3

Competences, Powers, and Legal Bases

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 competence relating to environmental issues has been dogged with controversy. 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.[1] Accordingly, their relationship is more dynamic than static.

It is the aim of this chapter to explore some of the key issues relating to the allocation of environmental competence to the EU. This issue is clearly of central importance. Given that the EU environmental policy straddles a number of other competences, among which the internal market, agriculture, transport, energy, and animal welfare, environmental shared competence interacts constantly with both exclusive and complementary competences listed under Articles 3 and 6 TFEU.

For the sake of clarity, we will distinguish internal competence (Section 2) from external competence (Section 3). Indeed, on an international level, Article 191(4) TFEU emphasizes the shared nature of environmental external competence, as the EU and the Member States each intervene 'within their respective spheres of competence'. As discussed later, this shared competence has implications for the nature of the agreements concluded by the EU.[2]

Whilst the expansion of EU regulatory action aimed at environmental protection dates back to the early 1970s, it has however suffered—following the entry into force of the SEA—from differences of interpretation regarding the legal basis on which legislation adopted in this area is grounded. Section 4 will set out the procedures relating to the legal basis on which measures pursuing environmental objectives are grounded. The relations between Article 192 TFEU with the other legal bases will also be described.

2. Nature of Internal Environmental Competence

2.1 Shared competence

The EU does not have exclusive competence for protecting the environment. Pursuant to Article 4(2)(e) TFEU, the environment has been classified among the 11 shared competences: alongside the internal market, consumers protection, transports, etc.

[1] L. Brinkhorst, 'Subsidiarity and European Community Environmental Policy. A Pandora's Box' (1991) *EELR* 20.

[2] Opinion 2/00 [2001] ECR I-9713, para. 47; and Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, para. 92.

Consequently, by virtue of Article 2(2) TFEU, 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 of the meaning of shared competence, focus should be placed on Article 2(2) TFEU that reads: '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 in this context.

First, both the EU and the Member States may act in order to protect the environment. However, Member States exercise their competence only if the EU has not exercised its own competence. Member State intervention can be envisioned, first, when the EU has not yet activated its powers, second, when the EU decides to repeal existing legislation without replacing it with new legislation,[3] or when the legislation has been annulled by an EU Court.[4]

Second, if the EU has not taken action, the Member States maintain their competence, provided that they act in accordance with EU law.[5]

- 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, thus far, to leave enactment of the rules by which to ensure the coexistence of genetically modified crops and neighbouring traditional agricultural crops to the Member States.[6] As long as no decision has been adopted with respect to the coexistence of different categories of crops at the EU level,[7] Member States are empowered to decide on coexistence measures. However, in spite of the ability to lay down national, regional, or local coexistence rules, a Member State is not entitled to make the cultivation of genetically modified organisms (GMOs) subject to a specific national authorization based on considerations of protection of health or the environment.[8] In particular, national authorities are called upon to give consideration to the substantive and procedural conditions provided for in the different EU regulations and directives covering the placing on the market of GMOs and seeds.[9]

[3] It should be noted, however, that whenever the EU has acquired new competences regarding the protection of the environment, it has never given them up. That said, the Council and the Parliament have watered down several obligations deemed to be too strict, in particular regarding waste management and nature conservation.

[4] 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, 2007) 24.

[5] Case C-114/01 *AvestaPolarit Chrome Oy* [2003] ECR I-8725, para. 57.

[6] Opinion AG Bot in Case C-442/09 *Bablok* [2011] OJ C311/7, para. 4.

[7] See, eg, 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 [2010] OJ C200/1.

[8] Case C-36/11 *Pioneer Hi Bred Italia* [2012] OJ C355/5, para. 69.

[9] See Cases C-58–68/10 *Monsanto* [2011] OJ C311/8, para. 76.

- With respect to the fundamental freedom of free movement of goods, as long as the EU lawmaker has not pre-empted the position in this area, Member States may justify their restrictive measures by invoking either one of the reasons provided for in Article 36 TFEU or a mandatory requirement. Conversely, Member States may no longer rely on these exceptions if the area has already been fully harmonized.

Third, given the sheer breadth of the objectives set out in Article 191(1) TFEU[10] and the zeal of the EU institutions to harmonize an array of environmental issues, it comes as no surprise that national competences are constantly diminishing. It follows that where the subject matter has already been harmonized under secondary law, Member States cannot pursue their own environmental policy. In such a 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.

