# VIII.27 Environmental protection through legal acts and instruments by the European Union

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**Abstract**

The harmonisation process of environmental rules within the European Union (EU) has been fraught with controversies since the inception of EU environmental policy. When it comes to deciding which ecosystems and species to protect, which hazardous products to control or to ban, which factories to authorise, the thresholds for reuse and recycling waste, EU institutions and the 28 Member States have crossed swords. The depth of the harmonisation process depends to a great extent on the type of act – binding or non-binding, directly or non-directly applicable – the EU institutions are likely to adopt. It is the aim of this chapter to explore some of the key issues arising in the harmonisation process of environmental rules in light of the features of the different EU acts (directive, regulation, decision, recommendation, communication, etc.).

**Keywords**

Market integration, Article 114 TFEU, environmental integration, Article 192 TFEU, subsidiarity, harmonisation of environmental standards, harmonisation through regulations, directives, decisions and non-binding acts

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## VIII.27.1 Introduction

Although it was not mentioned in the 1957 Treaty of Rome, environmental concerns have, through the various treaty reforms, gradually been able to establish themselves as one of the greatest values enshrined in the EU treaties. As far as EU primary law (as

reflected in the Treaties) is concerned, the concept of environment appears in several provisions of the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)[1] without, however, being defined, no doubt out of fear of circumscribing its scope to overly specific areas. These Treaty provisions empower the EU institutions to adopt a swathe of legal acts covering nearly all aspects of that policy, ranging from listed installations and pollution control, through waste management and nature conservation, to procedural requirements.

However, environmental policymaking powers are not vested exclusively in the EU. The EU institutions are empowered to harmonise in as much as they comply with the principle of subsidiarity (Article 5(3) TEU). Accordingly, all environment issues cannot be regulated at EU level. In addition, in so far as the EU has not taken action (eg brownfields), the Member States maintain their competences, provided that they act in accordance with EU law.

Each of the acts adopted so far by the EU institutions is likely to promote a specific regulatory approach. By way of illustration, whilst regulations of hazardous substances support the unification of national law, the different directives on water, air and waste management foster a minimal common denominator between the various domestic laws.

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

Three key sources of law can be distinguished within the EU legal order:

- Primary law, in the shape of Treaties such as the TEU, the TFEU, and the Charter of Fundamental Rights (EUCFR). These treaties are carving out a specific constitutional framework.
- Secondary law made up of different binding instruments (regulations, directives, and decisions) and non-binding instruments (opinions and recommendations), as set out in Article 288 TFEU. A dividing line has to be drawn between legislative acts (adopted by the European Parliament and the Council acting in accordance with

[1] Articles 3(3) and 21(2)(d)–(f) TEU; Articles 11, 114(3)–(5), 191–193, and 194(1) TFEU.

the ordinary or a special legislative procedure), delegated acts,[2] and implementing acts[3] (adopted by the European Commission). The power to adopt these acts may be delegated to the Commission by the European Parliament and the Council.

- Tertiary law consisting of acts adopted by virtue of executive provisions of secondary legislation established by Articles 289, 290 and 291 TFEU.

Account must also be taken of the specific characteristics of these laws arising from the very nature of EU law. In particular, as the Court of Justice of the EU (CJEU) has noted many times, EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States,[4] and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves.[5] These essential characteristics of EU law have given rise to 'a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other, which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a 'process of creating an ever closer union among the peoples of Europe'.[6]

Lastly, environmental law by no means aspires to stability: the acts discussed below are subject to constant adaptation not only to scientific and technical progress, but also to decisions taken on an international level. Accordingly, this chapter does not have the goal of furnishing an exhaustive inventory of the rules applicable in the numerous sectors of environmental protection law. It merely illustrates the significance of each legal act on the harmonisation process.

### VIII.27.2 Primary law

Primary law originates from the 28 Member States in their role of *Masters of the Treaty* whereas secondary law is the product of the EU institutions (European Commission, Council, European Parliament). What is more, the fact that both primary and secondary law of this autonomous legal order take precedence over 28 national legal orders emphasises the key role played by the EU in Europe regarding an array of subject-matters.[7] Besides, the CJEU plays a key role in ensuring that EU law is observed 'in the interpretation and application' of the Treaties (Article 19(1) TEU). The Court reviews the legality of the acts of the institutions of the EU, ensures that the Member States comply with their obligations under treaty law, and interprets EU law at the request of the national courts and tribunals (Article 267 TFEU).

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[2] By virtue of Article 290 TFEU delegated acts for their part are non-legislative acts of general application which supplement or amend certain non-essential elements of a legislative act.

[3] By virtue of Article 291 TFEU implementing acts are adopted by the Commission in accordance with a comitology procedure.

