AN INTRODUCTION TO HEALTH, ENVIRONMENT AND CONSUMERS EU POLICIES

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INTRODUCTION

The aim of the course is to analyse the origins and the scope of the environmental protection, consumers and public health policies in the EU legal order and the ways in which these three policies interact. In so doing, we shall place much emphasis on the precautionary principle that straddles these three EU policies. Accordingly, the course highlights the similarities and the differences of these three policies, both as regard the rules of primary law (TFEU) and secondary law (directives, regulations).

With respect to the exam, you have to take:

a) the annex with the relevant TEU and TFEU provisions
b) the case law
c) an English dictionary

You will have to resolve a case regarding the management of a specific risk by the EU institutions. You are call on to use the theoretical developments below as well as other documents to resolve the case. You are also called on to invoke the relevant treaty provisions discussed below. You don't have to learn the footnotes. You have to understand the theoretical developments.

You will have to be precise, systematic, and innovative.

The exam shall last 1,30 h.

TITLE I. LINKAGES BETWEEN THE THREE POLICIES

SECTION I. DIFFERENCES BETWEEN THE THREE POLICIES

Disparity between the movements of environmental protection and the defence of the consumers

At first sight, the objectives pursued by each of these three EU policies do not overlap.

The environmental protection pursues the preservation of an object: the natural environment, including the living and not living components, as well as the place of man.

The protection of the consumers pursues the protection of a subject: the consumers, in particular their economic, sanitary interests, …

Moreover, environmental protection benefited:

on the one hand, of the intervention of local, regional, national and international NGOs which widely contributed to promote this imperative at the political level;

on the other, of the emergence of green political parties which took part in various national governments (France, Germany, Belgium, Finland).

In contrast, consumers' protection did not always reach the general public. The organizations of protection of the consumers hardly aroused the interest of the population, though citizens consider themselves as consumers.

In addition, the movement of the consumers did not receive a political echo comparable to that of the environmentalist movement.

The implementation of a single policy is made to the detriment of the other one

On the one hand, consumers benefit indisputably from environmental measures carried out by public authorities with a view to protecting the environment. On the other hand, consumers' needs increase pressures on the environment.

Accordingly, the consumption can be perceived has having unfavourable repercussions on the environment. Indeed, the consumers try generally to obtain the lower price and to be able to choose between a wide range of products and services.

Thanks to the internal market, the reduction in prices of goods and services led to an important increase of their consumption. As a result, the pressures on the environment (characterized by air transports, road transports, purchase of a greater amount of

cheaper goods) increased.

For instance, the variety of products and packaging makes more difficult the implementation of policies of re-use of packaging.

So far, purchases based exclusively on environmental criteria cover only a restricted part of the market.

Therefore, consumers tend to have a dim view of the integration of environmental concerns. By way of illustration, by virtue of the directive 2000/ 60/EC establishing a framework for the water policy, the costs of water treatment, must be transferred to the consumers by virtue of a principle cost-truth. Therefore, the environmental water policy leads to an increase of water pricing. Similarly, products conceived from environmentally-friendly techniques (organic farming) turn out to be more expensive.

Consequently, the environmental rules can, on one hand, increase the costs of products and services and, on the other hand, limit consumer's freedom of choice.

Besides, the pursuit of genuine sanitary objectives (drying out of marshlands, use of the DTT in Africa) can be made to the detriment of ecosystems.

SECTION II. CONVERGENCES BETWEEN THE POLICIES OF ENVIRONMENTAL PROTECTION, CONSUMERS AND THE PUBLIC HEALTH

A common feature: the conservation of certain values against the excesses of the market

As far as the ecological values and the aspects health / consumption constitute generally non-mercantile values conflicting with the internal market rules, each of these three policies try to put an end to the imbalance with economic integration requirements.

Under EU law, these three policies developed in a defensive way with regard to the economic freedoms (free movement of services and goods) enshrined in the TFEU. These policies thus appear in counterpoint with regard to that of the internal market. This explains that in particular that the national policies can be justified in accordance with several grounds of justification listed under Article 36 TFEU (as regards the health), or stemming from the case law *Cassis de Dijon*.

1. Integration of environmental concerns in consumer policy

A number of consumers consider that the quality of products also incorporates considerations of social or environmental nature. As a result, the quality of the product does not amount any more only to a question of affordable price. The notion of

sustainable consumption suggests a new relationship between consumers and the goods and services they purchase. Developments can be noted in a number of areas (ecological label, ecodesign, organic products).

2. Integration of health concerns in environmental policy

The improvement of the quality of the environment contributes generally to the improvement of the public health (regulation of garbage, limitation of carcinogenic substances, reduction of exposure to hazardous products,..). For instance, the regulations on dangerous substances are setting out protection standards for workers, consumers and the natural environment against the toxic, bioacumulative effects of these substances.

So the quality of life of the consumer depends on the protection of a healthy environment. A safe product is deemed to be a product that does not provoke too many nuisances.

The environmental protection can promote the health and the safety of the consumers.

Certain protective environmental measures, such as the bathing water directive or the water quality directive, aim at improving public health.

Other protective measures of the environment contribute indirectly to the improvement of the public health. It is the case of rules enacted with the aim of insuring a risk free management of waste.

A. Transversal approach in the TFEU

The convergences appear in various provisions of the TFEU which calls upon the institutions of the EU to integrate various concerns in the definition and the implementation of all other policies:

1. Environmental Policy (article 11 TFEU)

2. Consumer Policy (article 169 TFEU)

3. Culture (article 166 TFEU)

4. Health Policy (article 168 TFEU)

Accordingly, EU institutions are bound by a principle of *transversalité*. In other words, they have to take into account a flurry of concerns when they carry out their policies.

TITLE II
TRANSVERSALITY OF ENVIRONMENTAL CONCERNS WITHIN EU PRIMARY LAW

Whilst environmental protection is not a recent concern, it has taken on over recent years a renewed intensity, characterised by the urgent need to find universal solutions to global warming, the erosion of biodiversity as well as the depletion of natural resources. The interest pursued undoubtedly springs from the fact that the situation has become in many respects alarming and risks worsening if no ambitious action is undertaken.

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 thus gradually emerged. 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 treaties. Henceforth, environmental protection is not only a core objective of the EU, it has also been placed on equal footing with economic growth and the internal market. As far as secondary law is concerned, environmental issues also made headway. At first an obscure field in the nineteen seventies, and having long remained the preserve of engineers and biologists, this policy and the law which it gave rise to have ended up asserting themselves both on public and private actors. 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 is around 8 % of EU law.1 Several EU agencies, twenty seven Member States, three EFTA States, hundreds of Regions and Länder, thousands of municipalities now implement EU secondary environmental law through a complex web of regulations that affect virtually every aspect of our life's.

Thanks to EU environmental law, much has been achieved over these last thirty year: 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, reduction of acidification, improvement of some aspects of air quality.[2] These significant progresses demonstrate that environmental policy and law work. Even though recent years have seen a decline in legally binding instruments in favour of "voluntary" agreements and the abandonment of a sectoral approach in favour of a more global dimension, EU environmental law should continue to play a significant role in the

[1] Given that the scope of the environmental policy is dogged with controversies, the precise number cannot be precisely determined. According to the Directory of EU legislation in force, on the 1st of September 2010, they were 113 regulatory acts regulating directly chemicals, 365 acts adressing the wider area of pollution and nuisances and a total number of 1321 covering the broader environmental realm. See also L. Krämer, 'Thirty Years of EC Environmental Law : Perspectives and Prospectives' (2002)2 *Yb Eu EnvL* 160.

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

course of this century.

However, despite the progresses that were made, the results of this policy have at the very least been muted.[3] EU environmental and national policies are still facing a daunting agenda of unfinished business [4] as well as a swathe of new challenges. By way of illustration, air pollution still reduces significantly 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. [7] As regard new challenges, the most pressing one 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 century[8] is unlikely to be met, in part because of greenhouse gas emissions from other parts of the world.[9] A closer look at greenhouse gas emissions within EU reveals mixed trends: whereas emissions from large point sources have been reduced, at the same time emissions from some mobile and/or diffuse sources, especially those transport-related, have increased substantially. [10] To make matters worse, every step forward (such as reductions in industrial pollution) appears to be cancelled out by the appearance of new phenomena (mass consumption, more diffuse source of pollution proving more difficult to control) or unforeseen risks (biotechnology, nanotechnology, endocrine disruptors).

With the entry into force of the Treaty of Lisbon on the 1st of December 2009, environmental issues are not only cutting across traditional boundaries of other disciplines. They are also entangled with other non-tradable interests, such as consumers and health concerns, which have been gathering momentum in EU treaty law. These student materials will thus consider the place occupied by a broad range of objectives and obligations – **sustainable development**, **high level of protection**, **integration clauses,**

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[3] EEA, *Europe's Environment. The Dobris Assessment* (Copenhagen, 1995) 599-611; EEA, *The European Environment. State and Outlook* (Copenhagen, 2005) 18, 20 and 30; EEA, *Europe's Environment. The Fourth Assessment* (Copenhagen, 2007) 22; European Commission, *Environment Policy Review 2008*, COM(2009) 304; ; EEA, *Progress towards the European 2010 biodiversity target* (Copenhagen, 2009) 17-21 EEA, *The European Environment 2010. State and Outlook* (Copenhagen, 2010) 15.

[4] Within a single sector, the trends can be mixed: some pollutants might be declining whilst others are increasing. The stabilization of the total amount of mineral nitrogen fertilizer consumption is a good case in point in that respect. See the report of the Commission on implementation of Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources based on Member State reports for the period 2004-2007, COM(2010) 4 final.

[5] EEA, *The Fourth Assessment* (Copenhagen, 2007) 73.

[6] The Commission as well as the EEA have repeatedly been acknowledging that the EU was unable not achieve its global target of significantly reducing biodiversity loss by 2010. E.g. European Commission, A mid-term assessment of implementing the EC Biodiversity Action Plan, COM(2008) 864 final; Ibid., Communication on options for an EU vision and target for biodiversity beyond 2010, COM(2010) 4 final; EEA, *Progress towards the European 2010 biodiversity target (*EEA, Report, Copenhagen, 2009); Ibid., *The European Environment 2010,* above, 49-50.

[7] EEA, The *European Environment 2010,* above, 71-75.

[8] Communication from the Commission, *20 20 by 2020, Europe's climate change opportunity*, COM(2008) 30 final.

[9] EEA, The *European Environment 2010,* above, 27.

[10] EEA, The *European Environment 2010, above,* 34.

and the **precautionary principle**– that are enshrined in the TEU, the TFEU, and the Charter of Human Rights. We suggest that this flurry of treaty obligations contribute in equilibrating the economic core of EU integration and the environmental concerns.

The second chapter is thus dedicated to one of the principle encapsulated in title XX: Articles 191 TFEU, paragraph 1.

Further developments regarding these issues may be followed on the professor's website at www.tradevenvironment.eu ou www.tradevenvironment.com

TITLE III
CROSS-CUTTING CONCEPTS WITHIN EU PRIMARY LAW

Introduction

The three following sections offer the opportunity to consider the extent of cross-fertilisation between different areas of EU law. Indeed, in view of Article 3(3) TEU, sustainable development, and hence the objective of environmental protection, cannot be dissociated from the internal market. Paragraph 3 of this provision places these objectives on an equal footing. Consequently, they must be analysed more in terms of reconciliation than of opposition. Moreover, it may be added that environmental concerns are not isolated; they overlap with other policies that were originally regarded as ancillary to or liable to counter the goals of economic integration. In particular, the consumer, the health and the environmental policies share a range of common features, up to the point that one may speak of a cross-fertilisation between them.

As will be shown below, an understanding of the key role played by the precautionary principle in the area of environmental protection calls for a digression into public health. Conversely, the principle would not have been established as a guiding principle in the area of public health had it not originally been established in relation to environmental matters. By the same token, sustainable development appeals to consumer law. Sections 1 to 3 will therefore place special emphasis on the bonds uniting environment, consumer and health policies.

Accordingly, a great deal of attention is paid to different EU and TFEU provisions enshrining cross-cutting concepts that are likely to enhance the environmental values. There will be a discussion of the concept of sustainable development, the various integration obligations, as well as the obligation to achieve a high level of protection with respect to a number of non-tradable interests. As will be seen, these obligations are too a great extent intertwined.

Section 1. Sustainable Development

1. INTRODUCTORY REMARKS

The initial task of environmental law was, during the first three decades of its existence, to curb impacts, contamination and pollution through the harmonization of administrative regulations. In this regard, the law governing listed installations and industrial pollution still occupies a core position within this branch of the law.

However, this initial approach sidelined issues concerning, first, the extraction of natural resources – since the potential for exploitation appeared to be unlimited – and second the incessantly growing consumption of goods and services. The record of environmental policy remained modest precisely as a result of its inability to regulate the exploitation of natural resources and the consumption of goods and services. What indeed is the point of equipping cars with new technologies if the number of cars and of kilometres travelled is constantly on the increase? What interest is there in subjecting aviation to a regime of greenhouse gas emissions quotas if air transport continues to grow? Conversely, environmental protection measures have been criticised on the account that they are at best indifferent, and at worst hostile to economic development and social aspirations.

At the outset, the concept of sustainable development has been forged in an attempt to reconcile the needs of development with environmental protection. Sustainable development has been defined by the WCED as 'a development that meets the needs of the present without compromising future generations to meet their own needs'.[11] The underlying idea was to strike a balance between, on the one hand, the social and economic advantages of development projects providing jobs and amenities for the present generation and, on the other, the need of conserve a sufficient amount of natural resources for future generations. Since its proclamation in 1987, sustainable development has been gathering momentum from a swathe of international declarations and academic writings.[12] Since then, it has been encapsulated into a flurry of international and national laws. Given the challenges related to energy security, food safety, biodiversity loss, illegal immigration prompted by natural disasters, the limited amount of natural resources that are heavily exploited, the importance of sustainable development is even more obvious today than twenty years ago.

Since it is made up of three heads (social, environmental and economic), sustainable development represents a delicate balancing of the competing social, economic and environmental interests. Indeed, according to ICJ's case-law, 'this need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development'.[13] As a result, sustainable development requires

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[11] WCED, *Our Common Future* (Oxford, OUP, 1987) 86.

[12] M.-C. Cordonier Segger and A. Khalfan, *Sustainable Development Law* (Oxford, OUP, 2004).

[13] *GabCikovo-Nagymaros Project* (*Hungary v Slovakia*) [1997] I. C. J. Reports 7, para. 140. See also *Arbitration Regarding the Iron Rhine Railway (Belgium v. Netherlands),* Arbitral Award of 24 May 2005,

commercial law, competition law, consumer law, environmental law and worker protection law to interact. Similarly, the dialogue between law and science, economic development and the preservation of natural resources, the regulation of access to resources and our consumer society must find the green shoots of a solution under the aegis of this kind of rule that is dedicated *par excellence* to the reconciliation of competing interests. What is more, given that 'environmental law and the law on development stand not as alternatives but as mutually reinforcing', there is a duty under international law 'to prevent, or at least to mitigate' significant harm to the environment.[14]

Despite the success with which it has met in international circles, the concept of sustainable development has encountered difficulty establishing itself under Treaty law. At the outset, under the Maastricht Treaty, the Union was called on to promote 'sustainable and non-inflationary growth' rather than 'sustainable development' in its own rights.[15] However, the concept has been recognized later on as one of the main objective pursued by the EU. The concept is currently enshrined in Article 3(3) and (5) TEU, Article 21(2)(d)-(f) TEU, Article 11 TFEU and Article 37 of the Charter of Fundamental Rights of the EU.

The third paragraph of Article 3(3) TEU runs as follows: 'The Union … shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.' Moreover, pursuant to paragraph 5 of that provision as well as Article 21(2)(d) TEU, sustainable development is one of the corner stone of the EU external policy.

In addition, sustainable development is also encapsulated in both Article 11 TFEU and Article 37 of the Charter of Fundamental Rights of the EU, without however being defined. Under these two provisions, sustainable development is set out as the objective the environmental policy must pursue. Article 11 TFEU (ex Article 6 TEC) provides that: 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'. By the same token, in virtue 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'. A minor difference must be stressed: the Charter mentions 'policies' and not 'activities'.

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para. 222.

[14] *Arbitration Regarding the Iron Rhine Railway (Belgium v. Netherlands),* Arbitral Award of 24 May 2005, para.58.

