdly, given that the European Commission enjoys specific powers to require Member States to apply secondary law, the implementation of common environmental standards is likely to offer better protection for ecosystems than a highly variegated international law.

A fourth observation must be made. It is likely that unilateral measures would exacerbate the distortion of competition and create new barriers to free trade.

That being said, some environmental issues may also fall within the scope of an exclusive competence that is not subject to the principle of subsidiarity. In that connection, the opinion of the CJEU regarding a new generation trade agreement – the Free Trade Agreement between the EU and the Republic of Singapore – is a case in point. According to the Council and the 25 Member States which have submitted observations to the court, the provisions concerning environmental protection, set out in the envisaged free trade agreement, fell within the environmental competences shared between the EU and the Member States. However, the court took the opposite view: given that the parties are prohibited from applying measures adopted or maintained to implement a multilateral environmental agreement in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the parties or a disguised restriction on trade, the agreement at issue has 'direct and immediate effects on the trade' and consequently fell under the exclusive competence regarding the common commercial policy.⁶³

⁶¹ Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment.

⁶² Article 16(1) to (3), Directive 2008/98 on waste.

⁶³ Opinion 2/15 [2017] C:2017:376, para. 157.

4.2. AN EU ENVIRONMENT POLICY LEADING TO HARMONISATION OF NATIONAL PROCEDURAL AND SUBSTANTIVE STANDARDS

Driven by the fear of a disintegration of the internal market, concerns over portraying a less mercantile image of the EU, as well as the intention to safeguard ecosystems and species under threat, a European environmental policy has gradually emerged.⁶⁴

Starting from a range of action programmes, EU environmental law has progressively grown from a sparse set of directives to a vast body of regulatory measures aiming both to regulate the main forms of pollution as well as to protect the main ecosystems along with some of their composite elements. Today it is possible to count more than three hundred regulatory measures that are around 8 per cent of EU law. Several EU agencies, 27 Member States, three EFTA States, hundreds of regions and *länder* and thousands of municipalities now implement EU secondary environmental law through a complex web of regulations that affect virtually every aspect of our lives.

Neither Article 192 nor Article 114 TFEU specifies that a particular legal act should be used in order to harmonise environmental measures. Accordingly, environmental standards have been harmonised at EU level haphazardly by directives and regulations. As a matter of fact, in environmental matters there has always been a mismatch with traditional legal categories.

4.2.1. *Harmonisation through Regulations*

Regulations, which for a long time played a secondary role, have been privileged as a means of enhancing a level playing field for traders, in particular with regard to harmonisation of the placing of certain goods posing environmental and health risks on the market and control of the import, export or transfer of goods involving ecological risks (chemical products, GMOs, etc.). For instance, chemicals (REACH and CLP regulations), pesticides and GMOs have been harmonised thanks to the adoption of regulations. Given that these sectors are product-related, it comes as no surprise that the EU institutions have lately favoured regulations adopted pursuant to Article 114 TFEU. The preference for regulations based on Article 114 TFEU could be explained by the fact that the more flexible nature of a directive entails a genuine risk of market fragmentation.

Regulations have also been adopted under Article 192 TFEU with the aim of formalising voluntary forms of participation for businesses; see, for example, the regulations on eco-labels or on environmental audits and where it is necessary

⁶⁴ N. de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford, OUP, 2014), 175–233.

to implement obligations flowing from international agreements to which the EU is a party.⁶⁵ On occasion, a choice has been made, within the context of environmental policy, for regulations aiming to set out product standards or to ban the import of endangered species⁶⁶ or invasive species.⁶⁷ Moreover, in some cases directives are amended, or even completed, by regulations.⁶⁸ On the other hand, the EU lawmaker has never used regulations to ensure the protection of water or the air, or the regulation of noise.

In practice, these regulations encapsulate a number of provisions requesting Member States to take specific actions.⁶⁹ Where these regulations require Member States to establish enforcement agencies and to develop enforcement policy, they are not self-executing.