[4] Case 6/64 *Costa v ENEL* [1964] ECR 585 (*Costa*); Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; Case C-399/11 *Stefano Melloni* (Grand Chamber, 26 February 2013), para 59. See also Opinion 1/91 [1991] ECR I-06079, para 21; Opinion 1/09 (2011) EU:C:2011:123, para 65; and Opinion 2/13 (2014) ECLI:EU:C:2014:2454, para 166.

[5] Case 26/62 *van Gend en Loos* [1963] ECR 1, 12; and Opinion 1/09 (n 4), para 65.

[6] Opinion 2/13 (n 4), para 167.

[7] *Costa* (n 4).

mental policy has gradually emerged in treaty law. It has even become a core objective of the EU, given that it has been placed on an equal footing with economic growth and the internal market (Article 3(3) TEU). In addition, a broad range of objectives and obligations – sustainable development, high level of protection, integration clauses, policy principles, and fundamental rights – are enshrined in the TEU, the TFEU, and the EUCFR, and thus occupy a high place in the hierarchy of EU norms. What is more, entirely devoted to the environment, Title XX of the TFEU confers on the EU a specific competence in environmental matters: it sets out goals (prudent and rational use of natural resources, fight against climate change, etc.), states principles (high level of protection, precautionary principle, prevention, rectification at source of the environmental damage, the polluter-pays principle),[8] and establishes criteria (available scientific and technical data, environmental conditions in the various regions of the Union, cost benefit analysis, etc.). Given the protean nature of the concept of environment, it is difficult to define exactly the boundaries of an EU environmental policy. A specific EU environmental policy does not preclude the possibility that other measures aimed at protecting the environment may be adopted under the auspices of the internal market policy, the Common Commercial Policy, the Common Agricultural Policy, criminal law, and nuclear law (the European Atomic Energy Community).[9]

### VIII.27.3 Secondary law

At the outset, it must be stressed that secondary legislation is made up of all binding and non-binding acts which enable the Union to exercise its powers. Three main institutions are involved in the adoption of EU legislation: the European Parliament, which represents the EU's citizens and is directly elected by them; the Council of Ministers, which represents the governments of the individual member countries (the Presidency of the Council is shared by the Member States on a rotating basis); and the European Commission, which represents the interests of the Union as a whole.

Given that the EU is endowed with a specific shared competence for protecting the environment (Article 4(2)(e) TFEU), it has the power to legislate and to adopt legally binding acts in the environmental area. Starting from a range of action programmes (Article 192(3) TFEU), 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 (waste, water and air emissions, chemicals, etc.) as well as to protect the main ecosystems (air, water and soil) along with some of their composite elements (habitats, wildlife, etc.). Today it is possible to count more than 300 regulatory measures, that is, around 8 per cent of EU law. Several EU agencies, 28 Member 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 lives.

In particular, secondary law comprises the following instruments:

- The legal instruments listed in Article 288 TFEU: the binding regulations, directives, and decisions, and the non-binding opinions and recommendations; and

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[8] Sadeleer (2002).
[9] Sadeleer (2012).

- Soft law instruments not listed in Article TFEU, ie 'atypical' acts such as communications and recommendations, and white and green papers.

Environment policy enshrined in Title XX TFEU takes the form of both legal acts as well as non-legal instruments.

### VIII.27.4 Legal acts pursuant to Article 288 TFEU

Neither Article 192 TFEU (environmental policy) nor Article 114 TFEU (functioning of the internal market) specify that a particular legal act should be used in order to harmonise environmental measures. In these cases, Article 296(1) TFEU states that the institutions must select the relevant legal act on a case-by-case basis, 'in compliance with the applicable procedures and with the principle of proportionality'.

Accordingly, the environmental policy reckons upon the three legal acts listed in Article 288 TFEU: directives, regulations, or decisions. Each of these acts is likely to promote specific types of regulatory instruments, as explained below. It is important to emphasise their different features.

#### *VIII.27.4.1 Directives*

As a result of an EU policy in favour of subsidiarity, EU environmental law consists more of directives than regulations. In effect, in contrast to the regulation, the directive is deemed to be a very flexible tool mainly used to harmonise national legislation. While a regulation is applicable in Member States' internal law immediately after its entry into force, a directive must first be transposed by the Member States. In contrast to Regulations, their provisions don't apply directly, though some of their provisions might have a direct effect under specific circumstances. The directive obliges the Member States to achieve a certain result but leaves them free to choose how to do so. Thus, a directive does not set forth the means of application; it only imposes on the Member States the requirement of a result. Accordingly, national authorities are free to choose the form and the means for applying the directive.

It comes thus as no surprise that the provisions of the framework directives (water, air, waste, etc.) are typically worded in very general terms. By prescribing broad objectives but leaving the choice of implementing to Member State authorities, framework directives are well tailored to take into account the diversity of administrative and legal culture in the EU. In so doing, the lawmaker increases the discretion of national authorities regarding the choice of the form and appropriate means for implementing EU law. In tolerating, let alone encouraging administrative diversity, these directives are keeping uniformity at bay.