[15] Formerly, sustainability was linked to economic growth. That link was maintained under the Maastricht and the Amsterdam Treaty. Pursuant to the Maastricht Treaty, 'The Community shall… promote sustainable and not-inflationary growth respecting the environment' (Article 2 EC). Similarly, pursuant to Amsterdam Treaty, sustainable development was linked to economic activities (Article 2 EC).

2. Legal status of sustainable development in Treaty Law

2.1 The impact of the three pillar structure on the hierarchy of values

Firstly, in contrast to the dissipation and lack of precision in the references to sustainable development in the previous treaties, this third paragraph of Article 3 TEU expresses the tripartite nature of the concept in much clearer terms*:*

- a 'balanced economic growth and price stability',
- a 'highly competitive social market economy, aiming at full employment and social progress',
- a 'high level of protection and improvement of the quality of the environment'.

Account must be made of the fact that these objectives are placed on equal footing. Given the economic nature of the European integration project, this is of utmost importance.

So far, one of the main difficulties environmental law has been facing is related to the fact that the legal order of the EU is conceptualized in terms of economic integration. At the core of economic integration lies the internal market that is based on the free movement provisions promoting access to the different national markets and on the absence of distortions of competition (Article 26 TFEU). The internal market and environmental policy have traditionally focused on apposite, albeit entangled, objectives: deregulation of national measures hindering free trade, in the case of internal market, and protection of vulnerable resources through regulation, in the case of environmental policy. In other words, whereas the internal market is concerned with liberalizing trade flows, environmental policy encourages the adoption of regulatory measures (regulating through authorization and restriction schemes the placing on the market of hazardous products, bans, restrictions placed on the use of hazardous products, inspections, controls, penalties, etc.) that are likely to impact on free trade. In addition, the internal market favours economic integration through total harmonization (setting up a common playing field) whilst environmental law allows for differentiation (Article 193 TFEU).

These differences play themselves out in concrete disputes ranging from the use of safeguard clauses in order to ban GMOs to restrictions placed on additives in fuels[16]. In these clashes, internal market has an advantage based on its seniority. Freedoms in trading in services and goods are ingrained in the EU DNA. By way of illustration, the principle of free movement of goods flowing from Articles 34 and 35 TFEU [17] has been proclaimed by the CJEU as a fundamental principle of EU law. It follows that the environmental and health exceptions to this fundamental principle must be interpreted

[16] For a comprehensive of the EU case law on environment and trade disputes, see http://www.tradevenvironment.eu/documents-case-law/

[17] Articles 34 and 35 TFEU prohibit Member States to adopt quantitative restrictions or measures having an equivalent effect that are likely to impair the import or export of goods within the internal market. Concerning all *'goods taken across a frontier for the purposes of commercial transactions […], whatever the nature of those transactions'(*Case C-324/93 *Evans medical* [1995] ECR I-563, para. 20), the concept of 'goods' is interpreted broadly and can thus cover wildlife, chemicals, hazardous substances, etc.

restrictively. What is more, traders can invoke the economic rights enshrined in the EU Treaties before their domestic courts whereas the victims of pollutions are deprived of a right to environmental protection stemming from the EU Treaties.[18] The relationship is thus asymmetrical. In addition, internal market law empowers the European Commission to control the Member States wishing to adopt specific or more stringent environmental standards (prior notification and authorisation procedures under Article 114 TFEU). By contrast, national authorities are known to be reluctant to implement genuine environmental EU instruments. Here it is necessary to face hard facts: the main weakness of EU rules is, as recognized by the Commission, their lack of efficacy, with directives appearing as paper tigers due to the hesitancy, criminal activities, or even bad faith, on the part of certain national authorities and the difficulties encountered by the European Commission in pursuing infringements before the Court of Justice.

To conclude with, the relationship between the internal market law backed by a powerful business constituency and the environmental policy supported by a diffuse public is somewhat asymmetrical. Needless to say, in placing upon equal footing sustainable development with the internal market, the master of the Treaties have been reshaping somewhat differently the traditional hierarchy of values that has been so far detrimental to environmental interests.

Last, insufficient attention has been given to the fact that Article 3(3) as well as the other provisions proclaiming sustainability are silent as regard the equitable allocation of resources both within the present generation [19]and between the present and future generations as well as other duties such as the right to development.

2.2 A status dogged by controversies, but far from being meaningless

Secondly, the fact that sustainable development is encapsulated in three different provisions situated at the apex of the EU legal order – primary law - does not mean that its legal status is not dogged by controversies.[20] For instance, given that sustainable development has been coined both as an objective and a principle, there was obviously no clear concept of what sustainable development meant from a legal point of view when these various provisions were drafted. By definition, the term 'principle' implies a higher normative content than 'objective'.[21] However, we doubt that the concept of sustainable development is akin to general principles of EU law, such as proportionality

[18] However, rights are likely to stem from secondary law obligations, for instance regarding air pollution. See Case C-237/07 *Dieter Janecek* [2008] ECR I-6221; Case C-404/13 *Earthscan* [2014].

[19] With respect to the implementation of the Nagoya Protocol that provides for a fair and equitable sharing of benefits arising from the use of genetic resources, the EU institutions have adopted Regulation (EU) No 511/2014 of the European Parliament and the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization in the Union.

[20] As regard international law, e.g. P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, 3rd ed. (Oxford, OUP, 2009) 124.

[21] D. Barnstow Magraw and L. D. Hawke, 'Sustainable Development' in *The Oxford Handbook of International Environmental Law* (Oxford, OUP, 2008) 623.

and subsidiarity, that enable the EU courts to review the powers of the institutions. However, it may be akin to the concept of constitutional objective found under French and Belgian constitutional law.[22]

It goes without saying that this concept is characterized by a strong degree of indeterminacy.[23] Though few institutions and Member States will contend with the proposition that development should be sustainable, they might disagree on how to flesh out this proposition in individual cases. Given the significance of the social, economic and environmental value judgments involved in deciding on what is sustainable, EU institutions are indeed endowed with broad discretion in giving effect to Article 3(3) TEU, Article 11 TFEU and Article 37 of the Charter.

That being said, generality is inevitable because sustainability must provide guidance and inspiration to policy-makers in a wide variety of contexts ranging from agriculture to external trade.[24] Accordingly, the concept must be fleshed out into more precise political programs and regulatory schemes.

Moreover, the concept is far from being meaningless. Whilst the third paragraph of Article 3 TEU is not imposing clear-cut obligations, it nevertheless spells out a political imperative: the 'high level of protection and improvement of the quality of the environment' now has the same status as the objective, for example, of 'economic growth and price stability' (economic pillar) as well as with that of 'full employment and social progress' (social pillar of sustainable development). Given that these three components must be seen as interdependent and mutually reinforcing, the main objective of promoting economic growth and social progress must be viewed from a balanced and sustainable perspective. Since no hierarchy is provided for between these different pillars, they constitute an inseparable whole and cannot therefore be interpreted in isolation from one another. Accordingly, economic growth can't be achieved without the promotion of the two other components and environmental protection should constitute an integral part of development. By the same token both environmental and labour protection requirements are likely to reinforce each other. By way of illustration, energy from biofuels shall be taken into account only if they fulfil different sustainability criteria.[25]

This interpretation appears to be consistent with settled case law. Account must be taken of the fact that the Court of Justice of the EU (CJEU) has already held that the Union has not only an economic but also a social purpose.[26] Accordingly, the rights under the

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[22] Article 7bis Belgian Constitution; Article 1st French Charter for the Environment.
[23] D. Barnstow Magraw and L. D. Hawke, above, 621.
[24] Ibid., 621.
[25] Both for third countries and Member States that are a significant source of raw material for biofuel consumed within the EU, the Commission is called on to issue a report addressing the respect of land use rights and the implementation of various ILO conventions. See Article 7 b (7) of Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 98/70/EC as regards the specification of petrol, diesel and gas-oil and introducing a mechanism to monitor and reduce greenhouse gas emissions, [2009] OJ L 140/88.
[26] Case C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455, para. 12.

provisions of the Treaty on the free movement of goods, persons, services and capital must be balanced against the objectives pursued by social policy. [27]

2.3 Fleshing out sustainable development

Thirdly, the Treaty provisions don't determine the substantive and procedural components of sustainable development. Nonetheless, it could be argued that Articles 11 and 191(1) TFEU already encapsulate some elements, such as the duty to integrate environmental concerns into other policies and the 'rational' utilizations of natural resources.[28] In the next section, we shall discuss the obligation to integrate environmental concerns into others policies with the aim of enhancing sustainable development.

2.4 Broadening the scope of the environmental policy

Fourthly, it should be stressed that sustainable development does not appear in title XX TFUE on the environmental policy but in different provisions of the TEU, in Article 11 TFUE and in the EUCHR. By introducing a social and economic dimension, sustainable development thus broadly moves beyond traditional environmental issues.[29] What is more, whereas environmental protection involves a defensive stance against the depletion of natural resources and pollution, sustainability entails a pro-active approach in requiring the integration of environmental requirements into economic growth.

2.5 Is sustainable development environmentally friendly?

The fifth issue to be addressed is whether sustainable development does necessarily enhance environmental protection. As a matter of fact, the main attraction of this concept is that 'both sides in any legal argument will be able to rely on it'.[30] The

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[27] See Case C-438/05 *Viking Line* [2007] ECR I-10779, para. 79; Case C-341/05 *Laval* [2007] ECR I-11767, para. 105; and Case C-319/07 *3F* [2009] ECR I-000, para. 58.

[28] See the discussion below in section 5.

[29] The somewhat confusing dividing line between sustainable development and traditional economic development is likely to impinge upon the choice of legal bases. By way of illustration, the Council granted a Community guarantee to the European Investment Bank against losses under loans and loan guarantees for projects outside the Community. In a case regarding the legal base of that Council decision, the Court of Justice held that the act at issue fostered the sustainable economic and social development of developing countries, notwithstanding the fact that other components of that act concerned economic, financial and technical cooperation with third countries other than developing countries. As a result, the Decision fell under Article 179 EC (Article 208 TFEU) as well as under Article 181a EC (Article 212 TFEU). See Case C-155/07 *Parliament v. Council* [2008] ECR I-8103, para. 67.

[30] Under Article 12 of the Kyoto Protocol, Clean Development Mechanisms (CDM) project have to fulfil a sustainability test set out by the receiving State. In spite of their significant environmental impacts, large hydroelectric projects in China and India made up more than a quarter of all CDMs and accordingly were deemed to be sustainable. See A. Vassa, *The Effectiveness of the Clean Development Mechanism. A Law and Economic Analysis* (Rotterdam, 2012) 142.

interpretation given by AG Léger to sustainable development in its opinion in *First Corporate Shipping,* a case on development taking place in protected birds habitats, is testament to a conciliatory approach. Indeed, the AG stressed that 'the concept "sustainable development" does not mean that the interests of the environment must necessarily and systematically prevail over the interests defended in the context of the other policies pursued by the Community ... On the contrary, it emphasizes the necessary balance between various interests which sometimes clash, but which must be reconciled'.[31] In addition, the manner in which Article 3(3) TEU has been drafted does not reflect the postulate that each pillar has to be oriented towards the needs of future generations. As a result, these needs don't necessarily trump the right to economic development. It follows that environmental concerns risk being laid aside in the name of reconciliation stemming from the three-pillar structure.[32] By way of example, in case of conflict between growth and environmental protection, compromise must be found and necessary environmental measures could be discarded. That being said, our view is that sustainable development should not water down the basic environmental requirements. In effect, pursuant to Article 3(3) EU and Article 191(2) TFEU, the tasks of the EU include the requirement to attain a 'high level of protection and improvement of the quality of the environment'. In section 7, we shall indeed provide a detailed analysis of the legal status of the obligation to achieve a high level of environmental protection.

3. Integrating environmental concerns into other policies

Environmental protection does not take place in a vacuum but is very much related to other subject-areas, such as the internal market, transport, energy, agriculture and fisheries, health protection, etc. Accordingly, environmental concerns overlap constantly with other policies. On the one hand, the consumer, the health and the environmental policies share a range of common features with environmental policy, which have been gathering momentum in EU treaty law, up to the point that one may speak of a cross-fertilisation between them. On the other hand, environment requirements are also liable to counter the goals of different EU policies fostering economic integration, such as the internal market, the industrial, the agricultural policy, etc.

Roughly speaking, environmental protection has more often given way to socio-economic considerations. For instance, in cases involving the overlap of administrative regulations, the solutions adopted by the EU and national courts generally lean in favour of economic development rather than the conservation of natural resources. Nature has thus paid a heavy tribute to the absence of any incorporation of environmental requirements into other policies.

It follows that curbing unsustainable trends thus requires the integration of environmental requirements across policies such as energy, agriculture and fisheries,

[31] AG Léger opinion in Case C-371/98, *First Corporate Shipping* [2000] ECR I-9235, para. 54.
[32] G. Winter, 'A Fundament and Two Pillars' in H.-C. Bugge and C. Voigt (eds.) *Sustainable Development in International and National Law* (Groeningen, Europa Law, 2008) 28.

forestry, industry, transport, regional development, land use, and land planning. Needless to say, the need to integrate social, economic and environmental policies is a logical outgrowth of the three aspects of sustainable development.[33]

It was thus indispensable, alongside the recognition of sustainable development, to make provision for the decompartmentalization of different policies in line with environmental considerations. In that connection, the EU recognised relatively early the need to integrate environmental requirements in all policies. Against this background, a number of treaty provisions require the integration of environmental concerns.

As discussed above, Article 3(3) and Article 21 TEU promote sustainable development, a concept calling for reconciliation of the economic, social and environmental objectives pursued by the EU. In addition, in virtue of Article 13 and 21(3) TUE as well as Article 7 TFEU, the Union ensures consistency between all its policies and activities.

In particular, Article 11 TFEU requires that: 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'. Moreover, Article 11 TFEU must be read in combination with Article 37 EUCHR that in much the same vein requires the integration of 'a high level of environmental protection and the improvement of the quality of the environment…'.

Besides, Article 194(2) TFEU encapsulates another environmental integration clause for the Union' s energy policy. However, the other EU policies, no matter their impact on the environment, do not refer in any way to environmental objectives or to sustainable development.

It goes without saying that these TEU, TFEU and EUCHR provisions foster a more holistic approach. That being said, nothing is said as to the ways in which the EU should integrate environmental protection requirements into the other policies. It seems difficult to make this requirement operational. Does it follow from these treaty obligations that the level of protection integrated into the agricultural or the transport policy must be calculated at the highest conceivable level? Or should lawmakers make do with an intermediate level of protection? The uncertainty within the scope of this obligation does not however mean that the EU institutions enjoy absolute discretion in this regard. It is beyond question that a non-existent or low level of protection would violate this Treaty law obligation.

Given that environmental requirements have to be fleshed out into a number of other policies, a number of legal bases are accordingly likely to be considered for adopting environmental measures.[34] The obligation contained in Article 11 TFEU to take

[33] D. Barnstow Magraw and L. D. Hawke, above, 620.

[34] N. de Sadeleer, « Environmental Governance and the Legal Bases Conundrum », *Oxford Yearbook of European Law* (2012) 1–29.

environmental considerations into account within other policies exacerbates the proliferation of rules of any kind which are more or less directly related to environmental protection. However, this debate is not neutral since the choice of legal basis is not simply a question of form but, instead, a question of substance, given that it has a considerable impact on the degree of harmonization which can be achieved; as a result, residual competences are deeply affected.

4. Secondary law

4.1 Soft law instruments

Since 1992, sustainable development issues have become proeminent on the policy agenda. For instance, the Europe 2020 Strategy [35]is geared towards a green vision of the economy. With respect to climate and resource challenges, the Strategy requires 'drastic action'. Accordingly, a flurry of communications are dealing with strategies related on sustainable development.[36]

The 2002 6th Environmental Action Programme identified natural resources and waste as one of four key priority areas for the next decade. With the aim of fleshing out the 6th EAP objectives, in 2005, the Thematic Strategy on the Sustainable Use of Natural Resources (COM/2005/0670 final) was adopted by the Commission alongside a Thematic Strategy on Waste Prevention and Recycling, to take forward these aims. These thematic strategies form the cornerstone of EU natural resources policy to date. More recently, the EU's economic strategy, 'Europe 2020', focuses on resource efficiency ('Resource Efficient Europe'). However, this strategy falls short of explaining how efficiency is to be understood or how it can be achieved.