4.2.2. *Harmonisation through Directives*

Given the importance conferred on subsidiarity, directives – and more specifically, framework directives⁷⁰ – are deemed to be the spearhead of EU harmonisation. The provisions of these framework directives are generally worded in very general terms, whilst regulations may be extremely precise.⁷¹ By prescribing broad objectives but leaving the choice of implementation to Member State authorities, framework directives are well tailored to take into account the diversity of administrative and legal culture in the EU. In framing in fleeting terms the states' obligations to protect the ecosystems, these directives bear more

⁶⁵ Regulation (EC) No. 2037/2000 on substances that deplete the ozone layer, see earlier in this chapter; Regulation (EC) No. 1013/2006 on the shipment of waste, see earlier in this chapter; Regulation (EC) No. 338/97 on the protection of species of wild fauna and flora by regulating trade therein.

⁶⁶ Regulation (EEC) No. 348/81 on common rules for imports of whales or other cetacean products; Regulation (EEC) No. 3254/91 prohibiting the use of leghold traps in the EU; Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein.

⁶⁷ Regulation (EU) No 1143/2014 of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species.

⁶⁸ See Regulation (EC) No. 166/2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC [2006] OJ L33/1; Regulation (EC) No. 850/2004 on persistent organic pollutants and amending Directive 79/117/EEC [2004] OJ L158/1. See also Art 19(3) of Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the EU ([2003] OJ L275/32–46) empowering the European Commission to enact regulations.

⁶⁹ L. Krämer, 'On the Effectiveness of Monitoring the Application of EU Environmental Law' in *New Perspectives on Environmental Law in the 21st Century* (Barcelona, M. Pons, 2018) 15.

⁷⁰ Regarding the technique of environmental framework directives, see M. Bogaart, 'The Emergence of the Framework Directive in EU Environmental Policy', in M. Peeters and R. Uylenburg, *EU Environmental Legislation* (Cheltenham, Edward Elgar, 2015) 48–79.

⁷¹ See the degree of precision reached by Regulation (EC) No. 1013/2006 on the shipment of waste ([2006] OJ L190/1) and European Parliament and Council Regulation (EC) No. 2037/2000 on substances that deplete the ozone layer ([2000] OJ L244/1).

resemblance to declarations of intent. In so doing, the lawmaker increases the discretion of national authorities in the choice of form and appropriate means for implementing EU law. In tolerating – let alone encouraging – administrative diversity, many of these directives keep uniformity at bay.

Clearly, the extent of such discretion compounds the difficulties faced by the European Commission in verifying in accordance with Article 17 TEU the compliance of EU environmental law in Member States. To make matters more complex, the air, water, waste management and nature conservation policies are highly decentralised, since the control over implementation is left, by virtue of Article 192(4) TFEU, to the Member States. In particular, the enforcement of the EU harmonised measures is entirely left to the Member States.⁷² It follows that a decision as to whether to grant a license for operating a plant, to conduct an environmental impact assessment, to regulate waste streams or to prosecute environmental crimes are matters for national, regional and even to local authorities, not for the European Commission.

Accordingly, it is appropriate that the Member States establish control and oversight regimes in order to apply the policing measures associated with the conservation of environmental protection⁷³ and in order to punish infringements.⁷⁴ Given that the mechanics of enforcement diverge significantly among Member States, the adequacy of enforcement still remains a major issue. As the Guardian of the Treaties, the European Commission only exercises a relatively marginal control over the proper implementation of EU secondary law.⁷⁵

By the same token, the financing of environmental projects is, by virtue of Article 192(4) TFEU, also a matter for the Member States. Remarkably enough, although the social and economic pillars of sustainable development dispose of funds made available for these purposes,⁷⁶ the title dedicated to the environment does not make any provision for structural financing. Moreover, the significance of the socio-economic funds dwarfs the LIFE Programme that is deemed to be one of the spearheads of EU environmental funding.⁷⁷ Furthermore, other

⁷² Given the absence of genuine liability rules and legal remedies, private enforcement still is far less prominent.

