

High Level of (Environmental) Protection

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A. Introduction

1 Since Ursula von der Leyen's presidency of the European Commission, the European Union (EU) strives to achieve a 'Green Deal'. It wants to be the first climate-neutral continent. It has decided to make the EU's climate, energy, transport, and taxation policies fit for reducing net greenhouse gas emissions by at least 55% by 2030, compared to 1990 levels (European Commission, *The European Green Deal*, 2019). It also displays the ambition of a zero pollution by 2030 (European Commission, *Towards Zero Pollution*, 2021). The concrete policy, legislative, and regulated proposals needed to flesh out these visionary perspectives, must all take place in due respect of the current requisites of primary law in the EU.

2 For over three decades, EU primary law assigns an explicit ambition to Union policy with regard to the environment: a 'high level of protection'. This is for instance reflected in Article 3(3) of the Treaty on European Union (TEU), which is highlighted by the Court of Justice of the European Union (CJEU) as providing that the EU works in particular for a high level of protection and improvement of the quality of the environment (*Nostra Onlus*, para. 42; *Windmills Aalter*, para. 47). The notion is likewise explicitly anchored in Article 114 of the Treaty on the Functioning of the European Union (TFEU), in Article 191 TFEU and in Article 37 of the Charter of Fundamental Rights of the European Union ('Charter'). The aim of a 'high level of protection' is not the exclusive attribute of the environmental competences of the European Union. It is also an explicit feature of the public health chapter (Article 168 TFEU, Article 35 of the Charter) and of consumer protection attributions (Article 169 TFEU, Article 38 of the Charter) under EU primary law.

3 Assigning an explicit ambition to the environment policy generally happens in legal orders via specific mentions in constitutions, where existing, by proclaiming a right to a healthy environment or by imposing graduated positive obligations on public authorities. This second option is found in primary law through the use of an uncommon concept, when compared to global environmental policies, even if trade agreements contain provisions discussing levels of protection. The need to pursue and even achieve a high level of protection is indeed an original feature of EU law. It finds its origin in a defensive attitude to the integration process.

4 The present entry is dedicated to the high level of protection ('HLP') requisite under EU law in environmental matters and health-related fields. It presents its genesis, its legal bases, and how it is interpreted. It discusses its current status and shows its implications for EU law and policy, including in its implementation phase by EU institutions or Member States. It demonstrates that asserting such meta-aim can advance the effectiveness of environmental law and plays a role in judicial review. It highlights indicators on what the high level of environmental protection requirement currently means and entails.

B. Genesis

5 The wording of 'a high level of protection' entered into primary law with an amendment to the Single Act (1986), as a defensive reaction to European integration, in the internal market Chapter. The novel idea was that the European Commission, in its legislative proposals aimed at favouring the completion of the internal market and concerning health, safety, environmental, and consumer protection, will take as a base 'a high level of protection'. Concerns were raised that the approximation of laws meant to accelerate the internal market (maximal harmonization), based on a qualified majority quorum (depriving Member States of their former veto power), could lead to lower environmental protection. Similarly, it was a change of the voting quorum from unanimity to qualified majority during the 1992 Maastricht reforms that triggered the insertion of the reference to a 'high level of protection' in the TEU chapter dedicated to environmental policy, not any more as a mere

baseline but as a specific aim for the whole action. The context of the early 1990s, influenced by the 1992 Rio Earth Summit, was favourable to a strengthening of the environmental dimension of the European treaties.

6 The mention consolidated and disseminated afterwards across the main primary law provisions governing Union policy on the environment. It even settled in chapters dedicated to public health and consumer protection. It is closely linked, especially since the entry into force of the Charter of Fundamental Rights, to the transversal integration principle. Through Article 11 TFEU and Article 37 of the Charter, it now expands to all Union policies, including the EU's relations with the wider world.

C. Legal Bases and Scope in Primary Law

7 The provisions referring to a high level of protection of the environment are not to be interpreted or examined independently of each other, according to Advocate General Kokott (opinion in *Nostra Onlus*, para. 25). 'On the contrary, 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', she says. This is an important and relevant assertion as, despite nuances and variations between how the notion is inserted in the various legal bases, its interpretation in case law is not strictly framed by the distinct, very precise wording but tend to extrapolate a more transversal approach. On the effect of Article 37 of the Charter ('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'), the CJEU confirmed that it must be exercised under the conditions and within the limits defined by the Treaties, referring in that regard to Article 3(3) TEU and Articles 11 and 191 TFEU (*Nostra Onlus*, para. 62).