Given that a number of major environmental challenges still remain, and 'serious repercussions will ensue if nothing is done to address them', the European Parliament and of the Council adopted in 2014 the 7th Environmental Action Programme [37] entitled 'Living well, within the limits of our planet'.

However, despite much debate and a flurry of political initiatives, the EU still lacks a clear political and legal approach regarding natural resource use.

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[35] Communication from the Commission Europe 2020; A strategy for smart, sustainable and inclusive growth, COM(2010)2020 final.

[36] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development (COM/2009/0400 final).

[37] Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2014 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'.

4.2 Binding instruments

It should be stressed at the outset that EU environmental legislation is stretching over a broad range of issues such as pollution and climate change, waste and hazardous substances management, the protection of wildlife as well as assessment and participation procedures, and the recognition of procedural rights (information, participation and access to justice).

Although the establishment of the concept amounts to an important step forward in the taking of ecological imperatives into account, it still needs to be endowed with a content that measures up to its ambitions and which can actually be applied within the various EU policies likely to contribute to the deterioration of the environment. As far as secondary legislation is concerned, sustainable development and its offshoot, the integration clause, tend to favour the establishment of rules intended to protect the environment beyond the confines of environmental law in more peripheral domains such as public procurements,[38] research, agriculture,[39] competition,[40] energy, transports as well as internal market.[41] So far, the approach endorsed by the EU institutions is somewhat patchy.

To make matters worse, since it is not defined under Treaty law, few secondary law acts define this concept. For instance, with regard to the conservation of tropical forests, sustainable development is defined as 'the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations'. [42]

Moreover, even where the concept is proclaimed, its content has hardly been fleshed out. Though the Water Framework Directive 2000/60/EC stresses that water management must promote '… sustainable water use based on a long-term protection of available water resources',[43] it does not impose on the Member States any specific method of defining what is sustainability. With respect to waste management, when applying extended producer responsibility, Member States shall take into account the three pillars of sustainable development, e.g. 'the overall environmental, human health and social impacts' as well as 'the need to ensure the proper functioning of the internal

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[38] S. Arrowsmith and P. Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law* (Cambridge, CUP, 2009).

[39] B. Jack, *Agriculture and EU Environmental Law* (Farnham, Ashgate, 2009).

[40] S. Kingston, 'Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special' (2010) 6 *ELJ* 781; *Greening EU Competition Law and Policy* (Cambridge, Cambridge University Press, 2011)

[41] N. de Sadeleer, *EU Environemntal Law and the Internal Market,* above.

[42] See Regulation (EC) n°2494/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the conservation and sustainable management of tropical forests and other forests in developing countries, [2000] OJ L288/6, article 2(4). Needless to say that such a definition is extremely broad.

[43] Article 1, b) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327/1.

market.'[44]

What is more, the manner in which some of environmental provisions were drafted or are implemented are testament to the ambiguous nature of sustainable development. For instance, Directive 2009/28/EC of 23 April 2009 on the promotion of the use of energy from renewable sources provides a striking evidence of this ambiguity. On one hand, the directive establishes mandatory national targets consistent with a 20 % share of energy from renewable sources and a 10 % share of energy from renewable sources in transport in EU energy consumption by 2020. On the other hand, it sets out sustainability criteria ensuring that biofuels and bioliquids can qualify for the incentives only when it can be guaranteed that they do not come from land with high biodiversity value or with high carbon stock.[45] The question is whether these criteria will be sufficient to ward off the negative social and environmental impacts of biofuels production. In effect, the increased production of biofuels is likely to compound deforestation in developing countries and to increase intensive agriculture of biomass crops.

By the same token, the Common Fisheries Policy (CFP) also illustrates the inherent ambiguity of sustainable development. Pursuant to Article 2(1) of the Council Regulation (EC) n° 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources, the general objectives of the CFP consist of ensuring '…exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions' and that the environmental impact of fishing shall be limited.[46] The tri-dimensional aspect of sustainable development and the simultaneous character of the pursuit of those aspects are thus underscored. Though nobody would contend with the interdependency of these three pillars of sustainable development in the management of fisheries, disagreements bout what they concretely require arise constantly. Needless to say, the fixing of total allowable catch proposed by the Commission on the basis of scientific data have generally been raised by the Council on the account that the different interests at sake had to be balanced in the context of sustainable development, among others safeguarding of jobs and food security. [47] At first glance, the Council's argumentation seems compatible with the three-pillar structure of sustainable development. Given that the conflicting interests must be weighed, biodiversity concerns are deemed to be merely one aspect of the problem. Admittedly, such a short-termed vision has been downgrading environmental concerns at the expense of an ecosystemic approach and a sustainable exploitation of fish stocks.[48] Indeed, reconciling the conservation of natural resources, the growth of fishing fleet, as well as the social welfare of fishermen and consumers is a tall order, that is likely to entail the spectacular collapse, as seen in a recent past, of fish stocks.

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[44] Article 8(3) of directive 2008/98/EC on waste, [2008] OJ L 312, p. 3.
[45] Recital 69 and Article 17 [2009] OJ L140/16.
[46] [2002] OJ L358.
[47] See N. de Sadeleer and C.-H. Born, *Droit international et de l'UE de la biodiversité* (Paris, Dalloz, 2004), 684, n° 740; J. Wakefield, 'Fisheries: A Failure of Values' (2009) 46 *CMLRev* 439 and 440; G. Winter, 'A Fundament and Two Pillars', above, 28; L. Krämer, 'Sustainable Development in EC Law', above, 379-381.
[48] T. Markus, *European Fisheries Law. From Promotion to Management* (Groeningen, Europa Law Publishing, 2009).

Another piece of evidence for this are the objectives of the Regional Fund, the Social Fund and the Cohesion Fund setting out that these funds 'must be pursued in the framework of sustainable development…'.[49] However, no indication is given as to how this should be achieved. For instance, the question arises as to what 'sustainable tourism'[50] means as regard land planning, water and energy consumption, ecotourism, transport, coastal zonal management, and a flurry of other indicators.[51] That being said, the fund promotes sustainability in supporting projects related to energy or transport, as long as they clearly benefit the environment in terms of energy efficiency, use of renewable energy, developing rail transport, supporting intermodality, strengthening public transport, etc.

To sum up, there has been no serious attempt to operationalize this popular piece of EU political jargon and to take measures with a view to reversing unsunstainable environmental trends.[52]

Conclusions

Today, thanks to the changes brought to the original treaties by the 2009 Treaty of Lisbon, a broad range of objectives and obligations – sustainable development, high level of protection, integration clauses, policy principles, and fundamental rights –are enshrined in the Treaty on the EU, the Treaty on the functioning of the EU (TFEU), the Charter of Fundamental Rights and thus occupy a high place in the hierarchy of EU norms. In particular, sustainable development as an essential objective of the EU has been gathering momentum. Such a change is not neutral. Combined with the requirements of integration, a high level of protection, and the different principles of environmental law (prevention, precaution, polluter-pays, etc.)[53], sustainable development had become a normative concept. Accordingly, it is more than just a simple policy guideline; it is a binding constitutional objective. Its prominent position within the legal order must be hailed on the account that the EU is better placed to deal with a number of transnational issues than its 28 Member States.

Section 2. High level of protection of societal values

Pursuant to **Article 3(3) EU and Article 191(2) TFEU**, the tasks of the EU include the requirement to attain a 'high level of protection and improvement of the quality of the

[49] Article 17 of Regulation No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund, [2006] OJ L 210/25. See also Articles 4, 5(2)(d), 6(2)(b)(d), 9 and 10 of Regulation No 1080/2006 on the European Regional Fund, [2006] OJ L 210 p. 1; Article 3(1)(b) (c) of Regulation No 1081/2006 on the European Social Fund, OJ L 210 p. 12; Article 2(1) of Regulation No 1084/2006 on the European Cohesion Fund, [2006] OJ L 210 p. 79.
[50] Article 6(2)(b) and 10 of Regulation No 1080/2006 on the European Regional Fund, [2006] OJ L 210 p. 1.
[51] L. Krämer, 'Sustainable Development in EC Law', oc, 392; G. Winter, 'A Fundament and Two Pillars' oc, 28.
[52] Ibid., 392.
[53] N. de Sadeleer, *Environmental Principles (Oxford, OUP, 2005).*

environment'. We shall adumbrate at this stage a number of legal issues related to the implementation of similar obligations encapsulated in the TFEU and EUCHR.

Public health and consumers protection policies reiterate this qualitative requirement. In virtue of **Article 168 (1) TFEU** 'a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities' whereas pursuant to **Article 169(1),** 'in order to promote the interests of consumers and to ensure a high level of consumer protection', the Union shall contribute to safeguard various consumers' interests. In addition, **Articles 35, 37 and 38 of the Charter** require the achievement of a high level of health, environmental protection and consumers protection.

Conversely, the internal market policy must fully integrate these various concerns. Accordingly, pursuant to **Article 114(3) TFEU**, the internal market Commission's proposals must pursue a high level of protection, when they concern health, safety, environmental protection and consumer protection. However, in *Schulte*,[54] the Court of Justice held that the requirement for a high level of protection contained in the old Article 95(3) EC (Article 114(3) TFEU) was not directly applicable to national authorities, irrespective of its implementation under secondary law. This obligation was therefore not directly binding on the Member States.[55]

Table 1. TFEU and EUCHR provisions requiring a high level of protection

VALUES	**EU-TFEU PROVISIONS**	**EUCHR PROVISIONS**
Environment	Article 3(3) EU Articles 114 (3) and 191 TFEU	Article 37
Health	Articles 114(3) and 168 TFEU	Article 35
Consumers	Article 114(3) and 169 TFEU	Article 38
Worker Safety	Article 114(3) TFEU	----
Employment	Article 9 TFEU	----

Be it for workers, patients, consumers or the environment, the requirement to attain a 'high level of protection' has scarcely attracted any attention and has been the object of only a few commentaries in the academic literature. These obligations often been

54 Case C-350/03 and C-229/04 *Schulte* [2005] ECR I-9215, noted by E. Jerry (2007) 44 *CMLR* 501-518.
55 Para. 61.

classed under the category of declarations of intent, are considered at best as policy principles devoid of any binding force, or as a guarantee of legitimacy which is automatically placed on draft regulations, directives, and decisions.

There is in the first place a strong doctrinal resistance to the idea that the courts may control compliance with the requirement for a high level of protection irrespective of the subject matter. It is argued that it is not a matter for the courts to interfere with the margin of appreciation that is naturally reserved to the EU institutions. This is claimed to undermine the very idea of the separation of powers. Strictly speaking, institutions are called on to determine the optimal level of protection not the courts. Accordingly, the obligation to improve living and working standards which is incumbent upon the Member States in the area of social protection has been interpreted as being of a general and policy nature.56

By way of illustration, in a case concerning the safety of working conditions, with an evident environmental element since the danger threatening the health of workers came from petrol vapours emitted by service stations, the Court of Justice held that it was not a matter for it to review the proportionality of a duty to reduce the use of a carcinogen at the place of work, without linking that requirement to the outcome of a risk assessment. 57 Admittedly, it is not for the Court to interfere with the verification of the manner in which the Member State has exercised the powers that have been conferred upon it pursuant to the old Article 118a EEC. It is therefore not for the Court to rule on the relevance of more stringent measures than those which form the subject-matter of Community action increases in the technical threshold, reductions in time limits or extensions to the scope of application. The review of the proportionality of a measure is a matter for the national courts and not for the Community courts.

That said, these obligations to attain a high level of protection are likely to become interpretative principles where a conflict between economic and antagonist societal objectives arises. The need to guarantee a high level of protection for health had already led the Court to emphasise the efficacy of a directive in order to justify its compatibility with the general principles of Union law. For instance, in *Tobacco II*, the Court of Justice held that in situations where there is a risk of divergence resulting from differing levels of protection on national level, the common goal of achieving a high level of protection for health means that it is necessary to harmonise national regulations.58 Similarly, only the prohibition on the marketing of tobacco for chewing will guarantee complete efficacy with regard to the pursuit of a high level of protection, going beyond economic interests.59 In other words, an effective policy of prevention will contribute to achieving a high level of protection. This assertion made with reference to public

56 Case C-126/86 *Gimenez-Zaera* [1987] ECR I-3697; and Case C-72/91 *Sloman-Neptune* [1993] ECR I-887.
57 Case C-2/97, *Borsana* [1998] ECR I-8597, para. 40.
58 Case C-380/03 *Germany v. European Parliament and Council* [2006], paras. 40-41.
59 Case C-434/02 *Arnold André* [2004] ECR I-11825; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paras. 56 and 57.

health is of course capable of applying to the environment.

Section 3. Integration of societal values

1.INTRODUCTORY REMARKS

Environmental protection has more often given way to socio-economic considerations. For instance, in cases involving the overlap of administrative regulations, the solutions adopted by the EU and national courts generally lean in favour of economic development rather than the conservation of natural resources. [60] Nature has thus paid a heavy tribute to the absence of any incorporation of environmental requirements into other policies.[61] As discussed in chapter 2, one of the key feature of sustainable development is precisely to integrate environmental concerns into socio-economic policies. In other words, curbing unsustainable trends thus requires the integration of environmental requirements across policies such as energy, agriculture and fisheries, forestry, industry, transport, regional development, land use, and land planning. Unless this is achieved, environmental degradation will continue apace. Standing alone, the environmental policy has indeed no chance to achieve its objectives.

Though international treaties rarely provide for the obligation to integrate environmental requirements into other policies[62], principle 4 of the Declaration on Environment and

[60] To the convenience of representation, we have chosen the impacts of transport infrastructures on protected habitats. For instance, the construction of a highway across a Natura 2000 site in order to cope with the car traffic is deemed to be an imperative reason of overriding public interest that justifies in virtue of Article 6(4) of the Habitats Directive encroachments on priority habitats and species (BVerwG A 20.05 of 17 January 2007, BVerwGE 128 1). By the same token, the enlargement in a protected area of an existing industrial plant in order to complete the production of a jumbo passenger airplane was deemed to fulfil an imperative reason of overriding public interest on the account that 'the German authorities have demonstrated that the project is of outstanding importance for the region of Hamburg and for northern Germany as well as the European aerospace industry' (Commission, C(2000) 1079 of 14 April 2000). In spite the fact that a number of specimens of the most endangered mammal in Europe, the Iberian lynx (*Lynx iberica*), were killed due to an increase of traffic, the converting of a byroad into a regional road across a national park is not infringing the EU obligations as regard the protection of that species (Case C-308/08, *Commission v. Spain* [2010] ECR I-xxx). See also G. Garcia Ureta, 'Habitats and Environmental Assessment of Plans and Projects' (2007) 2 *JEELP* 84-96; L. Krämer, 'The European Commission's Opinions under Article 6(4) of the Habitats Directive' (2009) 21: 1 *JEL* 70.

[61] EU policies have been criticized for being inconsistent, in particular with respect to nature conservation. In an infringement case brought by the Commission against France as regard the destruction of the wetlands of the *Marais poitevin*, the French authorities submitted that the Community aid package for intensive agriculture run contrary to the policy of safeguarding wetlands pursuant to the Wild Birds Directive. As regards those allegations, the ECJ held that even assuming that that was the case and a certain lack of consistency between the various EC policies were shown to exists, that could not authorise a Member State to depart from its obligations under the Wild Birds Directive (Case 96/98 de*Commission v. France* [1999] ECR I-8531, para. 40).

[62] Principe 14 of the Stockholm Declaration on the Human Environment, Principe 4 of the Declaration on Environment and Development, paragraphs 7 and 8 of the World Charter for Nature, Article 6(b) of the Convention on Biodiversity, Article 4(2) of the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification. With respect to integration of more specific nature protection concerns, see the Article 4 of the Chamberry Protocol to the Alpine Convention on Conservation

Development provides that 'environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'.

As far as EU law is concerned, it was also indispensable, alongside the recognition of sustainable development, to make provision for the decompartmentalization of different policies in line with environmental considerations. Against this background, a number of treaty provisions require the integration of environmental concerns.

As discussed above, **Article 3(3) and Article 21 TEU** promote sustainable development, a concept calling for reconciliation of the economic, social and environmental objectives pursued by the EU.

In accordance with the super-integration clause, **Article 7 TFEU**, the Union ensures consistency between all its policies and activities.

In particular, **Article 11 TFEU** [63] requires that: 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'.