⁷³ Recommendation 2001/331/EC of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States [2001] OJ L118/41.

⁷⁴ See Directive 2008/99/EC on the protection of the environment through criminal law. The Framework Decision was nullified in 2005 in Case C-176/03 *Commission v Council* [2005] ECR I-7879.

⁷⁵ Given that the Commission does not have investigative powers of its own in the environmental area, it is largely reliant on the information provided by complainants, by public or private bodies, by the press or by the Member State concerned. See Case C-494/01 *Commission v Ireland* [2005] ECR I-3331, para. 43, Case C-135/05 *Commission v Italy* [2007] ECR I-3475, para. 28; and Case C-297/08 *Commission v Italy* [2010] ECR I-1749, para. 101.

⁷⁶ Regulation (EC) 2012/2002 establishing the European Union Solidarity Fund [2002] OJ L311/3.

⁷⁷ Launched in 1992, Life has financed 3115 projects contributing in €2.2 billion to the protection of the environment. The latest Financial Instrument for the Environment (LIFE+)

programmes of importance to the protection of the natural environment depend on the willingness of the Member States to provide the matching funds. By way of illustration, although the contribution to the agro-environmental schemes provided under Regulation (EC) 1698/2005 on rural development may be as low as 15% – unlike the first pillar of the CAP, these schemes are subject to co-financing – this appears to be a sufficient deterrent for state financial intervention.⁷⁸

4.2.3. *Technical Directives Akin to Regulations*

Some directives are so precise and restrictive that they end up looking like regulations. This may be the case of the Emissions Trading System (ETS) Directive. The ETS was established by Directive 2003/87/EC. Constituting the *piece de résistance* of the EU's climate change policy, its main objective is to reduce GHGs in line with the commitments made by the EU and its Member States under the Kyoto Protocol, and lately under the Paris Agreement. Following its entry into force on 1 January 2005, the ETS was significantly amended⁷⁹ in 2004, in 2008, in 2009 and in 2018 – in particular in order to meet the political commitments made by the European Council. It has been gradually extended to 12,000 industrial plants as well as to airliners in relation to certain flights. The inclusion of aviation in ETS is deemed to be compatible with customary international law,⁸⁰ on the grounds that the EU and its Member States enjoy 'unlimited jurisdiction' over aircraft that are present with the territory of one Member State.⁸¹

Thanks to the ETS, the largest carbon market in the world has been created. It has subsequently been emulated both in China and in the USA. Harmonisation was justified on the one hand by the desire to coordinate the implementation of these international obligations and on the other hand out of concerns to avoid distortions of competition. The environmental objective of curbing GHG emissions stands alongside several ancillary objectives: 'sub-objectives of an economic nature'⁸² consisting of the maintenance of the 'cost-effective and economically efficient manner';⁸³ 'economic development and employment';⁸⁴

was adopted through Regulation (EC) 614/2007 concerning the Financial Instrument for the Environment (LIFE+) [2007] OJ L149/1. See Communication from the Commission, Mid-term review of the LIFE+ Regulation, COM(2010) 516 final.

⁷⁸ B. Jack, *Agriculture and EU Environmental Law* (Farnham, Ashgate, 2009).

⁷⁹ N. de Sadeleer, *Commentaire Mégret. Environnement et marché intérieur* (Brussels, ULB, 2010) 291–313.

⁸⁰ Case C-366/10 *ATAA* [2011] C:2011:864, para. 125.

⁸¹ *Ibid.* paras. 124 and 125.

⁸² Case T-178/05, *UK v. Commission* [2005] ECR II-4807, para. 60.

⁸³ Directive 2003/87/EC of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community, Article 1.

⁸⁴ *Ibid.* Preamble, 5th recital

and the presentation of the ‘integrity of the internal market’⁸⁵ and the maintenance of competitive conditions.⁸⁶ A particular effect of this economic logic is to ensure that reductions in GHG emissions occur at the lowest cost.⁸⁷

At the outset, the use of a directive in order to harmonise the area reflected the highly decentralised nature of the ETS from the start. In effect, within the ambit of the shared competence over environmental law, this instrument leaves a considerable margin of appreciation to the Member States, which should be assessed with reference to the principle of subsidiarity.⁸⁸ Accordingly, the Member States were charged with various tasks in relation to the organisation and control of this market.