8 With the integration clauses, like Article 11 TFEU ('Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development') and Article 37 of the Charter, the requisite of a high level of environmental protection extends to legislation based upon all legal bases and even all EU (funding) treaties, like the Euratom Treaty (*Austria v Commission (Hinckley)*) dedicated to civil nuclear activities.

9 As to the specific wording in various legal bases, the TFEU's environmental chapter mentions that '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' (Art. 191(2) TFEU). In the internal market chapter dedicated to maximal harmonization, Article 114(3) TFEU mentions that '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'.

10 The European Court of Justice's mandate includes the verification of the use of the correct legal basis. In that regard, it is noteworthy that the Court used the HLP requirement at an early stage to confirm the legality of choosing Article 114 TFEU on the approximation of laws (formerly Article 100A EC Treaty ('EC')) over Article 191 TFEU (formerly Article 130R EC) on environmental matters. Because Article 114 TFEU refers to the need to take as a basis a high level of protection, the Court decided that it 'expressly indicated' that the objectives of environmental protection referred to in the environmental chapter may be effectively pursued by means of harmonizing measures adopted on the

alternative legal basis (*Commission v Council*, para. 24). The Court further exploited the potential of the HLP requirement to comfort the legality of maximal harmonization measures in health-related matters, for which the EU competence is in principle only ranked as a complementary competence. Taking advantage of the integration principle, as expressed in the health policy chapter this time, 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, it read Article 114 TFEU expansively and asserted that the article *explicitly* requires that a high level of protection of human health ‘is to be ensured’ or ‘should be guaranteed’ in achieving harmonization (*British American Tobacco*, para. 62), while this is actually not the exact wording of the Treaty. The Court considered 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 proposals based on Article 114 encompass that dimension just as one can accept the possibility of harmonization in health-related areas.

D. Presence in Secondary Law

11 Many legislative acts contain black and white letter mentions of the aim of a high level of protection. They even apply the objective to new fields, like animal health. Where not explicitly mentioned in the preamble or provision of a legislative act, the CJEU tend to recall that a high level of protection constitutes the ‘more general objective’ of secondary law (*Bia&Istrokeowieża Forest*, para. 106) or that a directive comes within the framework provided for both in Article 3 TEU and in Article 37 of the Charter, provisions according to which, in essence, the European Union is to work for sustainable development and ensure a high level of protection of the environment (*One voice*, para. 60). Such reference helps the justification of a strict content and contributes to explain the *ratio legis* of severe obligations imposed on Member States.

E. A Special and Hybrid Status

12 The status of the HLP requirement is still slightly unclear. The reference to a high level of protection of the environment, as found in the environmental chapter, has recently soberly been summarized by the CJEU as ‘the principle of protection of the environment’ (*Austria v Commission (Hinckley)*). It has already been referred to as the ‘common principle of a high level of environmental protection’ (opinion in *Nostra Onlus*, para. 25) or as ‘the principle that a high level of protection should be ensured’ (*Paraquat*, para. 262).

13 One can consider that the HLP has indeed progressively become a core principle of EU environmental law and policy, but there is more to it. Interestingly, in the environmental chapter, the HLP is the *raison d’être* of EU policy on the environment, while the principles of prevention, precaution, correction by priority at source, and polluter-pays are its necessary foundations. The CJEU confirms this when describing the precautionary principle as ‘one of the foundations of the high level of protection pursued by Community policy on the environment’ (*Waddenzee*, para. 44). Likewise, complying with the precautionary principle is a necessity in order to ensure a high level of protection of human health (*Blaise*, paras 41 and 42), in environmental-related matters like pesticides. In Article 191(2) TFEU, the goal of Union policy on the environment is thus articulated to the listed principles but occupies, at least formally, a different position. It is for instance described since long as a “requirement” of the Treaty (*Safety Hi-Tech*, para. 47–48).

14 Although precaution and the HLP requirement both deal with ambition—the level of protection to be pursued—precaution under EU law always implies situations where risks and uncertainty are combined. This is not intrinsic to the HLP requirement. The peculiarity of HLP lies in its bold questioning of the ambition as such, with no necessary link to issues of scientific uncertainty.