Moreover, Article 11 TFEU must be read in combination with **Article 37 EUCHR** that in much the same vein requires the integration of 'a high level of environmental protection and the improvement of the quality of the environment…'.

Also known as the principle of integration, the environmental integration clause is called upon to play a greater role, not only due to the fact that it makes it possible to **avoid interferences and contradictions between competing policies**, but also because it may **enhance sustainable development** in favouring the implementation of more global, more coherent and more effective policies. In other words, environmental policy should now reach beyond the restricted area to which it is generally confined (listed installations, emission and quality standards, waste management, ecosystem management, etc.).

Furthermore, integration calls in any case for the **abandonment of a vertical organisational model**, according to which each policy is confined to a very specific field of action, in favour of a more cross-cutting approach.

That being said, it must be noted that with the sole exception of the new energy policy encapsulated in Article 194 TFEU, the other policies impinging upon the quality of the environment – industry, agriculture, transport, tourism, etc. - do not contain reference neither to the environment nor to sustainable development.

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of Nature and the Landscape Protection; and Article 4(6) of the Framework Convention on the Protection and Sustainable Development of the Carpathians.

[63] Formerly Article 6 TEC.

2.A FLURRY OF INTEGRATION CLAUSES

Having been progressively reinforced by the amendments made to the former EC Treaty,[64] the integration clause embodied in Article 11 TFEU now occupies a symbolic position amongst the introductory provisions of the TFEU.[65] Before attempting to set out the legal nature of this provision, the following paragraphs will discuss several observations regarding its positioning within the TFEU.

First, it is important to point out that although the desire of the framers of the Treaty to place this clause in the part dedicated to 'Provisions having general application' is apparently devoid of any legal significance, this does not alter the fact that this logistical choice may have effects with regard to the position of the environment within the hierarchy of values and the resulting balance of interests. [66]

Furthermore, the obligation to integrate environmental requirements is not any more an exclusive priority[67], as other provisions of the TFEU proclaim the cross-cutting nature of the legitimate interest of EU citizens, whether it be in the area of culture, regional policy, animal welfare, industry, health, consumer protection or development cooperation.

Conversely, the treaty drafters have been calling on the EU institutions to integrate into hard-core economic policies societal concerns. Pursuant to **Article 114(3) TFEU**, the Commission's proposals which have as their object the establishment and functioning of the internal market must pursue a high level of protection, when they concern health, safety, environmental protection and consumer protection. Accordingly, health, safety, environmental protection and consumer concerns have to be fully integrated into the internal market harmonization process.

Last, this cross-sectoral approach has been exacerbated by **Article 7 TFEU** that has

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[64] The environmental clause was progressively reinforced. Although the environmental protection requirements were originally 'a component of the Community's other policies' (Article 130 r (2) such as it appears in the Single European Act), later on they would have to be 'be integrated into the definition and implementation of other Community policies' (according to the same Article such as it appears in the Treaty of Maastricht), as well as in 'the Community … activities' (Article 6 such as it appears in the Treaty of Amsterdam). In addition, under the Treaty of Maastricht, the aim of the clause has been specified: integration must be pursued in particular with a view to achieving sustainable development.

[65] M. Wessmaier, 'The Integration of Environmental Protection as General Rule for Interpretating Law' (2001) *CML Rev* 159-177; N. D'Hondt, *Integration of Environmental Protection into other European EU Policies. Legal Theory and Practice* (Groeningen, Europa Law Publishing, 2003); D. Grimmeaud, 'The Integration of Environmental Concerns into EC Policies: A Genuine Policy Development?'(2000) *EELR* 207-218; W. Lafferty and E. Hovden, 'Environmental Policy Integration: Towards an Analytical Framework' (2003)3 *Environmental Politics* 1-22; R. Macrory, *Regulation, Enforcement and Governance in Environmental Law* (Oxford, Hart, 2010) 567-583; J. Jans, 'Stop the Integration Principle' (2010)33/5 *Fordham Intl LJ* 1533-1547.

[66] Case C-176/03 *Commission v. Council* [2005] ECR I-7879, para. 42.

[67] When the environmental integration clause was inserted in former Article 130s(1) EEC by the SEA, it was the single horizontal clause.

been placing emphasis upon the 'consistency between [the different EU] policies and activities, taking all of its objectives into account'. As a result, there is no hierarchy between these various integration clauses.[68]

Table 1. TFEU and EUCHR provisions requiring cross-sectoral approaches

EU POLICY	TFEU PROVISIONS	EUCHR PROVISIONS
Equality between men and women	Article 8 TFEU	Article 23 EUCHR
High level of employment	Article 9 TFEU	
The combat against discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation	Article 10 TFEU	Article 21(2) EUCHR
Environment protection	Article 11 TFEU	Article 37 EUCHR
Consumer protection	Article 12 TFEU	Article 38 EUCHR
Animal Welfare	Article 13 TFEU	
Culture	Article 167(4) TFEU	Article 151(4) EC
Health	Article 168(1) TFEU	Article 35 EUCHR
Industry	Article 173(3) TFEU	
Regional policy	Article 175 TFEU	
Development cooperation	Article 208(1)(2) TFEU	
Internal Market	Article 114(3) TFEU	

This flurry of cross-sectoral obligations calls for some observations.

As a matter of course, these TFEU and EUCHR provisions foster **a more holistic approach**. Indeed, the different integration clauses require decision makers to take into

[68] H. Vedder, 'The Treaty of Lisbon and European Environmental Law and Policy' (2010) 22:2 *JEL* 289.

account, as part of the decision making process, not only the full range of the interests affected by the decision but also a number of interests that so far have not been receiving a lesser degree of priority. It follows that the EU institutions must reconcile the various objectives laid down in both the TEU and the TFEU. Prioritizing one objective should not render the achievement of the other objectives impossible.[69]

That being said, should all these integration clauses be placed on equal footing? First, there are subtle differences between the wording of each of these clauses. Whereas the environment must be 'integrated' and the protection of health must be 'ensured', the other interests need only be taken 'into account'[70] or into consideration. Second, Article 11 TFEU is the only horizontal clause pursuing one of the objectives spelled out by Article 3(3) TEU. It follows that Article 11 TFEU lays down a stronger commitment than some of the other horizontal clauses.

Given this **proliferation of cross-cutting concerns**, one might ask whether these numerous integration clauses all end up cancelling one another out. This calls for a few words of explanation. First and foremost, there is no doubt that a EU act will never end up addressing all objectives cumulatively at the same time.[71] Sometimes it will emphasise one of them, sometimes another, whilst at other times both at the same time. Second, given that the TFEU does not prioritize a specific clause, one policy objective or requirement could override the other policies. Hence, this flurry of integration clauses brings with it the risk of watering down the integration of environmental requirements and their replacement with good intentions.[72] Given that the EU institutions have wide discretionary powers as to how they shape their different policies, EU environmental policy is likely not been given priority over other policy areas. Indeed, it is settled case law that institutions have 'to strike a balance between the relative importance of the environmental objectives and others objectives as they proceed'.[73] Accordingly, review by courts must be limited to the question whether the institutions have committed a manifest error of appraisal or misuse their powers.

Conversely, it will not be possible for action carried out within the ambit of a policy to reject or disregard squarely the other interests in play. Therefore, even though it is not necessary to grant absolute priority to the interests protected by the different integration clauses, the EU institutions should nevertheless take due account of the impact caused

[69] See in particular the ECJ case law on CAP objectives. Joined Cases 197-200/80 *Ludwigshafener Walzmühle v. Council and Commission* [1981] ECR 3211, para. 41; Case 59/83 *Biovilac v. Commission* [1984] ECR 4057, para.16; Case C-280/93 *Germany v. Council* [1994] ECR I-4973, para.47 and 51; Case C-280/93 *Commission v. Council* [1996] ECRI-881, para. 24.

[70] Articles 9 and 12 TFEU.

[71] Several EU acts list a swathe of objectives without organizing them into a hierarchy. For instance, in accordance with its Article 1(a), regulation No 1829/2003 of the European Parliament and the Council of 22 September 2003 on genetically modified food and feed is deemed to ensure concomitantly 'a high level of protection of human life and health, animal health and welfare, environment and consumer interests in relation to genetically modified food and feed, whilst ensuring the effective functioning of the internal market'.

[72] J. Jans, 'Stop the Integration Principle', above, 1547.

[73] Case C-176/03 *Giani Bettati* [1998] ECR I-4355, para. 35.

by the act considered on less priority objectives. Put it simply, they cannot remain blind to the concerns expressed by each of these policies. As far as environmental issues are concerned, this is particularly true when the action carried out may imperil key natural resources, endanger endemic or rare species or cause irreversible damages. These values are too fundamental to be overridden by the objectives of other policy sectors. In a nutshell, all of these integration clauses participate in a common project, namely of ensuring that the actions of the Union are guided by a quality of life project both for its inhabitants as well as its workers. These values are indeed a counterweight to the project of an essentially economic nature. Last, a legal systematic argument supports this interpretation: the founding treaties should be viewed as forming a consistent legal system.[74] Therefore, where possible, 'treaty provisions should be interpreted so as to help, and not hinder, the EU's other policy objectives'.[75]

3. LEGAL STATUS OF ARTICLE 11 TFEU

We now turn to the legal status of Article 11 TFEU. Three issues emerge as of particular importance.

In spite of the fact that the procedures for its application have not been specified, it must be pointed out that this provision is binding ("must") and its material scope is particularly broad ("definition and implementation of policies and activities"). Unlike sustainable development which is a rather ambiguous objective, Article 11 TFEU poses a concrete obligation.[76] Accordingly, EU institutions, who are bound by the obligation to integrate environmental concerns, cannot ignore the requirements of a policy of environmental protection when pursuing other policies. A literal interpretation of Article 11 TFEU suggests there is an obligation to "integrate" and not merely to take into account. In sharp contrast, in virtue of Article 192(3) TFEU, institutions are merely called upon to 'take into account' the different environmental criteria. As a result, these criteria are not deemed to be binding.[77]

Moreover, given that the 'environmental requirements' have to be integrated, the institutions cannot content themselves with the objectives of that policy. They have also to pay heed to the principles and the criteria guiding that policy.[78]

Accordingly, Article 11 TFEU not only obliges the EU institutions to intervene, but also encourages them to extend the field of environmental action, given that the "policies and activities ..." embrace all regulatory and financial measures contemplated under that provision, including measures, programmes, regimes and not only those specifically entitled "policies" and "activities".

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[74] P. Pescatore, *The Law of Integration* (Stijhol, 1974) 41.
[75] S. Kingston, 'Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special' (2010)6 *ELJ* 781.
[76] Ibidem, 786.
[77] J. Jans and H. Vedder, above, 17. See the discussion in Part II, chapter 3, below.
[78] N. Dhondt, above, 72-80; J. Jans, 'Stop the Integration Principle', above, 1542. As regard the scope of the environmental principles and criteria, see the discussion in Part II below.

As a result, this clause has been coined a "general principle",[79] a "legal principle"[80] and even a "basic principle"[81].

However, the binding nature of this clause is hindered by several stumbling blocks. So far, many questions are left unanswered. Article 11 refers indeed to the integration of 'environmental policy requirements'. But what should be integrated into other policies: objectives, criteria, principles, standards? Pursuant to Article 37 EUCHR, 'a high level of protection' should at least be integrated. But the determination of that level has always been dogged with controversies. The degree of integration required is not specified at all in the TFEU and, in practice, it may vary substantially depending on the degree of openness of the different public policies which contribute to worsening the quality of the environment.

Another of its drawbacks stems from the fact that the conceptual tools for implementing the integration clause were not defined by the framers of the Treaty. Indeed, methods of integrating environmental requirements are not spelled out in the TFEU. The environmental principles proclaimed in Article 192(2) TFEU could provide the muscle for the obligation to integrate environmental considerations, but the EU courts appear to be hesitant in heading down this path.[82]

A further difficulty stems from the fact that the incorporation of environmental requirements is supposed to promote pursuant Article 11 TFEU 'in particular ... sustainable development', or in virtue of Article 37 of the Charter 'the principle of sustainable development'. Hence, integration is not a goal in itself but rather a means by which the EU should achieve a much more ambitious objective. Needless to say that since sustainable development tends precisely to reconcile economic, social and environmental interests, the environmental requirements risk being laid aside in the name of contradicting requirements. The result is at the very least paradoxical: since Article 11 TFEU appears to give priority to environmental protection, the promotion of sustainable development may, by contrast, water down or even weaken the scope of the integration clause.

To sum up, as with the concept of sustainable development, this provision is characterised by a strong degree of indeterminacy.

4. FLESHING OUT THE ENVIRONMENTAL CLAUSE

There is no shortage of provisions referring to this obligation. For instance, the

[79] M. Wasmeier, above, 161; J. Jans, 'Stop the Integration Principle', above, 1537.
[80] N. Dhondt, above, 143.
[81] S. Mahmoudi, 'Integration of Environmental Considerations into Transport' in R. Marcrory (ed.), *Reflections on 30 Years of EU Environmental Law,* above, 185.
[82] The CFI took the view that the precautionary principle is '… the corollary of the principle that the requirements of the protection of public health are to prevail over economic interests'. See Case T-74/00 *Artegodan* [2002] ECR II-4945, para. 174.

objectives of the Regional, Social and Cohesion Funds shall be pursued 'in the framework of sustainable development and the Community promotion of the goal of protecting and improving the environment as set out in [Article 11 TFEU].'[83]However, such statements may be ineffective where they not supplemented with more precise environmental requirements integrated into non-environmental legislations. In this respect, it is worthy of note that the environmental integration clause has been transposed into secondary EU law, in particular through a certain number of harmonization measures obliging public and private actors to incorporate into their decisions certain basic rules and procedures which have the goal of contributing to environmental protection. As a result, EU secondary law integrates progressively environmental concerns. To the convenience of representation, we have chosen but a few examples relating to CAP and State aids.

"Eco-conditionality" or "cross-compliance" allows the granting of direct payments provided the recipients (farmers, fishermen) abide by specific environmental requirements. The strength of this financial mechanism lies in the economic nature of the sanction it holds, which is the suppression of the advantage granted.[84] So far, agricultural aid has been the favoured field of this mechanism. By way of illustration, Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the CAP and establishing certain support schemes for farmers encapsulates such mechanism. Pursuant to that Regulation, farmers receiving direct support of any kind are bound to abide by two types of environmental requirements: on the one hand, requirements relating to the respect of secondary environmental legislation; and on the other, the obligation to maintain their land in '*good agricultural and environment condition*'. It emerges from the regulation's genesis that the Council wanted to lend more weight to environmental considerations. [85]

The integration clause is also fleshed out in the European Commission's practice that aims at encouraging State aids that are deemed to be favourable to environmental protection. Thus, as we will address this issue later on,[86] undertakings may obtain State aids not to comply with existing environmental standards but exclusively in order to improve their environmental performances beyond regulatory standards.

These various regimes illustrate how the environmental clause has filtered into secondary law. However, one doesn't have to be a genius to acknowledge the extent of the disparity between discourses of integration and the hard facts.[87] Integration

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[83] Article 7 of Regulation (EC) No 1083/2006. The integration requirement provided the basis for an action of annulment lodged by an Irish NGO against a Commission' decision financing through structural funds the construction of an interpretative centre in a national park. See Case T-461/93 *An Taisce v. Commission* [1994] ECR II-733.

[84] B. Jack, *Agriculture and EU Environmental Law* (Farnham, Ashgate, 2009) 70-79

[85] Opinion AG Trstenjak in Case C-428/07 *Mark Horvath v. Secretary of State for Environment* [2009], paras. 47 and following.

[86] Part VI.

[87] As regard the lack of integration of environmental concerns in the EU development policy, see the Special Report No 6/2006 of the Court of auditors concerning the environmental aspects of the Commission's

discourses in may respects go hand in hand with the replacement of action by good intentions, given the difficulties encountered in modifying policies deeply branded by a production-based ideology, whether it be the CAP [88] or transport policy.[89]

Also the implementation of contradictory EU policies has the effect of exacerbating environmental problems.

development cooperation, together with the Commission's replies ([2006] OJ C 235/1 – 39). With respect to the use of EU funds jeopardizing an habitat deemed to be protected under the 92/43/EC Habitats Directive, see Case T-461/93 *An Taisce v. Commission* [1994] ECR II-733. As regard the poor implementation of environmental requirements in the energy, agriculture and transport, see N. Dhondt, above, 442-444.