Following the entry into force of the rules applicable to the third period (2013–2020) provided for under the amending Directive 2009/29/EC, the powers of the Member States have been restricted further. As it was necessary to reduce distortions of competition to a minimum, numerous aspects of the system are now governed by European Commission regulations. As a result, the ETS now oscillates between decentralisation and centralisation.

4.2.4. *Room for Manoeuvre Left by the Directives to the Member States*

Account must be made of the fact that the issue of harmonisation is more complex than just a matter of choice between Article 192 and 194 TFEU or other legal bases.⁸⁹ It is mostly the substantive content of the directives that determines the leeway left to the Member States in implementing their environmental obligations. The following cases illustrate the room for manoeuvre left to the state authorities in carrying out their environmental obligations.

4.3. THE BROAD DISCRETION GRANTED TO THE MEMBER STATES BY THE ENVIRONMENTAL DIRECTIVES

On the one hand, the CJEU is taking duly into account the discretion left to the national authorities by the recourse to framework directives. The following cases are testament to this judicial approach.

- The Court has, for example, held that when national courts review the legality of measures to combat agricultural pollution, they must take account of the discretionary power of the Member States, which is presupposed by the

⁸⁵ Preamble, 7th recital.

⁸⁶ Preamble, 7th recital.

⁸⁷ Case C-127/07 *Arcelor Atlantique et Lorraine* [2008] para. 32.

⁸⁸ Case T-374/07 *Germany v Commission* [2007] T:2007:147, paras. 78 and 79; Case T-374/07 *Estonia v Commission* ~~Estonia v Commission~~ [2009] para. 52.

⁸⁹ *D. Langlet and S. Mahmoudi*, *EU Environmental Law and Policy* (Oxford, OUP, 2016) 118.

complex nature of the assessments concerning the impact of the spreading of nitrates.⁹⁰

- Similarly, Member States are endowed with broad discretion when they are required to ensure that their land-use policies take into consideration the need to maintain appropriate distance between Seveso establishments and buildings for public use.⁹¹
- The Water Framework Directive (WFD) 2000/60 is also a case in point given that it does not seek to achieve complete harmonisation of the rules of the Member States concerning water.⁹² Accordingly, the Member States must be allowed a certain margin of discretion for determining whether the construction of a hydropower plant may in fact be an overriding public interest such that it could outweigh the preventive requirements of Article 4(7) of Directive 2000/60.⁹³ By the same token, the methods enabling the objective of ensuring that water-pricing policies provide adequate incentives for users to use water resources efficiently are left to the discretion of the national authorities.⁹⁴ Accordingly, the setting of the price of water services according to the volume of water actually consumed constitutes one of these methods. However, nothing in the WFD precludes that the water-pricing policy based on a price for water consumed by the users includes the costs of water distribution independent of their consumption.
- Regarding brownfields, it may be impossible to identify the polluter of a contaminated plot of land. Although Directive 2004/35/CE on environmental liability (ELD Directive) requires that a causal link exists between the operator and the damage, it does not preclude that national law could order the landowners to adopt preventive or remedial measures even when they are not the operator who had caused the damage.⁹⁵

4.4. THE NARROW DISCRETION STEMMING FROM A TELEOLOGICAL AND SYSTEMATIC INTERPRETATION OF THE ENVIRONMENTAL OBLIGATIONS

On the other hand, even though most of the obligations laid down in framework directives provide for relatively fuzzy obligations, the discretion stemming from these obligations is by no means unfettered. In a swathe of cases, the CJEU has

⁹⁰ Case C-293/97 *Standley* [2004] ECR I-2603, para. 37.

⁹¹ Case C-53/10 *Franz Mücksch* [2011] C:2011:585, paras. 40–1.