For instance, most directives relating to water, [10] the air,[11] noise, [12] hazardous

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[10] Designation of vulnerable areas to nitrates is required under Article 3(2) of Council Directive concerning the protection of waters against pollution caused by nitrates from agricultural sources [2004] OJ L375/1.

[11] Establishment of areas where concentrations of ozone sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter, lead, benzene and carbon monoxide are exceeded is required under Article 4 of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L152/1.

[12] Strategic noise mapping is required under Article 7 of Directive 2002/49/EC of the European

plants,[13] and nature protection[14] entail a delineation of specific areas which act as a framework for the application of technical rules adapted to the management of these issues or the protection of specific areas. Therefore, protection rules only apply to areas that have been subject to a prior designation by a Member State.[15]

Moreover, the CJEU has, for example, held that when the national courts review the legality of measures to combat agricultural pollution, they must take account of the discretionary power of the Member States, which is presupposed by the complex nature of the assessments concerning the impact of the spreading of nitrates.[16] Similarly, Member States are endowed with broad discretion when they are required to ensure that their land-use policies take into consideration the need to maintain appropriate distances between Seveso establishments and buildings of public use.[17]

Alongside duties of oversight, the policing powers allow the national authorities to impose prohibitions, grant authorisations for activities which would normally be prohibited, encourage or require the taking of particular action, and verify compliance with the obligations created[18] These obligations are generally associated with criminal and administrative sanctions.[19]

That being said, this discretion is by no means unfettered. The flexibility inherent in the environmental approach does not allow Member States to depart from their obligations of result. In an attempt to guarantee the effectiveness of the conservation regimes for vulnerable ecosystems, the CJEU has accordingly circumscribed the margin of appreciation of the national authorities in relation to the following operations:

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Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise [2002] OJ L189/2168.

[13] Under the Seveso III Directive (Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, OJ L197/1), land-use planning policies shall ensure that appropriate distances between hazardous establishments and residential areas are maintained (Article 13(2)a)). Regarding the distances set out under the SEVESO II Directive, see Case C-53/10 *Franz Mücksch* [2011] ECR I-08311.

[14] In order to fulfil its objective of the conservation of biodiversity, the Habitats 92/43/EC Directive provides for the constitution of a 'coherent ecological network', called Natura 2000. The ecological coherence of this network rests mainly on Member States' site selection procedures based on ecological criteria. With respect to wild birds, Member States are called on to designate 'special protection areas' (SPAs) whereas they have to designate 'special conservation areas' with a view to protecting other types of habitats. See Sadeleer (2005).

[15] However, the Habitats preventive regime applies prior the designation of the Natura 2000 sites. See Case C-117/03 *Dragaggi* [2005] ECR I-167, para 29; C-244/05 *Bund Naturschutz* [2006] ECR I-8445, para 46; C-404/09 *Commission v Spain* [2011] ECR I-8445, paras 156–57.

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

[17] Case C-53/10 *Franz Mücksch* [2011] ECR I-8311, paras 40–41.

[18] Directive 96/82/EC on the control of major-accident hazards involving dangerous substances as amended by Directive 2003/105/EC [2003] OJ L 345/97.

[19] Article 79 of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions [2010] OJ L334/17; Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L328/28.

- The choice of projects covered by Annex II of the Environmental Impact Assessment (EIA) Directive 85/337/EEC[20] codified by Directive 2011/92/EU;[21]
- The choice of plans and programmes covered by the Strategic Environmental Assessment Directive 2001/42/EC;[22]
- The designation of sites intended to guarantee the favourable conservation of habitats or endangered species, which must comply with scientific criteria;[23]
- The designation of areas vulnerable to pollution from nitrates of agricultural origin;[24]
- The designation of bathing waters.[25]

In this connection, lessons can be drawn from the case law on the EIA requirements. Since *Kraaijeveld* it is settled case law, on the one hand, that the national authorities are not endowed with an unfettered margin of discretion when they select the projects submitted to an EIA and, on the other, that individuals may rely on the EIA obligations before their national courts. In other words, even though EIA procedures provide the national authorities with some room for manoeuvre, the national courts are nonetheless called upon to verify whether the authorities did not exceed the limits of their discretion. In so doing, the national courts are required to interpret national law 'as far as possible' in conformity with the EU requirements. The CJEU's reasoning is based on the assumption that the effectiveness of such a directive

> would be diminished if individuals were prevented from relying on it in legal proceedings and if national courts were prevented from taking it into consideration as a matter of Community law in determining whether the national legislature, in exercising its choice as to the form and methods for implementing the directive, had kept within the limits of its discretion set by the directive.[26]

*Linster* is a good illustration of proceedings in which the EIA directive was relied on irrespective of the direct effect of the directive in question. In that case, the national court referred a question to the CJEU for a preliminary ruling to know whether it could verify the legality of a procedure for the expropriation in the public interest of immovable property belonging to a private individual taking into account the EIA directive which has not been fully transposed, notwithstanding the expiry of the time-limit laid down for that purpose. In particular, the national court asked the Court whether such a finding involved an appraisal of the direct effect of the directive.