[88] See the first objective of the CAP, namely the increase of the agricultural productivity (Article 33 (1), a) CE ; article 39(1), a) TFEU).

[89] In the context of '… the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures' (Article 170(1) TFEU; former Article 154(1) EC), which is a full EU's policy, the 21 priority projects of the trans-European transport network (TEN-T) would cross no less than a thousand of sites classified as protected sites in the Natura 2000 network in accordance with the directive 92/43/CE on the conservation of natural habitats and of wild fauna and flora (Birdlife International, *Hundreds of Nature Sites at Risk from EU Transport Projects* 2008), though those sites are harbouring wildlife species which are very sensitive to the cutting effects resulting from the building of motor roads.

TITLE IV

COMPETENCES AND LEGAL BASES

SECTION 1.INTRODUCTION

It has always been a tall order to specify with exactitude the division of competence between the EU and the Member States. Given their cross-cutting nature, the exercise of competences relating to environmental and health issues have been dogged with controversies. In fact, the allocation of competence between the EU and the Member States tends to be not so much a separation but rather an intermingling of powers. Accordingly, their relationship is more dynamic than static.

It is the aim of this fourth title to explore some of the key issues related to the allocation of an environmental competence to the EU. This issue is clearly of central importance. Given that the EU environmental and health policies straddle a number of other competences, among which internal market, agriculture, transport, energy, and animal welfare, these competences interact constantly with both exclusive and complementary competences listed under Article 3 and 6 TFEU.

SECTION 2. NATURE OF THE ENVIRONMENTAL AND CONSUMERS COMPETENCES

2.1. Shared competence

The EU has no exclusive competence for protecting the environment or the consumers. Pursuant to Article 4(2)(e)(f) TFUE, the environment and consumers protection have been classified among the eleven shared competences alongside the internal market, transports,… Accordingly, in virtue of Article 2(2) TFUE, the EU has the power to legislate and to adopt legally binding acts in the environmental area.

As a starting point for analysis of the question what does sharing of competence mean, one should focus on Article 2(2) TFEU that reads as follows: 'When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.'

It is important to make six observations within this context.

Firstly, both the EU and Member States may act in order to protect the environment. However, Member States exercise their competence inasmuch as the EU has not

exercised its own competence. Member States' intervention could be envisioned first, when the EU has not yet activate its powers, second, when the EU decides to repeal existing legislation without replacing it by new legislation,[90] or when the legislation has been annulled by an EU court.[91]

Secondly, insofar as the EU has not taken action, the Member States maintain their competences, provided that they act in accordance with EU law.[92]

As the following example shows, the absence of EU legislation does not allow the Member States to regulate the use of products as they wish. In accordance with the principle of subsidiarity, the EU legislature has chosen, so far, to leave the enactment of the rules by which to ensure the coexistence of genetically modified crops and neighbouring traditional agricultural crops to the Member States. [93] As long as no decision has been adopted with respect to the coexistence between the different categories of crops at EU level,[94] Member States are empowered to decide the coexistence measures. However, in spite of the faculty to lay down national, regional, or local coexistence rules, a Member State is not entitled to make the cultivation of GMOs subject to a specific national authorisation based on considerations of protection of health or the environment.[95] In particular, national authorities are called on to have consideration to the substantive and procedural conditions provided for in the different EU regulations and directives regulating the placing on the market of GMOs and seeds.[96]

Thirdly, given the sheer broadness of the objectives set out in Article 191(1) TFEU[97] and of Article 169(1) TFEU and the eagerness of the EU institutions to harmonize a flurry of environmental issues it comes as no surprise that the national competences are constantly shrinking. It follows that where the subject matter has been harmonized under secondary law, Member States cannot pursue an environmental or a consumers protection policy as they understand it. In such case, the Member States must simply implement secondary law. If they do not do so, infringement proceedings may be brought against them before the Court of justice for failure to fulfil their EU obligations.

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[90] It must be noted however that whenever the EU has been acquiring new competences regarding the protection of the environment, it has never been giving them up. That being said, the Council and the Parliament have been watering down several obligations deemed to be too strict, in particular regarding waste management and nature conservation.

[91] R. van Ooik, 'The European Court of Justice and the Division of Competence in the EU' in D. Obradovic and N. Lavranos (eds.), *Interface between EU Law and National Law* (Groeningen, Europa Law Pub., 2007) 24.

[92] Case C-114/01 *AvestaPolarit Chrome Oy* [2003], para. 57.

[93] Opinion AG Bot in Case C-442/09 *Balbok*, para. 4.

[94] See for instance, Commission Recommendation of 13 July 2010 on guidelines for the development of national measures to avoid the unintended presence of GMOs in conventional and organic crops (OJ 2010 C 200, p. 1).

[95] Case C-36/11 *Pioneer Hi Bred Italia*, [2012], para. 69.

[96] See Cases C-58/10 to C-68/10 *Monsanto*, para. 76.

[97] Chap 1, section 5 above.

Fourthly, the real limits of the national environmental competences reckon upon the manner in which the EU has been exercising its own competence. However, the state of EU secondary law is much more complex. Unless the subject matter has been completely harmonized, the Member States remain free to intervene provided that their regulatory measures are consistent with the economic freedoms of the TFEU. In this context, account must also be made of the fact that EU legislations are not only minimal but also often incomplete. It follows that where a criterion necessary for the implementation of a directive adopted on the basis of Article 192 TFEU has not been defined in the directive, such a definition falls within the competence of the Member States and they have a broad discretion, in compliance with the Treaty rules, when laying down national rules developing or giving concrete expression to the EU obligation.[98] Moreover, the scope of ambit of several environmental legislations is far from complete.

Fifthly, though a field may be subject to harmonization, Member States still retain much leeway in particular with respect to environmental issues. Though Article 192 TFEU is silent about the choice of the regulatory instruments, directives have always been preferred to regulations, and framework directives to detailed directives. Indeed, the majority of environmental legislations are 'predicated upon broadly drawn principles and objectives' and follow the principle of subsidiarity by setting largely general targets for protection.[99] In particular with respect to management of ecosystems, the need for uniform rules seems less pressing than in the establishment of the internal market. In addition, Member States can also depart from EU harmonized standards on the account that these legislations are rife with specific escape and safeguard clauses. These highly permissive legislations charge the national authorities with the programming of implementing measures. Against this background, they are endowed with much leeway in framing their policy. Consider, for sake of illustration, the review of the decisions adopted by the Commission regarding the validity of the national allocation plans for GHG emission allowances in virtue of ETS Directive 2003/87/EC.[100] The General Court held that according to the principle of subsidiarity, 'in a field, such as that of the environment governed by [Articles 191 to 193 TFUE], where the [EU] and the Member States share competence, the [EU], …, has the burden of proving the extent to which the powers of the Member State and, therefore, its freedom of action, are limited' with respect to the obligation to implement through proper regulatory instruments the obligations laid down in Directive 2003/87/EC.[101]

Last, though the EU lawmaker pre-empts the field, the Member States still retain a residual competence. Indeed, following the adoption of EU measures, they have the right by virtue of Article 173 TFEU to retain or to introduce more stringent protection

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[98] See, to that effect, Case C-254/08 *Futura Immobiliare and Others* [2009] ECR I-0000, paras. 48, 52 and 55 ; and Case C-378/08, *Agusta* [2010], para. 55.

[99] J. Scott, 'International Trade and Environmental Governance: Relating Rules and Standards in the EU and the WTO' (2004) 15:2 *EJIL* 309.

[100] OJ 2003 L 275/32.

[101] Case T-374/04 *Germany v. Commission* [2007] II-4431, para. 78; and Case T-263/07 *Estonia v. Commission* [2009], para. 52.

requirements.[102] In virtue of Article 169(3) TFEU measures adopted by the European Parliament and the Council regarding consumers protection 'shall not prevent any Member State from maintaining or introducing more stringent protective measures'. That being said, both environmental and consumers stricter measures must be compatible with the Treaties.

Accordingly, given that minimum harmonization expresses a preference for regulatory differentiation that mirrors subsidiarity,[103] minimum EU environmental standards allow diverging national standards.[104]

2.2. Shared competence and subsidiarity

Since environmental and consumers protection policies are not vested exclusively in the EU, the principle of subsidiarity enshrined in **Article 5(3)** TUE applies.[105] 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 harmonization of the internal market, where Member States are usually unable to achieve the economic goals pursed by harmonisation,[106] environment policy entails constantly cooperation between all institutional players.

In a nutshell, the aim of principle of subsidiarity is **not to allocate powers, but rather to regulate the use of powers**.[107] In particular, the focus is on **whether the EU is the most appropriate decision-maker.** The EU 'action' must satisfy **two tests**. First, the EU institutions have to demonstrate that the objectives of the proposed action cannot be sufficiently achieved by the Member States 'either at central level or at regional and local level' (**sufficiency test**). Second, they should also demonstrate that the proposed action by reason of its scale or its effects 'can be better achieved at Union level'. According to this second test, the lawmaker is required to demonstrate that the proposed action has an added value in terms of effectiveness (**value-added test**).

Five separated, albeit related issues, must be distinguished.

The first concerns the **objectivity of these two tests.** Neither of them establish objective points of comparison.[108] As regard environmental protection, what is 'better' is

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[102] Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753. See below Part II, chap. 3.
[103] F. De Cecco, 'Room to Move? Minimum Harmonization and Fundamental Rights' (2006) 43 *CMLRev* 10.
[104] D. Freestone and H. Somsen, 'The Impact of Subsidiarity' in J. Holder (ed.), *The Impact of EC Environmental Law in the UK*, above, 87.
[105] Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725, para. 56. It ought to be remembered that the principle of subsidiarity was at the outset enshrined in Article 130r(4) EEC and was thus restricted to the environmental policy. However, the Court of justice never ruled on that requirement.
[106] Case C-58/08 *Vodafone* [2010] ECR I-4999, paras. 77 and 78.
[107] A. Estrella, *The EU Principle of Subsidiarity and Its Critique* (Oxford, OUP, 2002) 91; N. de Sadeleer, 'Principle of Subsidiarity and the EU Environmental Policy' (2012) 9:1 *JEEPL* 63-70.
[108] Ibid., 95.

embroiled with controversies. Does it mean more effective, more protective, more democratic, more social, cheaper, more consistent with the internal market obligations or with international obligations, etc.? At first glance, no easy answer can be given to these questions.[109] That being said, there are a number of good reasons supporting the view that EU environmental measures easily pass the hurdles of subsidiarity. Several arguments can be mustered.

On the one hand, there is no doubt as to the Member States inability to solve environmental issues having a transboundary nature, such as ozone depletion, climate change, biodiversity, air and water pollution, etc. As a result, regulating these issues should be a matter for the EU and not chiefly for the Member States.

On the other, subsidiarity does not preclude the EU lawmaker to regulate issues that don't have cross-frontier elements, such as urban noise, household waste, or contaminated land remediation. Given the significant discrepancies among the Member States regarding the stringency of their environmental policies, EU harmonization ensures that a common playing field will apply in all Member States in a way ensuring a high level of environmental protection. In the absence of such a common regulatory approach, the efforts made by the most zealous Member States would easily be frustrated by the passivity of the others.

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

The second issue concerns **judicial review of legislative powers** exercised in this area. Since the EU courts carry out a marginal review action whenever the institutions have to address complex issues, the Court of Justice has up to now never declared void an EU legislative act on the grounds that it contradicts subsidiarity. Accordingly, it is likely to reject the claim that existing environmental legal acts violate the principle. In this respect, it is sufficient to observe that with respect to measures regarding safety at work, public health, and food safety, claims according to which these measures could have been better achieved at national level have been rebutted.[110] This prompts the question as to whether subsidiarity is no more than a mere pre-legislative requirement.

Nevertheless, with the entry into force of the Lisbon Treaty, the "ineffective" *ex-post* judicial review has been supplemented with an ***ex-ante* political control** that is likely to increase the accountability of the EU's law-making bodies.[111] Brief mention should be made of the fact that pursuant to **Article 5(3) TEU and Protocol No 1 on the Role of National Parliaments in the EU,** national parliaments may consider all legislative proposals for compatibility with subsidiarity. It goes without saying that some parliaments may have a strong interest in ensuring that the EU abides by the principle.

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[109] L. Krämer, *EC Environmental Law,* above, 19.
[110] Case C-84/94 *UK v. Council (working time directive)* [1996] ECR I-5755; Case C-491/01 *British American Tobacco* [2001] ECR I-11453; Case C-154/04 *Alliance for Natural Health* [2005] ECR I-6541.
[111] M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts' (2008) 45 *CMLRev* 659.

What is more, Article 8 of the Protocol confers on the Court of justice jurisdiction to hear actions for the annulment of EU acts based on the principle of subsidiarity brought by Member States on behalf of their national parliaments or a chamber thereof. That being said, whether this review mechanism would lead to a closer national check of the exercise of EU competence as regard the protection of the environment remains to be seen.

The third issue concerns the **political impact of subsidiarity**. Though it is doubtful that this principle could become a serious ground for review of environmental measures, EU environmental policy bears the marks of subsidiarity. First, the policy is highly decentralised since the control over its implementation is left, by virtue of Article 192(4) TFEU, to the Member States. In particular, the enforcement of the EU harmonized measures is entirely left to the Member States.[112] This means that decisions as to whether to grant a license for operating a plant, to conduct an EIA, to regulate waste, to prosecute environmental crimes are matters for national, regional and even to local authorities not for the 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 protection[113] and in order to punish infringements.[114] Given that the mechanics of enforcement are likely to 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.[115]

Another practical observation must be made: the intent to repatriate in the name of subsidiarity some legislations regarding water protection has not been successful.[116] Indeed, not a single piece of major environmental legislation has been repealed so far. Instead, the subsidiarity-led thinking has rather been, on one hand, an exercise of simplification and deregulation of the existing environmental legislation.

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

[113] European Parliament and Council Recommendation 2001/331/EC providing for minimum criteria for environmental inspections in the Member States, [2001] OJ L118/41.

[114] See European Parliament and Council Directive 2008/99/EC on the protection of the environment through criminal law, [2008] OJ L328/28, replacing the Council Framework Decision 2003/80/JAI on the protection of the environment by criminal law. The Framework Decision was nullified in 2005 in Case C-176/03 *Commission v. Council* [2005] ECR I-7879.

[115] 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. With respect to the ineffectiveness of enforcement, see R. Williams, 'The European Commission and the Enforcement of Environmental Law: an Invidious Position' (1994) *14 Yb Eur L* 351; P. Weneraas, *The Enforcement of EC Environmental Law* (Oxford, OUP, 2007) 251-308; L. Krämer, 'The Environmental Complaint in EU Law' (2009)6:1 *JEELP* 13-35; P. Frassoni, 'Is the Commission still the Guardian of the Treaties?' (2009-10)1 *RAE-LEA* 45-57.

[116] A. Weale and al., *Environmental Governance in Europe* (Oxford, OUP, 2000) 359 and 461.

A last issue regarding the personal scope of the principle should be addressed. One school of thought argues that subsidiarity is not exclusively related to the EU Member States dimension. In addition to this vertical dimension (**who is the appropriate decision-maker?**), the horizontal dimension of the principle has to be emphasized (**what is the appropriate instrument?**).[117] Accordingly, self-regulation should be promoted thanks to the rhetoric of subsidiarity. Therefore, subsidiarity signals not only a shift away from detailed harmonization and towards a more flexible regulatory style characterized by vague objectives leaving ample room for manoeuvre but also a shift towards negotiated rule-making through soft-law instruments. Such interpretation is open to doubt.[118] We are inclined to the view that the question whether the environmental goals could be better achieved by self-regulation or by deregulation is falling within the scope of the principle of proportionality and not subsidiarity.[119]

SECTION 3. EU COMPETENCES REGARDING HEALTH ISSUES

The fact that both environmental policy (Article 191(1) TFEU) and the consumers protection policies (Article 169(1) TFEU) take account of health protection raises the problem of its delineation with regard to other EU policies, given that health, alongside the environment, is a cross-cutting concern permeating in virtue of Articles 168(1) TFUE and 35 CFREU all other EU policies.[120]

Account must be made of the fact that there are significant differences between the environmental and the health policies. First, it may be noted that on an institutional level the framers of the EC Treaty and latter on the TFEU did not put environmental policy on an equal footing with health policy. In fact, the means of action differ substantially on an institutional level. On one hand, pursuant to Article 4(2)(e)-(k) TFEU, both competences as regard health aspects of the environmental policy and the 'common safety concerns in public health matters' are shared. On the other, the genuine 'protection and improvement of human health' is deemed to be a complementary competence in virtue of Article 6(a) TFEU (see Table 4).