⁹² Case C-32/05 *Commission v Luxembourg* [2006] C:2006:749, para. 41; Case C-525/12 *Commission v Germany*, [2014] C:2014:2202, para. 50; and Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland*, [2015] C:2015:433, para. 34.

⁹³ Case C-346/14 *Commission v Austria* [2016] EU:C:2006:749, para. 70.

⁹⁴ Case C-686/15 *Vodoopskrba i odvodnja* [2016] C:2016:927, para. 21.

⁹⁵ Cases C-378/08, C-379/08 and C-380/08, *ERG* [2015] EU:C:2010:126, para. 63.

gradually been able to uncover their full potential, thanks to a teleological and systematic interpretation of these texts, thereby causing the objectives of nature conservation or the preservation of the environment to prevail over more literal interpretations. Accordingly, the purpose of the various directives at issue is the determining factor as to how to interpret the scope of complex technical concepts.

It is settled case law that given the aim of different directives to providing for a high level of protection of the environment, their provisions must be interpreted broadly. In particular, in an attempt to guarantee the effectiveness of the conservation regimes for vulnerable ecosystems, the CJEU has accordingly circumscribed the margin of appreciation of the national authorities in relation to the operations subject either to environmental impact assessments or to Strategic Environmental Assessments (SEAs), the designation of vulnerable areas, the qualification of waste and environmental information, as well as the quality of water bodies.

- As regards the interpretation of the scope of technical projects laid down in the annex of the EIA Directive, codified by Directive 2011/92/EU,⁹⁶ the CJEU held that ‘the purpose of the directive would be undermined if some projects could escape an environmental impact assessment, though they were likely to have significant effects on the environment’.⁹⁷
- Given the objective of SEA Directive 2001/42, which is to provide for a high level of protection of the environment, the provisions delimiting its scope must be interpreted broadly. It is settled case law that the Member States cannot exempt any plan or programme likely to have significant effects on the environment from the directive procedural requirements.⁹⁸ A regional regulation laying down the environmental requirements for the installation of wind turbines is subject to an SEA.⁹⁹

However, the SEA Directive authorises the Member States to exclude the plans and programmes determining the use of small areas at a local level provided that they have no significant effects on the environment.¹⁰⁰ Highlighting the aim of that directive of providing a high level of environmental protection, the CJEU held that a purely quantitative threshold regarding the size of the plan would lead, in practice, to exempting an entire class

⁹⁶ Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26/1.

⁹⁷ Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, para. 39; Opinion of AG Elmer in Case C-72/95 *Kraaijeveld* [1996] ECR I-5403.

⁹⁸ Case C-295/10 *Valčiukienė* [2011] C:2011:608, para. 53; Case C-567/10 *Inter-Environnement Bruxelles* [2015] C:2012:159, para. 37, and Case C-473/14 *Dimos Kropias Attikis* [2015] C:2015:582, para. 50; C-290/15 *d’Oultremont* [2016] C:2016:816, paras. 39 and 40.

⁹⁹ C-290/15 *d’Oultremont* [2016] C:2016:816, para. 54.

¹⁰⁰ Article 6(3).

of plans or programmes in advance from the requirement of environmental assessment. Small areas at the local level cannot thus be defined exclusively with reference to the size of the area concerned.¹⁰¹

Moreover, although that SEA Directive 2001/42 does not expressly apply to the repeal of a plan,¹⁰² the CJEU held in *Inter-Environnement Bruxelles* that the total or partial repeal of a plan or programme does fall within the scope of that directive. In effect, 'it is possible that the partial or total repeal of a plan or programme is likely to have significant effects on the environment'.¹⁰³ Lastly, Article 2(a) of the SEA Directive expressly includes within its scope measures modifying plans and programmes. Accordingly, a plan or programme that is intended to give more specific expression to and implement a master plan established by a hierarchically superior measure that has not itself been the subject of such an environmental assessment may not be exempted from the obligation to carry out an environmental assessment under SEA Directive 2001/42.¹⁰⁴