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[20] Opinion of AG Elmer in Case C-72/95 *Kraaijeveld* [1996] ECR I-5403.

[21] Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1.

[22] Case C-427/07 *Commission v Irlande* [2009] ECR I-6277, para 42; and Case C-295/10 *Valciukiene* [2011] ECR I-08819, para 46; Case C-567/10 *Inter-Environnement Bruxelles* [2012] ECLI:EU:C:2012:159.

[23] Sadeleer and Born (2002) 496–99.

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

[25] Case C- 56/90 *Commission v UK* [1993] ECR I-4109.

[26] Case C-72/95 *Kraaijeveld* [1996] ECR I-5403; Case C-435/97 *WWF* [1999] ECR I-5613, para 69.

*VIII.27.4.2 Regulations*

Regulations have general application, are binding in their entirety and directly applicable in all Member States. They bind the institutions, the Member States, and the individuals to whom they are addressed. In sharp contrast to directives, private parties can directly invoke regulations before their domestic courts.

Unlike the situation with other environmental sectors, these regulations increase the centralisation of the decision-making process. As far as internal market policy is concerned, the preference of regulations based on Article 114 TFEU could be explained by the fact that the more flexible nature of a directive entails a genuine risk of market fragmentation. Indeed, regulations enhance a common playing field for traders in particular with regard to the harmonisation of the placing of certain goods posing environmental and health risks on the market and the control of the import, export, or transfer of goods involving ecological risks – for example chemical products, GMOs, etc. For instance, chemicals (REACH and CLP Regulations), pesticides, and GMOs have been harmonised thanks to the adoption of regulations.

Furthermore, in contrast to directives, the various regulations on chemical substances (REACH and CLP Regulations, pesticides, biocides) lay down extremely precise procedural requirements.[27] Given the completeness of their procedures,[28] these regulations lead to a total or a complete harmonisation that reduces the Member States' room for manoeuvre.[29]

Besides, these internal market regulations strike a balance between a high level of protection of human health and the environment and the free circulation of substances in the internal market.[30] At the outset, these harmonising measures were primarily motivated by a desire to complete the internal market. They have nonetheless recently begun to consider environmental concerns. In effect, there has been an incremental evolution towards a more preventive regulatory approach based on approved lists at EU level of substances listed according to their absence of 'significant' health and environmental risk, coupled with the authorisation of products by national authorities and the mutual recognition of authorisations. Post-market measures may also be adopted to ward off unsuspected risks.

This web of regulations on the one hand, empowers the Commission to adopt implementing acts in accordance with comitology procedure and, on the other hand, delegates significant administrative tasks, in particular in the realm of risk assessment, to two

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[27] See the degree of precision reached by Regulation (EC) No 1013/2006 of the European Parliament and of the Council on shipments of waste [2006] OJ L190/1 and Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer [2000] OJ L244/1 (repealed and replaced by Regulation (EC) No 1005/2009 of the European Parliament and of the Council of 16 September 2009 on substances that deplete the ozone layer [2009] OJ L286).

[28] Both the biocides and the pesticides regulations confer an exclusive competence on the EU authorities concerning the assessment of the active substances found in these products. See Case T-31/07 *Du Pont de Nemours* [2013] ECR II-02767, para 203.

[29] Sadeleer (2014) 157–61, 291, 304, 353, and 358–82.

[30] Article 1(3) REACH, Article 1(3) Pesticides Regulation, and Article 1 Biocides Regulation. It must be noted that the European Commission is not empowered to undermine the equilibrium sought by the EU lawmaker. See Case T-521/14 *Sweden v Commission* [2015] T:2015:976, para 72.

EU agencies. The regulatory decisions in chemicals policy, such as those relating to the registration, authorisation, restrictions, classification, and labelling under the REACH and CLP Regulations,[31] are backed by the opinions of the European Chemicals Agency (ECHA), whereas the assessment of the active substances in pesticides is subject to the opinions of the European Food Safety Agency (EFSA).

Regulations have also been adopted under Article 192 TFEU with the aim of formalising voluntary forms of participation for businesses – see for example the regulations on eco-labels or on environmental audits and where it is necessary to implement obligations flowing from international agreements to which the EU is a party.[32] On occasion, a choice has been made, within the context of the environmental policy, for regulations aiming at setting out product standards or at banning the import of species threatened with extinction.[33] Moreover, in some cases directives are amended, or even completed, by regulations.[34]

### *VIII.27.4.3 Decisions*

According to Article 288 TFEU, a decision is a legal instrument which is binding upon those individuals to whom it is addressed. They may be addressed to Member States or individuals. Decisions are binding in their entirety.