15 In Article 37 of the Charter, there is no mention of any right to a high level of environmental protection. However, in that regard, it must be pointed out that the Court now interprets Article 37 of the Charter in the light Article 52(2) of the Charter, which ‘provides that *rights* recognised by the Charter for which provision is made in the Treaties are to be exercised under the conditions and within the limits defined by those Treaties’ (*Nostra Onlus*, paras 61–62 – Emphasis added). In *Nostra Onlus*, the CJEU, by referring to Article 52(2) and not to Article 52(5) of the Charter, thus interprets Article 37 in a way that not only blurs the differences between rights and principles under the Charter but also refrains from diluting the related obligations under the TEU and TFEU.

16 The HLP presents also the quite unique and remarkable characteristic of being an aim, an objective, or a goal, either at meta level (primary law) or at a lower level (as indicated in legislation). This can have several impacts in law. An aim for its own sake contributes to provide clarity and firmness in interpretations (*GSMB Invest*, para 68). It can also ease justifications with regard to the proportionality principle, would questions arise about the content of a legal regime. Indeed, settled case law affirms that the principle of proportionality requires that EU measures do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; where there is a choice between several appropriate measures, one must resort to the least onerous one, and disadvantages must not be disproportionate to the aims pursued. Francis Jacobs considered 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’ (Jacobs).

17 Strangely enough, the importance given by primary law to the HLP requirement or principle is often obscured, or even invisible, in the legislative process and still not openly taken into account. It is not formally highlighted as an autonomous criterium in the content of legislative impact assessment processes documents. However, it is found under the proportionality heading and, more recently, also under the fundamental rights heading. For instance, the commission proposal for a new legislation on nature restauration ‘contributes to the right to a high level of protection’, by reference to Article 37 of the Charter (European Commission, Proposal for a Nature Restoration Law). Or, the proposal for a recast of the CAFE Directive (European Commission, Proposal for a directive on ambient air quality and cleaner air for Europe (recast)).

respects fundamental rights and observes the principles recognised in particular by the EU Charter of Fundamental Rights. This proposal sets out to avoid, prevent and reduce harmful effects on human health and the environment from air pollution, in line with Article 191(1) of the TFEU. It thus seeks to integrate into EU policies a high level of environmental protection and improvement in the quality of the environment in accordance with the principle of sustainable development laid down in Article 37 of the EU Charter of Fundamental Rights. It also puts into concrete terms the obligation to protect the right to life and to the integrity of the person laid down in Articles 2 and 3 of the Charter.

F. Strength

18 The strength and particularity of the HLP requirement lies primarily in its phrasing as an ambitious objective. It reinforces the importance that primary law attaches to environmental protection, as an aim of general interest capable of imposing restrictions on other interests or rights, while not being the sole aim to be pursued or taken into consideration in society.

19 In a number of seminal cases addressing the question of a potential direct effect of Article 191(2) TFEU on Member States action, in relation to the polluter-pays principle, the CJEU keeps asserting that the whole provision ‘thus does no more than define the general environmental objectives of the European Union’ (*ERG and others*, para. 38, at the inspiration of a pre-Lisbon jurisprudence, referring to *Peralta*). This is because, in relation to the environmental competence, the Court says, Article 192 TFEU confers on the European Parliament and the Council of the European Union, acting in accordance with the ordinary legislative procedure, responsibility for deciding what action is to be taken in order to attain those objectives. The lawmaker must thus flesh out what such a high level shall concretely be, in due regard of other legitimate interests. Altogether, it is made clear by the same Court that ‘it is undisputed that Article 191(2) TFEU requires EU policy in environmental matters to aim for a high level of protection’ (*Nostra Onlus*, para. 44). The CJEU also interprets the integration principle laid down at Article 11 TFEU as an obligation (*E.ON Biofor*, para. 48, referring to *Opinion 2/15*, para. 146).