- With respect to natural habitats, the CJEU has interpreted rather strictly the obligations related to the designation of sites intended to guarantee the favourable conservation of habitats or endangered species, which must comply with scientific criteria.¹⁰⁵ A plan or project is subject to an impact assessment whenever the effects are deemed to be significant. The court held that it does not entail significant effect when 'it is considered not likely to adversely affect the integrity of the site concerned and consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2)'.¹⁰⁶
- By the same token, a somewhat strict interpretation applies to the designation of areas as vulnerable to pollution from nitrates of agricultural origin,¹⁰⁷ as well as the designation of bathing waters.¹⁰⁸
- Following the judgment in *Bund für Umwelt und Naturschutz Deutschland*, the Water Framework Directive (WFD) 2000/60 entails obligations that are more binding than any Member States really expected.¹⁰⁹ The Member

¹⁰¹ Case C-444/15 *Associazione Italia Nostra Onlus* [2016] C:2016:978.

¹⁰² The directive refers expressly not to repealing measures but only to measures modifying plans and programmes. See para. 36.

¹⁰³ Case C-567/10 *Inter-Environnement Bruxelles* [2015] C:2012:159, para. 38.

¹⁰⁴ Case C-473/14 *Dimos Kropias Attikis* [2015] C:2015:582, para. 59.

¹⁰⁵ *N. de Sadeleer and C.H. Born*, *Droit international et communautaire de la biodiversité* (Paris, Dalloz, 2002) 496–499.

¹⁰⁶ Case C-127/02 *Waddenzee*, para. 36.

¹⁰⁷ Case C-258/00 *Commission v France* [2002] ECR I-5959.

¹⁰⁸ Case C-56/90 *Commission v UK* [1993] ECR I-4109, case note (1993) 6:1 *JEL* 125.

¹⁰⁹ Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland eV* [2015] C:2015:43, paras. 50 and f. See *H. Van Rijswijk and C. Backes*, 'Ground Breaking Landmark Case on Environmental Quality Standards', 3–4 (2015) *JEEPL* 363–377.

States are called on to divide the ecological quality ratios (EQRs) for each surface water category into five different classes (high, good, moderate, poor and bad). Article 4(1)(a)(i) of Directive 2000/60 states that deterioration of the status of all bodies of surface water should be prevented. The CJEU interpreted the concept of ‘deterioration of the status’ of a body of surface water as not entailing a classification of that body of water in a lower class.¹¹⁰ Accordingly, the duty to prevent deterioration of the status of bodies of surface water applies whenever the body is deteriorated irrespective of any change of class. This obligation amounts thus to a standstill. Accordingly, the prohibition of deterioration of the quality of a water body is a binding requirement and not a political slogan.

- The CJEU has classified contaminated soils and polluted waters as waste where such matters appear by definition to be precluded from the scope of ambit of the waste framework directive.¹¹¹
- The right to obtain access to environmental information has been interpreted somewhat broadly by the CJEU. A Dutch association for the protection of bees had made a request, on the basis of Directive 2003/4 on access to information in environmental matters, to disclose the authorisations of several plant protection products and one biocide. Bayer, the holder of a large number of those authorisations, objected to that disclosure, on the ground that it would infringe copyright and adversely affect the confidentiality of commercial or industrial information. Under that directive, authorities may in principle refuse access to environmental information held by them in order to protect the confidentiality of commercial or industrial information, but they must nevertheless release information on emissions into the environment. The Dutch authority considered that a number of documents (laboratory studies, field studies, experiments conducted on the effects of the substance on bees, etc.) did not relate to ‘information on emissions into the environment’ within the meaning of the second subparagraph of Article 4(2). It took the view that from the legislative history of the directive, it could be inferred that the emissions clause does not cover ‘discharges or other releases of substances into the environment’.¹¹² However, endorsing a broad interpretation of the notion of ‘emissions’, the CJEU dismissed that interpretation. First, it held that no distinction must be made between ‘emissions into the environment’

¹¹⁰ Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland* [2015] EU:C:2015:433, para. 55.