Decisions have also been adopted in order to finance environmentally-friendly projects, harmonise administrative forms,[35] reject national plans for the allocation of GHG emission allowances,[36] determine the ecological criteria for the award of an EU label,[37] lay

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[31] Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) [2006] OJ L396/1; and Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures [2008] OJ L353/1.

[32] Regulation No 2037/2000 on substances that deplete the ozone layer (n 27); Regulation No 1013/2006 on the shipments of waste (n 27); Regulation No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L61/1.

[33] Council Regulation (EEC) No 348/81 of 20 January 1981 on common rules for imports of whales or other cetacean products [1981] OJ L39/1; Council Regulation prohibiting the use of leghold traps in the EU and the introduction into the EU of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards [1991] OJ L308/1.

[34] See Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC [2006] OJ L33/1; Regulation (EC) No 850/2004 of the European Parliament and of the Council of 29 April 2004 on persistent organic pollutants and amending Directive 79/117/EEC [2004 OJ L158/1.

[35] See for instance: Commission Decision 94/741/EC of 24 October 1994 concerning questionnaires for Member States' reports on the implementation of certain Directives in the waste sector and Commission Decision 94/774/EC of 24 November 1994 concerning the standard consignment note referred to in Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European EU.

[36] Article 9(2) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the EU [2003] OJ L275/32–46.

[37] Regulation (EC) No 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised EU eco-label award scheme [2000] OJ L237/1–12.

down the best available technology for listed installations,[38] and to authorise State aids intended to cover investments to combat pollution or agreements with anti-competition effects.

### VIII.27.5 Non-binding acts pursuant to Article 288 TFEU

Article 288 mentions two non-binding acts: recommendations and opinions. Although they are not binding, recommendations and opinions may provide guidance as to the manner in which secondary law acts must be transposed or implemented.

#### *VIII.27.5.1 Recommendations*

Recommendations differ from the previous acts, in that they are not binding for Member States. Although without binding force, they do play a role. According to the *Grimaldi* case law, national courts are even called on to interpret their national law in the light of the EU Recommendations. In effect,

> the national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EC provisions.[39]

Recommendations have regularly been adopted by the OECD or by the Council of Europe in environmental matters,[40] this instrument has not been privileged by the Commission.[41]

It should be noted that the procedures for applying the polluter-pays principle (PPP) were specified in Recommendation 75/436/ Euratom, ECSC, EEC of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters. Forty years later, this Recommendation remains indispensable for understanding the significance of the PPP. Accordingly, Recommendation 75/436 can still have a decisive influence on the outcome of disputes brought to national courts.

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[38] The Commission is empowered by Article 13(5) of Directive 2010/75/EU on industrial emissions (n 19) to adopt decisions encapsulating the conclusions of the best available techniques with reference non-binding documents.

[39] Case C-322/88 *Grimaldi* [1989] ECR I-4407, para 18.

[40] Recommendation of the OECD Council of 21 April 2004 on material flows and resource productivity.

[41] See the Commission Recommendation 1999/125/EC of 5 February 1999 on the reduction of $CO_2$ emissions from passenger cars and the recommendations taken towards the Automotive Sector about the reduction of $CO_2$ emissions; and Commission Recommendation 96/733/EC of 9 December 1996 concerning Environmental Agreements implementing EU directives (below). Likewise, given that Member States may take appropriate measures to avoid the unintended presence of GMOs in other products (Article 26a of Directive 2001/18/EC), the Commission has adopted two successive recommendations on the development of national strategies and best practices to ensure the coexistence of genetically modified crops with conventional and organic food. See the opinion of AG Bot in Case C-36/11 *Pioneer Hi Breed* [2012] ECLI:EU:C:2012:250, paras 3–7. Though not constituting binding sources as such, recommendations are likely to appear in national disputes in so far as national courts are bound to take them into account when they are likely to shed light on binding dispositions: *Grimaldi* (n 39).

*VIII.27.5.2 Opinions*

Finally, express provision has been made for certain advisory procedures, in particular regarding the recycling of packaging waste[42] and the conservation of natural habitats.[43]

## VIII.27.6 Atypical acts

As is the case for international environmental law, EU law abounds with instruments of ambiguous legal status. Indeed, the EU increasingly acts through a *melange* of communications, resolutions, declarations of intent, green and white papers, action plans and programmes, codes of conduct and contracts – all somewhat spellbinding instruments which replace action with the mere shadow of action. All of these instruments by definition lack binding force since they are not included in the list of EU instruments endowed with this characteristic.[44]

This soft or 'muffled' law is viewed not only as a precursor to legislative action, but also even as a substitute. Moreover, non-regulatory instruments are used both prior to as well as after the adoption of regulations.

Prior action, such as non-regulatory instruments (action programmes, green and white papers), acts as a warning signal sent to the various 'actors' of the adoption of future regulations. Accordingly, non-regulatory instruments, such as communications, are widespread: the Commission sets out its guidance.