20 The implication of the high level of protection is today potentially far reaching for European Union institutions. For AG Kokott,

[Although] Article 191(2) TFEU *obliges* the European Union to ensure a high level of protection when exercising powers under environmental law, Article 11 TFEU *further requires* that environmental protection requirements be integrated into the definition and implementation of the EU policies. Furthermore, Article 37 of the Charter of Fundamental Rights, with which the European Union *must always comply*, requires that a high level of environmental protection and the improvement of the quality of the environment be integrated into the policies of the European Union. Therefore, compliance with EU environmental law is incumbent on all its institutions and bodies, irrespective of whether powers under environmental law are exercised [emphasis added] (opinion in *EIB v ClientEarth*, para. 110).

G. Judicial Review of EU Acts

21 In environmental- and health-related issues, and similarly in agricultural matters, the EU legislature is allowed a broad discretion in an area that has always been described as entailing complex political, economic, and social choices. Therefore, when confronted to questions on the legality of a level of protection chosen by the EU legislator, judicial control restricts to a search for manifest errors of appraisal. The potential is limited but there are nuances to consider, depending upon the kind of act.

22 Challenging the level of protection of the environment in a secondary legislation adopted by the European Council and the Parliament on basis of the environmental chapter (Article 192 TFEU) is difficult, for the ECJ considers Member States have a large margin of appreciation and are anyway allowed to maintain or introduce more stringent protective measures based on Article 193 TFEU (*Safety Hi-Tech*, para. 49; *Bettati*, para. 47). That specific environmental chapter creates a ‘system’ for achieving the target of the policy by combining, on the one hand, the minimal protection which the harmonized rule has crystallized, and, on the other hand, the opportunity left to Member States to reinforce that protection. It explains why the Court once decided, in a situation where legislation did not

ban all ozone-depleting substances, that the required level does not necessarily have to be the highest that is technically possible (*Safety Hi-Tech*, para. 49; *Bettati*, para. 47). In this manner, the Court avoided a sword of Damocles that might have jeopardized any EU legislation that does not meet the most stringent standards. That original sentence, however, tends to be (mis)interpreted as an invitation to downgrade an ambition, when faced to various alternatives, if the precision ‘not necessarily’ is forgotten. There is also no clear conceptualization yet of what ‘un-high’ might mean in that context. Evidence that the level of protection is lower than that provided by internationally agreed common obligations might convince the Court (by analogy to the cases *Safety High-Tech* and *Bettati*). Indicators are emerging from case law, also potentially from other fields, like when EU legislation does not provide any improvement at the scale of the Union (*Germany v Parliament*, para. 48, on consumer protection, where one can also read that the legislature is not obliged to adopt the highest level which can be found in a particular Member State). The requirement could form a relevant basis for a future non-regression principle under EU environmental law.

23 Challenging the level of protection of the environment in a secondary legislation adopted by the European Council and the Parliament on the basis of the internal market chapter (Article 114 TFEU) offers more possibilities as, precisely, an enhancement of the level of protection at Member level is not systematically admissible and, moreover, a certain ambition must be met when health-related issues are concerned. Generalizing the lowest level of protection or adopting a standard that would result in a drastic reduction in protection at EU level may well be an indicator of error of appraisal. Admittedly, this would impact only on the most obvious situations.

24 Much easier is the possibility for the judiciary to control acts adopted by the European Commission. The aim of a high level of protection plays a role in distinguishing essential from non-essential elements of legislative acts, with implications on the admissibility of delegations (*Parliament v Council*, para. 31) or on its exercise of executory powers, such as the very need to adopt delegated acts (*Sweden v Commission*, para. 72) or on the allowance of exemptions, even without it being necessary to rule on the extent of the Commission’s discretion (*Parliament and Denmark v Commission*, para. 75). The conditions laid down by the Community legislature must be strictly interpreted due to the objectives being pursued, a high level of environmental protection, possibly combined with a same requisite on health protection, in matters like chemicals, phytosanitary products, or biocides. The General Court annulled a Commission Directive because the principle that a high level of protection should be ensured had been substantially breached (*Paraquat*, para. 262).

25 Implementing regulations are also assessed by the Court in the light of the HLP that is sought by the European Union, in order to confirm they meet the objective of the main legislative act, in particular to ensure a high level of protection of human and animal health and the environment (*Pan v Belgium*, para. 46).