Table 4. Categorization of competences relating to health and the environment		
Environment	Article 4(2)(e)TFEU	Shared competence
Common concerns in public	Article 4(2)(k)TFEU	Shared competence

[117] B.E. Olsen, 'The Subsidiarity Principle and its Impact on Regulation' in B.E. Olsen and K.E. Sorensien (eds), *Regulation in the EU* (Copenhagen, Thomson-Sweet & Maxwell, 2006) 57.
[118] N. de Sadeleer, 'Particularités de la subsidiarité dans le domaine de l'environnement', *Droit et Société,* 2012, n° 80, p. 73-90.
[119] G. Winter 'Constitutionalizing Environmental Protection in the EU' (2002)2 *YbEEL* 86.
[120] However, certain matters such as food safety do not fall within the ambit of environmental policy. See Opinion AG Darmon in Case 62/88 *Greece v. Council* [1990] ECR I-1527.

health matters		
Protection and improvement improvement of human health	Article 6(a)TFEU	Supplementary competence

Moreover, this imbalance is accentuated where there is a need to create exceptions to rules harmonising the internal market, as new measures may be taken in order to curb an environmental risk, but not a strictly health-related concern (Article 114(5) TFEU).

SECTION 4. CHOICE OF LEGAL BASES

4.1. Introductory remarks

Few sectors of EU law still elude the growing reach of environmental concerns. By virtue of the integration clause enshrined in Article 11 TFEU, measures taken in order to protect the environment have progressively merged in with an array of other policies. Due to their cross-cutting nature, environmental questions are much broader and do interact constantly with different EU policies, the legal bases of which have proliferated as a result of the successive revisions to the founding treaties. To some extent, these other EU policies are also contributing to improve the environmental protection.

It must not be lost from view that each EU piece of legislation must be founded on one or more legal basis set out in the TEU and TFEU. The Byzantine structure of treaty law with its diversification of legal bases likely to provide for specific competences to address environmental challenges remains the subject of an ongoing debate. Indeed, given the cross-cutting nature of environmental issues, the choice of legal base for the adoption of an environmental measure is far from being self-evident. As emphasized below, the identification of the act's centre of gravity may prove particularly difficult.

On one hand, the competence to protect the environment is not limited in advance by reference to a particular subject-matter defined *ratione materiae* but rather by a flurry of broad objectives encapsulated in Article 191(1) TFEU. Given the general nature of these objectives and the impreciseness of the concept environment, it is difficult to lay down the exact limits of the areas covered by that policy.[121] As a result, genuine environmental measures adopted in virtue of Article 192 are likely to encroach upon other EU policies.

On the other hand, not all of the provisions which are closely, or remotely, related with the environment are likely to be adopted in virtue of the provisions laid down in Title XX TFEU, a title that is entirely devoted to environmental protection. Indeed, the

[121] See, by analogy, the protean nature of other EU policies, such as the economic and social cohesion. See Opinion AG Poiares Maduro in Case C-166/07 *Parliament v. Council* [2009] ECR I-xxx, para. 81.

proliferation of legal bases in the environmental field has not been blocked by Article 192 TFEU, a provision regulating the decision-making of environmental measures. In effect, it is settled case law that this genuine environmental legal basis does not alter the competences which the EU holds under the terms of other provisions contained in either the TEU, either the TFEU.

Needless to say that the choice of legal basis of pieces of legislations aiming at protecting the environment represents a critical juncture in relations between institutions, as well as the relations between the Member States and the EU.

First, in defining the scope of the EU's intervention, the legal base enables the EU to exercise its legislative competence in a given field.[122] Moreover, **the basis chosen determines not only which institution has competence 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**.[123]

Just as the powers of the Commission, the Parliament and the Council are capable of varying considerably depending on the procedure used, they can also end up expressing contradicting preferences as regards the choice to be made between the different legal bases provided for.124 Indeed, the choice between a basis which requires unanimity within the Council and a basis which only requires a qualified majority is fundamental,[125] as too is the choice between a basis implying an ordinary legislative procedure (OLP) and a special legislative procedure (SLP).[126] Admittedly, an incorrect choice of legal basis does not therefore constitute a purely formal defect. Though the Treaty of Lisbon has

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[122] Article 5(1) TEU provides that 'The limits of Union competence are governed by the principle of conferral'. Accordingly, competence is conferred on the EU by a swathe of Treaty provisions in order to achieve objectives particular to those provisions, read in the light of the general objectives of the EU. As a result, the legal base occupies centre stage inasmuch as it identifies the competence under which EU institutions act.

[123] K. ST. C. Bradley, 'The European Court and the Legal Basis of Community Legislation' (1998) *EurLR* 379; N. Emiliou 'Opening Pandora's Box: the Legal Basis of Community Measures Before the Court of Justice ' (1994) *EurLR*, 488; B. Peter, 'La base juridique des actes en droit CEE ' (1994) 378 *RMC* 324 ; L. Defalque et al., *Libre circulation des personnes et des capitaux. Rapprochement des législations. Commentaire J. Mégret (*Brussels, IEE, 2007) 225-240; D. Chalmers and A. Tomkins, *EU Public Law* (Cambridge, CUP, 2007) 140; D. Chalmers, G. Davies and G. Monti, *European Union Law* (Cambridge, CUP, 2010) 95; C. Kohler and J.-C. Engel, 'Le choix approprié de la base juridique pour la legislation communautaire: enjeux constitutionnels et principes directeurs' (2007) *Europe* 4-10; J. Jans and H. Vedder, *European Environmental Law*, 4th ed. (Groeningen, Europa Law Pub., 2011) 59-94; N. de Sadeleer, 'Environmental Governance and the Legal Bases Conundrum' (2012) *YEL* 1–29.

124 R. BARENTS, 'The internal market unlimited: some observations on the legal basis of EU legislation' (1993) 30 *CMLRev*. 85; H. Cullen and H. Charlesworth, 'Diplomacy by Other Means: the Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States' (1999) 36 *CMLRev* 1243.

[125] If qualified majority voting prevails, recalcitrant Member States opposing the adoption of the proposed measure could be sidelined.

[126] Article 289(1)-(2) TFEU. With respect to the environmental policy, some acts have to be taken by the Council unanimously (Article 192(2) TFEU) whereas others by a qualified majority (Article 192(1) TFEU). Accordingly, as regard the environmental policy, the role of the European Parliament varies considerably: it can be placed on equal footing with the Council as it can be merely consulted by the Council.

generalised to some extent the ordinary legislative procedure, situations in which the special legislative procedure does apply remain sufficiently numerous in order to result in institutional conflicts. Unsurprisingly, given that the choice of the legal base shapes the decision-making process and influences its political outcomes, the institutions are seeking to choose the legal basis that provides the procedure the most advantageous to them. [127] The fact that such a choice is deemed to be of constitutional importance is likely to guarantee the institutional equilibrium.

In a recent case regarding the validity of a Council position to be adopted on behalf of the EU in a body established by the CITES, the Court of Justice laid particular emphasis on the obligations to indicate the legal basis of a legal act. The indication is justified in the 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**.[128]

Second, though the inter-institutional power struggles have abated to some extent with the generalization of the general legislative procedure, the **antagonism between Member States and the EU is still alive**.[129] In effect, when regulating activities impairing the environment, the EU is not acting in a policy vacuum. Indeed, as regard the vertical division of competence, the choice affects significantly the room for manoeuvre left to the Member States. Using **Article 207 TFEU** as the legal base for a regulation regulating the trade in hazardous substances implies that the act is a matter of **exclusive competence**.[130] Conversely, using **Article 192(1) TFEU** to adopt such an act implies that the act is a matter of **shared competence.**[131] What is more, in accordance with Article 193 TFEU, where the legal base is Article 192 Member States cannot be prevented 'from maintaining or introducing more stringent protective measures' inasmuch these measures are compatible with the Treaties.

4.2. Principles governing the review by the Court of Justice of the choice of legal bases

When confronted with a draft act, the instinctive reaction of lawyers from the institutions, bodies, and organisms of the EU is to search for the legal base which could serve as a foundation for it. Similarly, judges and advocates general share the same instinct when examining applications and preliminary references concerning such acts. It is hence through the practice of substantive law that one achieves an awareness of the importance of this issue. The question is especially important since disputes concerning the legal bases of environmental acts are far from limited in number.

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[127] D. Chalmers, G. Davies and G. Monti, *above*, 95.
[128] C-370/07 *Commission v Council* (2009) ECR I-8917, paras. 37, 39, 46, 48. It must be noted that AG Kokott stressed in addition to these obligations the principle of transparency (paras. 37 and 38).
[129] P. Wenneras, 'Towards an Ever Greener Union? Competence in the Field of the Environment and beyond' (2008) 45 *CMLRev*. 69.
[130] Article 3(1) e) TFEU.
[131] Article 4(2) e) TFEU.

The choice of the legal base is not a purely formal question, but rather one of substance, being a matter of 'constitutional significance'[132] that is regularly ruled on by the Court of Justice. It is settled case law that 'the choice of the legal base for a measure **may not depend simply on an institution's conviction as to the object pursued'**.[133] Instead, the determination of the legal base is **amenable to judicial review**, which includes in particular the aim and the content of the measure.[134]

If it is established that the act simultaneously pursues different objectives or has several components that are **indissociably linked**, and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, it will have to be founded on a single legal base, namely that required by the main or predominant purpose or component - the centre of gravity of the act - rather than its effects.[135] Accordingly, the act concerned should in principle be adopted on one sole legal base, *namely that required by the **main or predominant purpose or component***. It is therefore necessary to define precisely the scope of each legal base which are likely to found the proposed measure and to distinguish the core objectives and components from the ancillary ones. By way of example, the mere fact that the act contributes simultaneously to the internal market and the environmental policy is insufficient to taking it outwith the core of one of these EU policies.

However, it may be the case that the twin objectives and the two constituent parts of the act are 'inseparably' or inextricably linked without one being secondary and indirect in relation to the other. In such a case, it is impossible to apply the predominant aim and content test. Exceptionally, the Court of Justice accepts that such a measure must be founded on the corresponding legal bases and the applicable legislative procedures respected.[136] In other words, this will call for the recourse to a dual or a multiple legal base, provided that the corresponding procedures are compatible.

The fact that EU action may have a different legal base hardly poses any difficulties where the **procedures are identical**. By way of illustration, the **novel food regulation** is founded on three legal bases: Articles 43, 114, and 168(4) TFEU.[137] By the same token, in order to adopt an act promoting the use of renewable energy with the aim of combating

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[132] Opinion 2/00 [2001] ECR I-9713, para. 5.
[133] Case C-300/89 *Commission v. Council* (Titanium dioxide) [1991] ECR I-2867, para. 10.
[134] See, inter alia, Case C-300/89 '*Titanium Dioxide*', para. 10; Case C-269/97 *Commission* v. *Council* [2000] ECRI-2257, para. 43; and Case C-211/01 *Commission* v. *Council* [2003] ECR I-3651, para. 38; and Case C-338/01 *Commission v Council* [2004] ECR I-4829, para. 54
[135] See, inter alia, Case C-155/91 *Commission* v. *Council* [1993] ECR I-939, paras. 19 and 21, Case C-36/98 *Spain* v *Council* [2001] ECR I-779, para. 59; and Case C-211/01 *Commission* v. *Council*, cited above, para. 39; and Case C-281/01*Commission v. Council* [2002] ECR I-12049, para. 57; Case C-338/01 *Commission v. Council*, para. 55; and Case C-91/05 *Commission v. Council,* para. 73.
[136] Case C-300/89 *'Titanium dioxide'*, para. 13; Case C-336/00 *Huber* [2002] ECR I-7699, para. 31; Case C-281/01 *Commission* v. *Council* [2002] ECR I-12049, para. 35, Case C-211/01 *Commission* v. *Council*, para. 40; Case C-211/01 Commission v. Council [2003] ECR I-8913, paragraph 40, Case C-91/05 *Commission v. Council*, para. 75; and Opinion 2/00 [2001] ECR I-9713, para. 23.
[137] Regulation No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, OJ L 268/1.

climate change – objectives laid down under Articles 191(1) and Articles 194(1) -, the legislature ought to have recourse to both Articles 192(1) and 194(2) TFEU, both of which require the recourse to the OLP.

However, where there are **differences between the procedures**, the decision-making process is becoming much more complex. In effect, the compatibility of the procedures may raise difficulties, both with regard to the rules governing the majority within the Council and with regard to the participation of the European Parliament, which for certain procedures is merely consulted whilst for others is actively involved as a co-legislator. *Therefore,* no dual legal base is possible *where the procedures laid down for each legal base are incompatible with one another*.[138] This relative strict view entails the risk that in some cases it would be not possible to give priority to the OLP.[139] As a result, the recourse to the SLP is likely to encroach upon Parliament's rights whereas the use of other legal bases may *involve greater participation by the Parliament inasmuch they provide for the adoption of a measure by the ordinary legislative procedure*.[140] In particular, this would undermine 'the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly.'[141] In addition, the use of two different legal bases is also liable to affect the Member States' right to enact more stringent measures.[142]

4.3. Environment and Common Commercial Policy

The question arises as to whether an EU external measure concerning other policies such as international trade is likely to fall outside the scope of Article 192 TFEU merely because, in accordance with Article 11 TFEU, it takes account of environmental-protection requirements. Or, conversely, should an environmental measure seeking to facilitate trade be adopted on the basis of the legal base relating to the environmental policy? So far, the Court of Justice has been reluctant to draw strictly demarcation lines between these competing legal bases.

One difficulty stems from the fact that numerous environmental multilateral agreements (EMAs) regulating the trade in certain products sometimes invoke trade mechanisms in order to sanction the States which do not respect their international obligations.[143] Put it

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[138] Case C-300/89 *Titanium dioxide* judgment, above, paras 17 to 21; Joined Cases C-164/97 and C-165/97 *Parliament v. Council* [1999] ECR I-1139, para. 14; Case C-338/01 *Commission v. Council*, para. 57; Case C-94/03 *Commission v Council* [2006] ECR I-1, para. 52; Case C-178/03 *Commission v. Parliament and Council* [2006] ECR I-107, para. 57; and Case C-155/07 *Parliament v. Council* [2008] ECR I-8103, para. 37.

[139] Case C-155/07 *Parliament v. Council* [2008] ECR I-8103.

[140] Case C-178/03 *Commission v. European Parliament and Council* [2006] ECR I-12049; Case C-155/07 *Parliament v. Council* [2008] ECR I-8103, para. 37.

[141] Case C-300/89 *Titanium dioxide*, para. 20; and Case C-65/93 *Parliament v. Council* [1995] ECR I-643, para. 21

[142] P. Wenneras, above, 70.

[143] The EU is party to several multilateral environmental agreements that rely upon trade-related measures designed to ensure compliance: the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Council Decision 97/640/EC, [1997] OJ L 272/45); the Montreal

simply, these trade-related measures can prohibit or restrict imports of goods on the ground that the exporting country does not comply with the international agreement. Whilst the goal of these international agreements is clearly not to promote trade, this nevertheless does not prevent commercial aspects from constituting an anchor point for environmental policy.

In virtue of **Article 3(1)(f) TFEU,** EU's powers are **exclusive** in the area of CCP. Insofar as CCP instruments need not necessarily promote or facilitate commercial exchanges, Article 207 TFEU does not prevent EU lawmakers from placing restrictions on the importation or exportation of certain goods.[144]

Accordingly, the demarcation between the CCP and environmental policy may be marked out in the following manner. **Council decisions to conclude agreements with a main environmental goal and an ancillary goal related to foreign trade must be founded on Article 192 TFEU,** which is the case for the majority of agreements in this area.[145] Conversely, where EU law is intended "essentially to … promote, facilitate or govern trade",[146] it is necessary to found it on Article 207 TFEU.