By way of illustration, given that the precautionary principle is not defined in Treaty law, in 2000 the European Commission adopted a Communication on the principle.[45] This Communication sought to inform all interested parties – and in particular the European Parliament, the Council and the Member States – of the manner in which that institution applies or intends to apply the principle when faced with taking decisions relating to the containment of risk. While the communication is typically a soft-law instrument, it is however not devoid of any legal consequences. Indeed, in applying the principle of equal treatment, the EU judiciary can ascertain whether an EU measure is consistent with the guidelines that the institutions have laid down for themselves by adopting such a communication.[46]

Certain legislative acts expressly provide right from the outset for the adoption by the Commission of guidance documents on the implementation of specific arrangements, such as the ones regarding the allocation of GHG emission allowances.[47] Similarly,

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[42] Article 6(6) of the European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste [1994] OJ L 365/10–23.

[43] Ureta (2007).

[44] Senden (2004); Sadeleer and Hachez (2011). Nonetheless, the fact that the participation of undertakings in the Energy Star labelling program is not mandatory cannot affect the fact that the decision approving the agreement must be based on the Common Trade Policy legal basis (former Article 133 EC; Article 227 TFEU). See Case C-281/01 *Commission v Council* [2002] ECR I-12049, paras 43–44.

[45] Communication from the Commission on the Precautionary Principle COM (2000) 1, para 2.

[46] See Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305, para 123.

[47] See Article 9(1), 1st indent of Directive 2003/87/EC and Communication COM (2003) 830 final of 7 January 2004.

the Industrial Emission Directive provides for guidance documents on BAT applying to listed installations that are prepared by a 'forum' composed of Member States representatives, the industries concerned, and environmental NGOs.[48] Moreover, the European Commission also adopts interpretation guides in order to inform the Member States of the scope of specific legal arrangements. By way of illustration, with a view to providing Member States with clarifications as to the ways in which several provisions of the Habitats Directive have to be applied in different sectors – mining, dams, etc. – the Commission has adopted several guides on the compatibility of development projects within Natura 2000 areas.[49] As a matter of law, such guidance documents must be in line with the CJEU case law.

Nevertheless, whilst guidance documents do not have self-standing binding force in relation to third parties, the Commission may not disregard them without stating its reasons, at the risk, depending on the circumstances, of violating general principles of EU law.[50] After all, the EU courts do not hesitate to seek support for their reasoning in atypical acts. Indeed, there are various examples in the case law illustrating the extent to which the EU courts are prone to reckon upon soft law instruments to adjudicate hard cases.

### VIII.27.7 Self-regulation and co-regulation

Self-regulation has enjoyed, in environmental matters, a success similar to that of deregulation. This approach has been seen as a response to deficiencies both in administrative regulation and economic instruments.[51] Accordingly, it has been advocated as a remedy to the administrative model.

Though the concept of environmental agreement is not generally defined in precise terms,[52] these agreements are covering many sectors of environmental policy such as product waste-related agreements, recycling of end-of-life vehicles and batteries, product-related agreements, phase out, product improvement, packaging and labelling, as well as GHG reduction and energy efficiency targets.

It follows that the concept of agreement in fact embraces regulatory techniques that are highly varied with regard to the resulting level of binding force.

Several of these agreements have been concluded between the EU institutions, and either national authorities or business federations. In other words, the undertakings' self-commitment is expressly recognised by the state authorities.

In contrast, other agreements – codes of conduct – are concluded by businesses or federations of businesses without either the involvement or the endorsement of the public authorities. Indeed, this type of voluntary initiative does not imply that the

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[48] Article 13(3) of the industrial emissions Directive (n 19).

[49] See the many interpretation guides seeking to define the scope of the obligations relating to nature conservation.

[50] As for the obligation to take into account the recommendations establishing guidelines concerning the ETS (COM (2003) 830 final), see Case T-374/04 *Germany v Commission* [2007] ECR II-04431, paras 111 and 112.

[51] Rehbinder (1995) 240–42.

[52] See the definition given by Article 3(12) of the European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste [1994] OJ L365/10–23.

institutions have adopted any particular stance.[53] In EU law, these agreements have been defined as 'the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)'.[54] The Commission has also made recommendations to the Member States to encourage 'voluntary agreements and other forms of self-regulation'.

### VIII.27.8 Standardisation

Resolution of 7 May 1985 on the 'new approach' stipulates that safeguard procedures must be incorporated into the directives in order to enable both the Commission and the Member States to challenge measures drafted by standardisation bodies, such as the European Committee for Standardisation or the European Committee for Electrotechnical Standardisation. The 'new approach' has recently been reinforced by Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products,[55] which constitutes a non-binding 'general framework of a horizontal nature' intended for use as a basis for the elaboration of sectoral directives or the revision of existing directives, in respect of the conditions for the marketing of products, through to the requirements laid down by sectoral harmonisation directives.[56]

Standardisation[57] has been applied to certain fields touching on environmental protection issues.[58] Accordingly, framework directives lay down requirements termed 'essential',[59] in particular regarding safety requirements which products must satisfy

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[53] Communication from the Commission on the Proposal for an Interinstitutional Agreement on Better Regulation COM (2015) 216 final, para 22; replaced by Communication from the Commission on Better Regulation for Better Results – An EU Agenda COM (2015) 215 final.