H. Judicial Review of Member States Acts

26 The need to meet a high level of protection of the environment acts as an interpretation tool of EU legislation and regulations. While broadly open to the EU legislature, the margin of discretion reduces dramatically afterwards, when Member States are faced with the need to comply with EU secondary law as it stands. Even if a directive allows the Member States a certain latitude as regards the precise methods of implementing its requirements, Member States are, in all circumstances, obliged to ensure that the objectives of the EU legislation, and consequently the objectives of European Union policy in the area of the environment, are achieved (*Commission v France*, para. 30; *Wasserleitungsverband*, para. 54). Regulation and directives based on the Environmental Chapter of the TFEU must be interpreted according to the regulation or directive’s more general objective, which is to

ensure a high level of environmental protection (*Sweetman and Others; Lesoochranárske zoskupenie VLK*, para. 43; *Białostockie Lasy Forest*). The purpose of a directive on the environment comes within the framework established by Article 37 of the Charter of Fundamental Rights of the European Union, says the Court (*Windmills Aalter*, para. 44).

27 As a consequence, the HLP requirement decisively helps to fend off attempts to dilute the stringency of EU requirements. It sustains many interpretations towards stricter protection—and less leniency on derogations—or broader scope of application ('the SEA directive must be interpreted broadly', *D'Oultremont and Others*, 2016). It also helps giving concrete flesh to what a EU legislation truly means, like when the Court decides that the Union objective to promote a high level of protection and improvement of the quality of the environment, in the light of which a EU regulation must be interpreted 'might be undermined if the competent authority of dispatch were prevented from relying on its own standards, representing a high level of environmental protection, and from opposing consequently a shipment of waste the conditions of recovery for which in the State of destination could harm human health or the environment' (*EU-Wood-Trading*, para. 47).

28 The HLP requirement, combined with the precautionary principle, is a key argument in finding that a national decision might be illegal in the light of EU law, as the provisions governing authorisations—at Member State level—must ensure a high standard of protection, with the consequence that, when granting authorizations of plant protection products, the objective of protecting human and animal health and the environment should 'take priority' over the objective of improving plant production (*Pan v Belgium*, para. 46). If Article 53(1) Regulation No 1107/2009 were to be interpreted as authorizing the placing on the market and use of seeds treated with plant protection products, even though that placing on the market and use have been expressly prohibited following evaluation by the European Food Safety Authority, such an interpretation would, first, run counter to the objective of that regulation—pursuing a high level of protection of human and animal health and the environment. Secondly, that interpretation would give priority to improving plant production over the prevention of risks to human and animal health and the environment which the use of seeds treated with plant protection products—the harmfulness of which has been proved—could entail, contrary again to the need to ensure a high level of protection.

29 The importance of meeting the HLP aim of a given legislation also bears upon the principle of effective judicial protection under Article 47 of the Charter, in combination to the Aarhus Convention, for instance on the need to open administrative procedures to associations (*Lesoochranárske zoskupenie VLK*, para. 70).

30 However, outside environment and health-related matters, especially in the field of consumer protection (Misonne, 2011), the CJEU does not welcome attempts made by Member States to reinforce the level of protection on their own territory, where that level is settled in fully harmonized EU rules with no derogation clauses. Member States will argue to no avail that they merely wanted to achieve a higher level of consumer protection (*VTA-VAB Galatea*, para. 52), except where the very text of the harmonized legislative act explicitly foresees that they may adopt or maintain in force more stringent provisions in order to ensure an even higher level of consumer protection (*Quelle*, para. 36).

31 A prospective avenue is the role the general objective of a high level of protection could play in the future in relation to Member States policies, in particular on basis of Article 3 TEU or of the integration clauses, in situations where national measures impact the free movement of goods in health and environment-related matters. AG Bot saw a new opportunity to acknowledge the prominent place of environmental protection within the legal order of the European (opinion in *Essent*, para. 95). In a situation where a Member

State acted in a complementary way to the REACH Regulation, the Court held that the objective pursued at national level, 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' (*Canadian Oil*, para. 46).

I. Overview

32 There is more to discover than meets the eyes on the importance and impact of the high level of protection 'principle' as established under EU primary law, as far as environmental stakes, which are found in most EU policies, are concerned. The requirement is becoming stronger and stronger across the years due to the advances of case-law. It bears upon the acts of both EU institutions and, even if a less direct way, Member States, and still promises new developments, especially in a time of planetary crises on climate change, biodiversity loss, and excessive pollution.

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