Nevertheless, there is no lack of boundary disputes. As a matter of fact, the inclusion in international agreements of trade measures motivated by non-trading interests is likely to erode the scope of the CCP. In addition, in AG Kokott's view, 'the more players there are on the European side at international level, the more difficult it will be to represent effectively the interests of the Community and its Member States outwardly, in particular vis-à-vis significant trading partners'.[147] Anxious to guarantee a uniform EU position with regard to the external world, **the Commission tends to conclude agreements on the back of the CCP with a view to depriving the Member States of their external prerogatives**. Conversely, as guarantor of Member State sovereignty, the Council on the

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Protocol of 16 September 1986 on Substances that Deplete the Ozone Layer (Council Decision 88/540/EC, [1998] OJ L 297/8*)*; the Kyoto Protocol of 11 December 1997 (Council Decision 2002/358/EC, [1997] OJ L 130/1*)*; the Cartagena Protocol of 29 January 2000 on Biosafety; and the Stockholm Convention on Persistent Organic Pollutants (Council Decision 2006/507/EC, [2006] OJ 2006 L 209/1). It must be noted that unlike the Member States the EU is not a party to the Convention on International Trade in Endangered Species (CITES) which allows punitive trade restrictions to be imposed on non-complying parties.

[144] Footnote n. 28 in Opinion AG Kokott in Case C-178/03 *Commission v. European Parliament and Council* [2006] ECR I-12049.

[145] See Opinion 2/00 [2001] ECR I-9713, para. 44; Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635, above, para. 90. As a matter of practice, see the following agreements : The Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol (Council Decision 88/540, [1988] OJ L297/8) ; Rio Convention on Biological Diversity (Council Decision 93/626 [1993] OJ L309/1) ; Rio Convention on Climate Change (Council Decision 94/69, [1994] OJ L33/11) ; Espoo Convention on Environmental Impact Assessment in a Transboundary Context ; and Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Council Decision 95/308, [1995] OJ L186/42). The decision ratifying the Montego Bay Convention on the Law of the Sea was founded on Articles 37 EC (Article 43 TFEU), Articles 113 EC (Article 207 TFEU) et 174(1) EC (Article 192(1) TFEU). Articles 145 to 147 as well as Articles 192 to 243 of this convention deal with environmental protection.

[146] Opinion 2/00 of 6 December 2001 [2001] ECR I-9713, above, para. 5.

[147] Opinion AG Kokott in Case C-13/07 *Commission v. Council*, above, para. 72.

other hand seeks to limit the exclusive competences of the EU. Moreover, under the EC arrangements, the decision making weight of the European Parliament has been decisive in environmental matters, whilst it was almost non-existent in CCP matters.[148] Last, the choice of the environmental legal base has a significant bearing on the Member States' room for manoeuvre to enact more stringent measures. Whereas a decision concluding an international agreement founded on Article 192 TFEU allows the Member States' capacity to adopt more stringent measures in virtue of Article 193 TFEU, this is not the case where agreements are founded on Article 207 TFEU.

We discussed the judgment on the validity of the legal base of **Regulation no. 1013/2006 on the transfrontier movement of waste.**[149] In the proceedings initiated by the Commission against that regulation, the applicant argued that since the shipment of waste also has a commercial dimension, and the new regulation increased this dimension, the act concerned had to be based on both Articles 175 of the EC Treaty (now Article 192 TFEU) and 133 of the EC Treaty (now Article 207 TFEU). The Commission route had not been followed by the European Parliament and the Council on the grounds that the act concerned essentially related to waste management and not the facilitation of trade in waste. Applying the principles in this area, according to which the choice of legal base is based on objective elements associated with the purpose and content of the act, and given that where the act pursues multiple goals it is necessary to take account of the principal goal, the Court of Justice rejected the Commission's annulment action. Essentially, the Court held that the contested regulation pursued an environmental objective as its principal goal. This finding was made on various grounds: out of the 42 recitals setting out the justification for the regulation, only 2 referred to the internal market, the implementation of which may be furthered by the common trade policy.[150] The content of the various mechanisms for controlling transboundary movements of waste also confirms the environmental justification. The fact that waste may originate from or be destined for third countries did not imply that the regulation was trade related, as argued by the Commission. The Court found that the regulation did not treat such waste differently.[151] In this way, the regime applicable to transfers of waste with third countries was based on the same type of environmental control mechanism as that governing transfers within the Union. The Court went on to assert that an EU act falls within the exclusive competence in the field of the CCP insofar as it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade in the products concerned.[152] It follows from this judgment that the recourse to a dual legal base remains the exception rather than the rule.

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[148] See former Article 133 EC.
[149] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190/1.
[150] Case C-411/06, *Commission v. Parliament* [2009], para. 52.
[151] Para. 60.
[152] Paras. 71-72.

4.4. Internal Market Harmonization and Health Protection: The Case of the Tobacco Directive

You are called on to analyse carefully **Case C-380/03,** *Germany v EP and Council*

TITLE V

ENVIRONMENTAL, HEALTH AND CONSUMERS MEASURES AND THE PROHIBITION OF QUANTITATIVE RESTRICTIONS AND OF MEASURES HAVING EQUIVALENT EFFECT

In the event students could not attend the lectures on FMG, they are welcome to watch video of the following programme on youtube (Product Policy and the Environment within the EU), and in particular these 4 videos that are tailor-made for students.

- Promoting Sustainable Patterns of Production and Consumption and the Internal Market (videos 1 and 2)
- Measures Having Equivalent Effect to Restrictions on Imports (video 3)
- Derogations and Justifications: Article 36 TFEU and Mandatory Requirements (video 5)
- Proportionality Review of Environmental Measures (video 6)

Section 1. Introductory remarks

Certain national measures adopted with a view to protecting the health, the environment or the consumers are likely to fall under the concept of 'measures having equivalent effect' to 'quantitative restrictions' on imports - Article 34 TFEU.

Because of the preference given to free movement of goods in the framework of the internal market, pursuant to Articles 3(3) TEU and 26 TFEU, these two provisions are of considerable importance within the EU legal order.

Section 2. Material scope of application of Article34 TFEU

2.1. General considerations

Two criteria are used to define the scope of Articles 34 and 35 TFEU, namely the nature of the 'goods' meant to move freely within the internal market and the nature of the barriers concerning these goods. In the absence of Treaty definitions of 'goods', 'quantitative restrictions' and 'measure having equivalent effect', one must refer to the Court of Justice's case law to determine the scope of these provisions.

2.1.1. The goods concerned

Nowhere in the Treaty is the concept of "goods" defined. Article 34 uses the terms "imports" and "exports" rather than the terms "goods" or "products". Concerning all 'goods taken across a frontier for the purposes of commercial transactions […],

whatever the nature of those transactions'[153], the concept of 'goods' is interpreted broadly and can thus cover goods such as petroleum products[154], works of art[155], and electricity.[156] This definition may not depend on national classifications. As a result, specimens of wild animals caught and marketed are treated in the same way as any other good.[157]

As regard waste, in *Wallonian waste*, the Court underlined the practical difficulty in applying a distinction between recyclable and non-recyclable waste insofar as this distinction 'is based on factors which are uncertain and liable to change in the course of time according to technical progress'.[158] Moreover, the value of waste must not be taken into account as all objects subject to ownership or obligations must benefit from the principle of free movement regardless of their positive or negative commercial value. Accordingly, non-recyclable or non-reusable wastes have to be regarded as "goods" the movement of which must in principle not be prevented.[159]

2.1.2. The measures concerned

Articles 34 only applies if one can establish the existence of a quantitative restriction or a MEE. Given that it is unlikely to face quantitative restrictions, the definition of a MEE is therefore essential in the Court of Justice case law, which, through a broad interpretation of free movement of goods, puts more store in the effect of the measure than in its legal nature.

2.1.2.1. The *Dassonville* formula

Since its *Dassonville* judgment of 11 July 1974, the Court of Justice has broadly interpreted the concept of MEE. According to the wording of the judgment, 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly,

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[153] Case C-324/93 *Evans medical* [1995] ECR I-563, para. 20.
[154] Case 72/83 *Campus Oil* [1984] ECR 2727, para. 17.
[155] Case 7/68 *Commission v Italy* [1968] ECR 423.
[156] Case 6/64 *Costa v Enel* [1964] ECR 585; Case C-393/92 *Commune d'Almelo* [1994] ECR I-1477, para. 28; and Case C-158/94 *Commission v Italy* [1997] ECR I-5789, paras. 14 to 20. In *Jägerskiöld v Gustafsson*, AG Fennelly acknowledged that it might 'appear somewhat surprising that the Court has treated electricity, despite its intangible character, as goods'. In his view, 'electricity must be regarded as a specific case, perhaps justifiable by virtue of its function as an energy source and, therefore, in competition with gas and oil'. See Opinion in Case C-97/98 *Jägerskiöld v Gustafsson* [1999] ECR I-7319, 7328-29.
[157] This is the case of different taxonomic groups: British Grouse (*Lagopus lagopus scotius*) in Case C-169/89 *Gourmetterie Van den Burg* [1990] ECR I-2143; Canadian Goose (*Branta canadensis*) in Case C-149/94 *Vergy* [1996] ECR I-299; Bees (*Apis mellifera*) in Case C-67/97 [1998] *Bluhme* ECR I-8033; Goldfinch (*Carduelis carduelis*) in Case C-202/94 *Godefredius van der Steen* [1996] ECR I-355; Macaw (*Ara macao*) in Case C-510/99 *Tridon* [2001] ECR I-7777; and wild mammals in Case C-219/07 *Andibel* [2008] ECR I-4475.
[158] Case C-2/90 *Walloon Waste* [1992] ECR I-1, para. 27. Case law of the US Supreme Court agrees with this interpretation: 'all objects of interstate trade merit commerce clause protection; none is excluded at the outset. … Solid waste even if it has no value is an article of commerce'. All waste may thus move freely between States pursuant to the commerce clause of the United States Constitution (*Philadelphia v New Jersey* 437 US paras. 622-623).
[159] Case C-2/90 *Walloon Waste*, above, paras. 27-28.

actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions'.[160] Repeated on countless of occasions, this formula is still regularly cited in judgments. Its striking feature is its sheer breadth.[161] For a MEE to be prohibited, it needs not necessarily apply to imports or exports; it is sufficient that it be applicable to them. Nor is it necessary that it has a direct and appreciable effect on inter-State trade.[162] Furthermore, the measure need not intervene at the moment of the crossing of borders; its effects may only be felt later, inside the importing country.[163] Finally, to be prohibited, the measure need not render import or export impossible. It is sufficient for these operations to be rendered more difficult, for there to be a MEE.[164]

In *Cassis de Dijon*, the Court clarified that MEEs, not limited to measures directly affecting imports, were encompassing measures that are 'applicable without distinction' to foreign and domestic goods, as a foreign producer may find it more difficult to respect these rules than the national producer. According to settled case law, 'in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods' constitute MEEs prohibited by Article 34 TFEU.[165] The condition that the goods were 'lawfully manufactured and marketed in another Member State' reflects 'the obligation to comply with the principle of mutual recognition of products'.[166] Mutual recognition can be defined as 'a principle whereby the sale of goods lawfully produced and marketed in one Member State may not be restricted in another Member State without good cause'.[167] It follows that the importer can reckon upon a single regulation by the home state instead of having to overcome the hurdle to cope with both the home state and the domestic regulation.[168] However, as discussed below, the principle of mutual recognition has been to some extent neutralised by the mandatory requirement doctrine.[169]

The incorporation under former Article 28 EC (new Article 34 TFEU) of national measures which are indistinctly applicable has in any case permitted a considerable extension of the control of obstacles to trade between the Member States, which in turn gave rise to difficulties regarding the justification of national environmental measures. We shall later examine the importance of the *summa divisio* between distinctly and

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[160] Case 8/74 *Dassonville* [1974] ECR 837.
[161] P. Oliver, 'Of Trailers and Jet-Skis: is the Case Law on Article 34 TFEU Carrering in a New Direction' (2010) *Fordham Intl L J* 4; C. Barnard, above, 92.
[162] Case 16/83 *Prantl* [1984] ECR 1299, para. 20.
[163] Case 222/82 *The Apple and Pear Development Council* [1983] ECR 4083.
[164] Case 8/74 *Dassonville*, above; and Case C-128/89 *Commission v Italy* [1990] ECR I-3239.
[165] Case 120/78 *Cassis de Dijon* [1979] ECR 649.
[166] Case C-110/05 *Commission v Italy* [2009] ECR I-519, para. 34 and the case law cited; Case C-108/09 *Ker-Optika*, above, para. 48, noted by N. de Sadeleer (2011) 2 *EJCL* 435-444.
[167] Case C-120/78 *Cassis de Dijon* [1979] ECR 649, para. 14.
[168] A. Rosas, above, 440.
[169] N. Bernard, 'On the Art of Not Mixing One's Drinks: *Dassonville* and *Cassis* de Dijon Revisited' in M. Poiares Maduro and L. Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversery of the Treaty of Rome* (Oxford, Hart, 2010) 460.

indistinctly applicable measures as regards the possibility of justification by Member States.[170]

2.1.2.2. Selling arangements

Though the judgment in *Keck* and subsequent case law did not reverse *Dassonville* and *Cassis de Dijon* case law[171], it narrowed down the scope of Article 34 TFEU in removing 'certain selling arrangements' - sales at a loss, rules on advertising, opening of stores on Sundays, etc. - from the scope of that provision as long as these arrangements are equal in impact on both domestic and imported goods.[172] In so doing, the Court drew a distinction between selling arrangements and product requirements. On the one hand, the selling arrangements fulfilling the *Keck* conditions are not subject to any sort of justification. On the other, measures concerning the dimensions, weight, form, size, composition, designation, labelling, and presentation of goods, are falling within the scope of Article 34.

That said, *Keck* has come in for considerable criticism precisely on the account that the Court gave too much emphasis on factual and legal equality to the detriment of a market access.[173] In addition, most of the selling arrangements reviewed recently by the Court have not been found falling outwith the scope of ambit of Article 34 TFEU.[174]

Inasmuch as legal rules aiming to protect the environment concern primarily the characteristics of a good such as the toxicity of a chemical product, the origin or rarity of a plant or animal species, the danger of waste, the labelling, the concentration of hazardous substances rather than selling arrangements, it is unlikely that the Court of Justice or national courts will be faced with the case of national regulation on the selling arrangements for said good. Hence, as far as environmental issues are concerned, product bans, product standards, registration requirements, and emissions thresholds have to be considered as MEEs.

Section 2. Territorial scope of application of Article34 TFEU

In principle, provisions on free movement of goods apply only if the contested national

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[170] See the discussion below in Sct. 5.2.4.
[171] P. Kapteyn and P. Verloren van Themaat, above, 632; M. Poiares Maduro, *We, the Court. The European Court of Justice and the European Economic Constitution* (Oxford, Hart, 1998) 79.
[172] Joined cases C-267 and C-268/91 *Keck* [1993] ECR I-6097.
[173] F. Picod, 'La nouvelle approche de la Cour de justice en matière d'entraves aux échanges' (1998) 2 *RTDE* 169; A. Mattera, 'De l'arrêt "Dassonville" à l'arrêt "Keck": l'obscure clarté d'une jurisprudence riche en principes novateurs et en contradictions' (1994) 1 *RMUE* 117; S. Weatherill, 'After Keck: some thoughts on how to clarify the clarification' (1996) 33 *CMLRev* 885; R. Kovar, 'Dassonville, Keck et les autres: de la mesure avant toute chose' (2006) 2 *RTDE* 213; M. Poiares Maduro, 'Keck: The End? The Beginning of the End? Or just the End of the Beginning?' (1994) *Irish Journal of European Law* 36; L. Gormley 'Two Years after Keck' (1996)19 *Fordham Intl L J* 866; C. Barnard, 'Fitting the remaining pieces into the goods and persons jigsaw? (2001) 26 *ELRev* 35.
[174] E. Spaventa, 'Leaving *Keck* behind? The free movement of goods after the rulings in *Commission v Italy* and *Mickelsson and Roos'* (2009) 34 *ELRev* 920 and 922.

measure impedes inter-State trade, with the exception of purely national situations, i.e. situations that do not have a foreign element likely to link them to trade between Member States.[175] Hence, Article 34 applies only to goods passing between Member States; those moving within a Member State are not caught by these provisions.

However, the application of Article 34 TFEU cannot be excluded on the sole basis of the fact that all elements of the case are limited to the borders of one Member State.[176] As regards environmental protection, the Court certainly seems to have conceded that Articles 34 and 35 TFEU may apply to local situations.