[54] ibid.

[55] In view of contributing to the internal market dynamic, three legal acts were adopted in 2008, among which was Decision No 768/2008/EC on a common framework for the marketing of products. In addition to the creation of a common framework for the marketing of products, Regulations (EC) No 764/2008 and 765/2008 respectively set out prescriptions relating to the accreditation of evaluating organisms and proceedings concerning the application of technical national rules in not harmonised fields [2001] OJ L218/21.

[56] For the purpose of guaranteeing a better homogeneity, those directives will have to obey the precepts laid down in this decision. As far as the protection of non-trading interests is concerned, only the essential requirements establishing the level of this protection have the authority to be fixed by the EU lawmaker (recital no 8, and Article 3). It is only in the case where it is not possible to fix essential requirements that detailed specifications might be set out in the concerned EU legislation. Preference is thus given to bringing the national requirements together rather than to reaching a total harmonisation.

[57] See Council Resolution of 7 May 1985 on a new approach to technical harmonisation and standards (85/C 136/01); Council Resolution 2000/C 141/01 of 28 October 1999 on the role of standardisation in Europe [2000] OJ C141/1; Council Resolution of 10 November 2003 on the Communication of the European Commission 'Enhancing the Implementation of the New Approach Directives' [2003] OJ C282/3.

[58] Article 9 of the European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste [1994] OJ L365/10–23.

[59] EU legislation harmonising the conditions for the marketing of products 'shall restrict itself to setting out the essential requirements determining the level of the protection' of public

in order to be placed on the market. It is then a matter for the standardisation bodies – the European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardisation (CENELEC) – to adopt the technical specifications, 'drawing up the technical specifications needed for the production and placing on the market of products conforming to the essential requirements established by the Directives. Although technical specifications maintain their status as voluntary rules,[60] products manufactured in accordance with them are presumed to comply with the essential requirements laid down in the directives.

### VIII.27.9 Conclusions

EU environmental legislation stretches over a broad range of issues such as pollution and climate change, waste and hazardous substances management, and the protection of wildlife, as well as assessment and participation procedures, and the recognition of procedural rights (information, participation, and access to justice).

Due to its use of a variety of regulatory instruments with different legal status, EU environmental law nowadays has a composite nature. Hence, environmental law is like a toolbox containing a flurry of tools ranging from targets to markets. Thanks to this variety of instruments, much has been achieved over these last 30 years:[61] a ban on lead in petroleum products, phasing out ozone depleting substances, reduction of Nitrogen oxide emissions from road transport, improvement of waste water treatment and water quality, reduction of acidification, and improvement of some aspects of air quality.[62] These significant areas of progress demonstrate that environmental policy and law work provided the Member States are committed to enforcing the harmonised rules. EU environmental law is not without teeth.

### Bibliography

C-244/05 *Bund Naturschutz* [2006] ECR I-8445.
Case C-281/01 *Commission v Council* [2002] ECR I-12049.
Case C-258/00 *Commission v France* [2002] ECR I-5959.
Case C-427/07 *Commission v Irlande* [2009] ECR I-6277.
C-404/09 *Commission v Spain* [2011] ECR I-8445.
Case C-56/90 *Commission v UK* [1993] ECR I-4109.
Case 6/64 *Costa v ENEL* [1964] ECR 585.
Case C-117/03 *Dragaggi* [2005] ECR I-167.
Case T-31/07 *Du Pont de Nemours* [2013] ECR II-02767.
Case C-53/10 *Franz Mücksch* [2011] ECR I-8311.
Case T-374/04 *Germany v Commission* [2007] ECR II-04431.
Case C-322/88 *Grimaldi* [1989] ECR I-4407.
Case C-567/10 *Inter-Environnement Bruxelles* [2012] ECLI:EU:C:2012:159.
Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.
Case C-72/95 *Kraaijeveld* [1996] ECR I-5403.

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interest, among which are environmental interests. See Article 3(1) of Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products [2008] OJ L218/82. However, 'where health and safety, the protection of consumers or of the environment, other aspects of public interest, or clarity and practicability so require, detailed technical specifications may be set out in the legislation concerned'. See recital 8.