¹¹¹ Case C-1/03 *Van De Walle* [2004] ECR I-7613, case note (2006) 43 *CMLR* 207–223; and Case C-252/05 *Thames Water Utilities* [2007] ECR I-3883, para. 27.

¹¹² Opinion Kokott in C-442/14 *Bayer CropScience and Stichting De Bijenstichting* [2016] C:2016:213, para. 55.

within the meaning of Article 4(2) and ‘discharges’ and ‘releases’.¹¹³ Nor should the concept of ‘emissions’ be restricted to emissions emanating from certain industrial installations covered by Directive 2010/75.¹¹⁴

- Finally, the Court has made adjustments to theories on direct effect¹¹⁵ and consistent interpretation.¹¹⁶

To sum up, one is driven to the conclusion that the CJEU has narrowly interpreted the Member States’ room for manoeuvre. The stage is therefore set for the CJEU to play the role of a counterweight: the low level of binding force of the EU legal arrangements has been compensated for by the *effet utile* of the directive. It is significant that Member States adopt and implement salient regulatory measures with a view to achieving the environmental goals set forth by the various environmental directives.

5. CONCLUSION

Painting a portrait of EU environmental law is certainly a challenge. However, at this stage of our reflections we may nevertheless sketch out a few observations.

An initial observation points to the disparate nature of this area of law. This brief overview of the EU regulations and directives has given us the impression of a largely unfinished edifice, consisting of an array of disparate rules, scattered around within different sectoral regimes and with legislation varying widely between them.

This ‘Balkanisation’ of secondary law is a result both of the variety of legal bases as well as the diverse nature of harmonisation measures. Whereas the majority of environmental directives protecting ecosystems or regulating certain types of pollution relied on Article 192 TFEU, Article 114 is the legal basis of regulations governing the placing on the market of products or substances which are harmful to the environment. There is no doubt that as a result of the unadventurous nature of the EU policy, certain matters fall within the purview of subsidiarity (listed installations, quality objectives for different ecosystems ...), whilst other sectors have been almost completely harmonised (movement of waste, restrictions on the placing on the market or use of chemical substances).

A third point which needs to be made is that the harmonisation of the majority of the subject matters is still incomplete. In fact, unlike the Member

¹¹³ Case C-442/14 *Bayer CropScience and Stichting De Bijenstichting* [2016] C:2016:889, para 63.

¹¹⁴ Para. 71.

¹¹⁵ Case C-72/95 *Kraaijeveld* [1996] ECR I-5403; Case C-201/02 *Wells* [2004] ECR I-723, para. 67; and Case C-97/11 *Amia SpA*, above, paras. 34–35.

¹¹⁶ Case C-97/11 *Amia SpA* [2012] C:2012:306, paras. 29–30.

States, the EU is not capable of regulating everything, nor does it seek to be able to do so. The obligation to comply with the principle of subsidiarity prevents the European Union lawmakers from harmonising in areas of law where the Member States are better placed to enact legislation (mobile telephones, nuisances created by small industrial facilities, town planning, etc.). The very nature of harmonisation is thus flexible.

As far as the most advanced Member States are concerned, this policy is not particularly innovative, given that it generally limits itself to incorporating the *acquis* of the best. However, for a number of southern and central European countries, this policy has obliged them to overhaul their legal regimes in order to afford better protection to their environment.

As a result of the tangled web of contradictory rules, which is riddled with ambiguities, the EU courts are not only the guardians of the temple of law, but they have also turned into the architect. In effect, the increasingly frequent recourse by the EU lawmaker to catchall formulae can account for the growing importance of preliminary references pursuant to Article 267 TFEU.

Last but not least, in spite of the accumulation of directives and regulations, along with the resulting national rules, the pressure on ecosystems continues to grow, natural spaces have been seriously diminished, species are disappearing at a worrying rate, chemical substances are continuing to accumulate and the coasts are ever more smothered with concrete, *inter alia*. The gap between the rules and the problems, which the law is supposed to regulate, has never been so marked.