Danish legislation prohibiting the import of bees from other Member States on part of the Danish territory, to preserve an endemic taxon of wild bees, was found to be compatible with Article 36 TFEU, despite being classified as a MEE.[177]

SECTION 3. EXCEPTIONS TO FREE MOVEMENT OF GOODS

3.1 Introductory remarks

The free movement of goods, though it constitutes 'one of the fundamental principles of the Treaty', is not absolute.[178] Accordingly, Articles 34 and 35 TFEU do not enshrine a general freedom to trade or the right to the unhindered pursuit of one's commercial activities.[179] Given that these provisions are aiming at removing restrictions on imports and exports of goods rather than deregulating the national economy[180], they must not be confused with Article 16 EUCFR which recognises 'the freedom to conduct a business in accordance with Community law and national laws and practices'. This section addresses the exceptions to MEEs on imports whereas next section addresses the more complex issue of the justifications of MEEs having an extra-territorial dimension.

The first of these groups of exceptions can be found in Article 36 TFEU. As shall be seen, the ageing character of this provision and its ever strict interpretation do not make the work of national authorities any easier.

Created through case law following the *Cassis de Dijon* judgment, a specific ground of justification concerns environmental policy as such. Accordingly, environmental protection in its own rights is deemed to be an 'overriding requirement relating to the public interest' (ie, a "mandatory requirement").

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[175] Case 152/78 *Commission v France* [1980] ECR I-2299; Joined cases 314 – 316/81 & 83/82 *Waterkeyn* [1982] ECR I-4337; Case 98/86 *Mathot* [1987] ECR I-809; Case 168/86 *Rousseau* [1987] ECR I-1000.

[176] Joined cases C-1 & 176/90 *Aragonessa de Publicitat Exterior* [1991] ECR I-4151; Case C-47/90 *Delhaize* [1992] ECR I-3669; Case C-184/96 *Commission v France* [1998] ECR I-6197*;* and Joined cases C-321 – 324/94 *Pistre* [1997] ECR I-2343, paras. 44 and 45.

[177] Case C-67/97 *Bluhme* [1998] ECR I-8033, para. 20.

[178] Case C-112/00 *Schmidberger* [2003] ECR I-5659, para. 78.

[179] Case C-292/92 *Hünermund* [1993] ECR I-6787.

[180] Opinion AG Poiares Maduro in Case C-158/04 and C-159/04 *Alfa Vita* [2006] ECR I-8135, paras. 37 and 41.

3.1. Convergence and difference between Article 36 TFEU justifications and mandatory requirements

3.1.1. Convergence: pre-eminence of non-economic values over free trade

The two first derogations share common features: MEEs will be deemed in conformity with Articles 34 and following of the TFEU provided that they pursue non-economic aims.[181]

Be they admitted on the basis of a mandatory requirement or on the basis of Article 36 TFEU, reasons of general interest are of a non-economic nature. Expressing general interest, they indicate a supremacy of non-commercial values over free movement of goods. It follows that one may invoke neither Article 36 TFEU nor a mandatory requirement for economic reasons. This is confirmed by Article 114(10) TFEU, which allows Member States to adopt more stringent protection measures in the framework of derogations only for 'non-economic reasons referred to in Article 36'.

3.2.2. Convergence: use of exceptions is only allowed in the case of negative harmonization

Neither Article 36 TFEU justifications nor the rule of reason can be eternally invoked. These justifications remain applicable 'as long as full harmonization of national rules has not been achieved'.[182] In other words, as long as the EU lawmaker has not pre-empted the field (exhaustive, full, or complete harmonisation), in other words as long as harmonization remains incomplete, Member States may invoke either one of the reasons written in Article 36 TFEU, or a mandatory requirement.[183] Thus, one should contemplate these exceptions as a temporary acceptance, pending EU action, of national measures ensuring that they reveal the pre-eminence of certain values over free trade.[184]

3.2. Grounds of justifications of health measures embodied in Article 36 TFEU

Article 36 TFEU does mention a specific ground of justification as regard the 'health

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[181] Case 7/61 *Commission v Italy* [1961] ECR 317; Case 288/83 *Commission v Ireland* [1985] ECR 1761; and Case C-324/93 *Evans Medicals* [1995] ECR I-563.

[182] See Case 215/87 *Schumacher* [1989] ECR 617, para. 15; Case C-369/88 *Delattre* [1991] ECR I-1487, para. 48; Case C-347/89 *Eurim-Pharm* [1991] ECR I-1747, para. 26; Case C-62/90 *Commission v Germany* [1992] ECR I-2575, para. 10; and Case C-320/93 *Ortscheit* [1994] ECR I-5243, para. 14

[183] Total harmonization pre-empts national regulators to enact more stringent measures whereas minimum harmonization permits Member States to maintain or to introduce more stringent standards than those prescribed by the EU lawmaker. See M. Dougan, 'Minimum Harmonization and the Internal Market' (2000)37 *CMLRev* 855.

[184] L. Gormley, 'Free Movement of Goods and the Environment' in J. Holder (ed.), *The Impact of EC Environmental Law*, above, 289; Ibid., 'The Genesis of the Rule of Reason in the Free Movement of Goods' in A. Schrauwen (ed.) *Rule of Reason* (Groeningen, Europa Law, 2005) 24.

and life of humans, animals or plants'.

Given that the health and life of humans 'rank foremost among the assets and interests protected by the Treaty'[185] and that public health protection 'must take precedence over economic considerations'[186], the Court has proved to be in favour of Member State discretion whenever public health is at stake. Indeed, it is settled case law that each Member State is free to choose its own level of protection within the limits set by Article 36 TFEU. Accordingly, in the absence of EU harmonization, given that the subject matter has not been harmonized, it is for the Member States to determine the level of protection which they wish to afford to public health and the means to be employed in order to achieve it, while taking free movement of goods into account.[187]

What is more, the ground of justification linked to the 'protection of health and life animals or plants' are the cornerstone of national legislation on the protection of species of wild fauna and flora.

National measures may provide for broad protection, encompassing not only species but also subspecies as well as distinct populations. In the *Bluhme* case, the Court considered that 'measures to preserve an indigenous animal population with distinct characteristics contribute to the maintenance of biodiversity by ensuring the survival of the population'.[188] The Court used this reasoning to consider that 'the establishment […] of a protection area within which the keeping of bees other than Laesø brown bees is prohibited', by reason of the recessive character of the latter's genes, 'therefore constitutes an appropriate measure in relation to the aim' of biodiversity conservation. In addition, the population of bees at risk must not face an immediate danger of extinction for the exception to be justified.

3.3. Grounds of justifications of environmental and consumers measures embodied in Article 36 TFEU

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[185] Case 215/87 *Schumacher* [1989] ECR 617, para. 17; Case C-347/89 *Eurim-Pharm* [1991] ECR I-1747, para. 26; Case C-62/90 *Commission v Germany* [1992] ECR I-2575, para. 10; Case C-320/93 *Ortscheit* [1994] ECR I-5243, para.16; Case C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, para. 103; Case C-473/98 *Toolex* [2000] ECR I-5681, para. 38; Case C-141/07 *Commission v Germany* [2008] ECR I-6935, para. 46; Joined Cases C-570/07 and C-571/07 *Blanco Pérez* [2010] ECR I-4629; Joined Cases C-171/07 and C-172/07 *Apothekerkammer* [2009] ECR I-4171, para. 19; and Case C-108/09 *Ker-Optika* [2010] ECR I-12213, para. 58.

[186] Case C-183/95 *Affish* [1997] ECR I-4315, paras. 43 and 57. This judgment confirms the Case law of *United Kingdom v Commission* concerning export prohibitions of beef and veal due to contamination by bovine spongiform encephalopathy (BSE). See Case C-180/96 *United Kingdom v Commission* [1996] ECR I-2265; Case T-76/96 *Pfizer* [1996] ECR II-815.

[187] Case 104/75 *De Peijper* [1976] ECR 613, para. 15; Case 272/80 *Biologische Produkten* [1981] ECR 3277; Case 174/82 *Sandoz* [1983] ECR 2445; Case C-293/94 *Brandsma* [1996] ECR I-3159; Case C-375/90 *Commission v Greece* [1993] ECR I-2055; Joined Cases C-570/07 and C-571/07 07 *Blanco Pérez* [2010] ECR I-4629; and Joined Cases C-171/07 and C-172/07 *Apothekerkammer*, above, paras. 18 and 19.

[188] Case C-67/97 *Bluhme*, above, para. 33.

Article 36 TFEU allows Member States to adopt or to maintain quantitative restrictions or MEEs, inasmuch as the latter are justified by the need to preserve certain interests, exhaustively listed.[189] However, Article 36 TFEU is not necessarily the best solution for Member States.

While it concerns general values Member States have traditionally protected, such as 'public morality', 'public policy', 'public security' and the protection of 'health and life of humans, animals or plants', Article 36 TFEU does not mention a specific ground of justification as regard environmental protection.[190]

Many environmental protection measures aim to protect *'public health'*[191] and can be justified on the basis of this objective, which is reinforced by the fact that EU environmental policy has the aim pursuant to Article 191(1) TFEU and Article 169(1) TFEU to 'contribute to […] protecting human health'. As a result, it is perfectly feasible for a measure contributing to environmental protection in general, and more specifically to the protection of human health, to fall within the scope of Article 36 TFEU. In this connection, a single example will suffice. At the end of their useful life, tyres become waste, the accumulation of which is associated with risks to human. In tropical areas, specific risks to human life and health include the transmission of dengue, yellow fever, and malaria through mosquitoes which use tyres as breeding grounds. Therefore, taking regulatory actions to minimize the adverse effects of waste tyres aims at improving public health.[192]

The Court of Justice was brought to state, in a case on waste exports, that environmental protection was a **mandatory requirement** justifying restrictions to economic freedoms of the Treaty by EU institutions.[193] The Court held in this case that environmental protection was 'one of the Community's essential objectives', and later in the *Danish Bottles* case as well as a number of subsequent cases approved environmental measures on the basis of such a mandatory requirement.[194]

The mandatory requirement is a powerful tool to justify environmental measures that could not be justified in the light of the grounds listed under Article 36 TFUE.

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[189] Case 46/76 *Bauhuis* [1977] ECR 5.
[190] Nor does Article XX of the GATT.
[191] Given that the Treaties have not conferred full and absolute competence on the EU as regard health policy, such competence remains largely shared between the Union and its Member States, as attested by Article 6(a) and 168 TFEU.
[192] See Report of the Appellate Body in *Brazil - Measures Affecting Imports of Retreaded Tyres*, 12 juin 2007, AB-2007-4.
[193] Case 240/83 *ADBHU* [1985] ECR 531.
[194] See notably Case 302/86 *Commission v Denmark* [1988] ECR 4604, para. 9; Case C-389/96 *Aher Waggon* [1998] ECR I-4473; Case C-213/96 *Outokumpu* [1998] ECR I-1777, para. 32 and Case C-176/03 *Commission v Conseil* [2005] ECR I-7879, para. 41; and Case C-320/03 *Commission v Austria* [2005] ECR I-9871, para. 72.

SECTION 4. PROPORTIONALITY OF ENVIRONMENTAL MEASURES CONTRARY TO ARTICLES 34 TFEU

Once an MEE has been justified under Article 36 TFEU or the rule of reason, the Member State is free to determine the level of protection it wishes to pursue. To prevent the principle of free movement of goods from becoming nugatory, the Court has been putting in place a series of criteria to assess the proportionality of the the measures justified under the aforementioned exceptions. The principle of proportionality allows one to assess means used – ban, prohibition, approval, authorisation, restriction on use, etc. - with reference to the objectives pursued –health or environment - to best take into account the legitimate interests of undertakings in freely trading their goods. As stakeholders necessarily adopt opposite stances regarding the adequacy of the level of protection in this field, one must stress that the proportionality principle is ideologically neutral and does not aim to favour environmental interests over economic interests nor to create such a hierarchy of values from nothing.

As these criteria are applied in a flexible and evolutionary manner, it is difficult to establish a fixed definition of the principle. Nevertheless, certain Advocates General, whose point of view was echoed by several authors, managed to compile a list of conditions for the application of the principle, by dividing it into three successive tests. The *Fedesa* judgment also echoes this systematic approach. The three tests apply as follows: prohibitory measures are valid if they are 'appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued'.[195] As will be seen, the Court is applying these tests in different ways and does not always clearly distinguish them.

[195] Case 331/88 *Fedesa* [1990] ECR 4023, para. 13. See, to the same effect, Opinion AG Van Gerven in Cases C-312/89 *Sidef Conforama* and C-332/89 *Marchandise* [1991] ECR I-997, para. 14; and Opinion AG Poiares Maduro in Case C-434/04 *Jan-Erik Anders Ahokainen* [2006] ECR I-9171, paras. 23-26.

Conditions to be fulfilled to admit measures hindering inter-State trade

No complete harmonization at EU level	Secondary legislation entailing complete harmonization precludes Member States to justify their measures under Article 36 TFEU or a mandatory requirement
Legitimate objective of public interest	The measure must pursue a legitimate objective of public interest. Given that the environment has been recognised as 'a major objective in EU law' by the Court of Justice, Member States can invoke a mandatory requirement.
Non-economic nature of the measures	Expressing general interest, Member States can invoke neither Article 36 TFEU nor a mandatory requirement for economic reasons.
Respect for the principle of non-discrimination	In order to be justified either by a mandatory requirement, the measure must not draw distinctions on the basis of the nationality of products or producers. On the other hand, nature protection and health related measures can aply with distinction to domestic and foreign products.
Necessity and proportionality	The measure must have a causal link to the objective pursued and be appropriate for achieving it.

TEU AND TFEU PROVISIONS RELATING TO HEALTH, CONSUMER AND ENVIRONMENTAL POLICIES

EU TREATY

Article 3(3)

3. The Union shall establish an internal market. It shall work for the **sustainable development** of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

Article 21, par. 2

The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order :
(..)
d) foster the **sustainable economic, social and environmental development** of developing countries, with the primary aim of eradicating poverty;

TFEU

Article 4

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.

2. Shared competence between the Union and the Member States applies in the following principal areas:

(e) **environment**;

(f) **consumer protection**;

(i) energy;

(k) common safety concerns in public health matters, for the aspects defined in this Treaty.

Article 6

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

(a) protection and improvement of **human health;**

….

Article 7

The Union shall ensure **consistency** between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers.

Article 11

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.

Article 12

Consumer protection requirements shall be **taken into account** in defining and implementing other Union policies and activities.

Article 13

In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the **welfare requirements of animals,** while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

TITLE XIV

PUBLIC HEALTH

Article 168

1. A **high level of human health protection** shall be ensured in the definition and implementation of all Union policies and activities.

Union action, which shall complement national policies, shall be directed towards improving public health, preventing physical and mental illness and diseases, and obviating sources of danger to physical and mental health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education, and monitoring, early warning of and combating serious cross-border threats to health.

The Union shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.

2. The Union shall encourage cooperation between the Member States in the areas

referred to in this Article and, if necessary, lend support to their action. It shall in particular encourage cooperation between the Member States to improve the complementarity of their health services in cross-border areas.

Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health.

4. By way of derogation from Article 2(5) and Article 6(a) and in accordance with Article 4(2)(k) the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in this Article through adopting in order to meet common safety concerns:

(a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures;

(b) measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health;

(c) measures setting high standards of quality and safety for medicinal products and devices for medical use.

5. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, may also adopt incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol, excluding any harmonisation of the laws and regulations of the Member States.

6. The Council, on a proposal from the Commission, may also adopt recommendations for the purposes set out in this Article.

7. Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them. The measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood.

TITLE XV

CONSUMER PROTECTION

Article 169

1. In order to promote the interests of consumers and to ensure a **high level of consumer protection**, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

2. The Union shall contribute to the attainment of the objectives referred to in paragraph 1 through:

(a) measures adopted pursuant to Article 114 in the context of the completion of the internal market;

(b) measures which support, supplement and monitor the policy pursued by the Member States.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 2(b).

4. Measures adopted pursuant to paragraph 3 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. The Commission shall be notified of them.

TITLE XX

ENVIRONMENT

Article 191

1. Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,

- protecting human health,

- prudent and rational utilisation of natural resources,

- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. 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.

(…)

3. In preparing its policy on the environment, the Union shall take account of:

- **available scientific and technical data**,

- environmental conditions in the various regions of the Union,

- the **potential benefits and costs of action or lack of action**,

- the economic and social development of the Union as a whole and the balanced development of its regions.

(…)

Article 192

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.

(…)