60 Annex II of the Resolution of 7 May 1985 setting out that they 'are not mandatory'.

61 Sadeleer (2014) 175–224.

62 European Environmental Agency (2015) 19.

Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305.
Case C-36/11 *Pioneer Hi Breed* [2012] ECLI:EU:C:2012:250.
Case C-293/97 *Standley* [2004] ECR I-2603.
Case C-399/11 *Stefano Melloni* (Grand Chamber, 26 February 2013).
Case T-521/14 *Sweden v Commission* [2015] T:2015:976.
Case 26/62 *van Gend en Loos* [1963] ECR 1, 12.
Case C-295/10 *Valciukiene* [2011] ECR I-08819.
Case C-435/97 *WWF* [1999] ECR I-5613.
Commission Decisions 94/741/EC of 24 October 1994 concerning questionnaires for Member States' reports on the implementation of certain Directives in the waste sector.
Commission Decision 94/774/EC of 24 November 1994 concerning the standard consignment note referred to in Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European EU.
Commission Recommendation 96/733/EC of 9 December 1996 concerning Environmental Agreements implementing EU directives.
Commission Recommendation 1999/125/EC of 5 February 1999 on the reduction of $CO_2$ emissions from passenger cars.
Communication from the Commission on Better Regulation for Better Results – An EU Agenda COM (2015) 215 final.
Communication from the Commission on the Precautionary Principle COM (2000).
Communication from the Commission on the Proposal for an Interinstitutional Agreement on Better Regulation COM (2015) 216 final.
Council Regulation (EEC) No 348/81 of 20 January 1981 on common rules for imports of whales or other cetacean products [1981] OJ L39/1.
Council Regulation prohibiting the use of leghold traps in the EU and the introduction into the EU of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards [1991] OJ L308/1.
Council Resolution of 7 May 1985 on a new approach to technical harmonisation and standards (85/C 136/01).
Council Resolution 2000/C 141/01 of 28 October 1999 on the role of standardisation in Europe [2000] OJ C141/1.
Council Resolution of 10 November 2003 on the Communication of the European Commission 'Enhancing the Implementation of the New Approach Directives' [2003] OJ C282/3.
Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products [2008] OJ L218/82.
Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise [2002] OJ L189/2168.
Directive 96/82/EC on the control of major-accident hazards involving dangerous substances as amended by Directive 2003/105/EC [2003] OJ L 345/97.
Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the EU [2003] OJ L275/32–46.
Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L152/1.
Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law [2008] OJ L328/28.
Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions [2010] OJ L334/17.
Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1.
Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, OJ L197/1.
European Environmental Agency, *The European Environment: State and Outlook 2015* (Publications Office of the European Union, 2015) <www.eea.europa.eu/soer-2015/synthesis/report/action-download-pdf> accessed 7 May 2019.
European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste [1994] OJ L365/10–23.
Recommendation of the OECD Council of 21 April 2004 on material flows and resource productivity.
Regulation No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein [1997] OJ L61/1.
Regulation (EC) No 1980/2000 of the European Parliament and of the Council of 17 July 2000 on a revised EU eco-label award scheme [2000] OJ L237/1–12.

Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer [2000] OJ L244/1.
Regulation (EC) No 850/2004 of the European Parliament and of the Council of 29 April 2004 on persistent organic pollutants and amending Directive 79/117/EEC [2004] OJ L158/1.
Regulation (EC) No 166/2006 of the European Parliament and of the Council of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC [2006] OJ L33/1.
Regulation (EC) No 1013/2006 of the European Parliament and of the Council on shipments of waste [2006] OJ L190/1.
Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) [2006] OJ L396/1.
Regulations (EC) No 764/2008 and 765/2008 respectively set out prescriptions relating to the accreditation of evaluating organisms and proceedings concerning the application of technical national rules in not harmonised fields [2008] OJ L218/21.
Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures [2008] OJ L353/1.Rehbinder E, 'Self-Regulation by Industry' in G Winter (ed), *European Environmental Law: A Comparative Perspective* (Dartmouth 1995).
Regulation (EC) No 1005/2009 of the European Parliament and of the Council of 16 September 2009 on substances that deplete the ozone layer [2009] OJ L286.
Sadeleer N, de *Environmental Principles* (OUP 2002).
Sadeleer N de, 'Habitats Conservation in EC Law: From Nature Sanctuaries to Ecological Networks' (2005) 5 Yearbook of European Environmental Law 215.
Sadeleer N de, 'Environmental Governance and the Legal Bases Conundrum' (2012) 31(1) Oxford Yearbook of European Law 373.
Sadeleer N de, *EU Environmental Law and the Internal Market* (OUP 2014).
Sadeleer N de and Born C, *Droit international et communautaire de la biodiversité* (Dalloz 2002).
Sadeleer N de and Hachez I, 'Hiérarchie et typologie des actes juridiques de l'UE' in N de Sadeleer and others (eds), *Les innovations du traité de Lisbonne* (Bruylant 2011).
Senden L, *Soft Law in EC Law* (Hart 2004).
Ureta A, 'Habitats Directive and Environmental Assessment of Plans and Projects' (2007) 2 JEEPL 84.