Fourth, the real limits of national environmental competence are based on the manner in which the EU has exercised its own competence. However, as discussed in Chapter 4, the position of EU secondary law is much more complex. Unless the subject matter has already 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 taken of the fact that EU legislation is not only minimal but also often incomplete. Thus, 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 definition falls within the competence of the Member States and they have broad discretion, in accordance with Treaty rules, when laying down national rules to develop or give concrete expression to EU obligations.[11] Moreover, the scope of several pieces of environmental legislation is far from complete. In this connection, one example will suffice: given that the 'Forest Focus' Regulation No. 2152/2003 does not seek to effect complete harmonization, it is not designed to establish common rules for governing all activities concerning the management of forest areas. Accordingly, EU law does not preclude any other definition of what constitutes the forests that Member States seek to make subject to any action programme other than those governed by the 'Forest Focus' Regulation.[12]

Fifth, although an area may be subject to harmonization, Member States still retain much leeway. Although Article 192 TFEU is silent on the choice of regulatory instruments, directives have always been preferred to regulations, and framework directives preferred to detailed directives.[13] Indeed, the majority of environmental legislation is 'predicated upon broadly drawn principles and objectives' and follows the principle of subsidiarity by setting mainly general targets for protection.[14] In particular, with respect to management of ecosystems, the need for uniform rules seems less pressing

[10] See the discussion in Section 4.3.1.

[11] See, to that effect, Case C-254/08 *Futura Immobiliare and others* [2009] ECR I-6995, paras 48, 52, and 55; and Case C-378/08 *Agusta* [2010] ECR I-01919, para. 55.

[12] Case C-82/09 *Dimos Agiou Nikolaou* [2009] ECR I-03649, para. 26.

[13] See the discussion in Chapter 4, Section 4.2.

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

than for the establishment of the internal market. In addition, Member States can also depart from EU harmonized standards since this legal discipline is rife with specific escape and safeguard clauses. These highly fluid pieces of legislation charge the national authorities with the programming of implementing measures. Against this background, they are endowed with much latitude to frame their own policy. Consider, for sake of illustration, the review of the decisions adopted by the Commission on the validity of national allocation plans for greenhouse gas (GHG) emission allowances by virtue of Emissions Trading Scheme (ETS) Directive 2003/87/EC.[15] The General Court held that according to the principle of subsidiarity, 'in a field, such as that of the environment governed by [Articles 191–193 TFEU], 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.[16]

Finally, even in situations where the EU lawmaker has already pre-empted the field, the Member States still retain residual competence. Indeed, following the adoption of EU measures, they have the right by virtue of Article 13 TFEU to retain or to introduce more stringent protection measures.[17] As a result, minimum harmonization has been recognized as the modus operandi of environmental policy. Given that minimum harmonization expresses a preference for regulatory differentiation that mirrors subsidiarity,[18] minimum EU environmental standards allow diverging national standards.[19]

2.2 Shared competence and subsidiarity

Since environmental policy is not vested exclusively in the EU, the principle of subsidiarity enshrined in Article 5(3) TEU applies.[20] Moreover, subsidiarity comes further 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 harmon-

[15] [2003] OJ L275/32.

[16] Case T-374/04 *Germany v Commission* [2007] ECR II-4431, para. 78; and Case T-263/07 *Estonia v Commission* [2009] ECR II-03463, para. 52.

[17] Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753. See Chapter 7, Section 2.

[18] F. De Cecco, 'Room to Move? Minimum Harmonization and Fundamental Rights' (2006) 43 *CML Rev* 10.

[19] D. Freestone and H. Somsen, 'The Impact of Subsidiarity' in J. Holder (ed.), *The Impact of EC Environmental Law in the UK* (Chichester: Wiley & Sons, 1994) 87.

[20] Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725, para. 56. It should be recalled that the principle of subsidiarity was at the outset enshrined in Art. 130r(4) EEC and was thus restricted to environmental policy. However, the Court of Justice never ruled on that requirement. However, although agriculture falls under the area of shared competence (Art 4(2) d TFEU), the decision to include an active substance in annex I of Directive 91/414 on pesticide fall within the exclusive competence of the Community authorities. It follows that the measure adopted in the exercise of that competence is not covered by application of the principle of subsidiarity. See Case T-420/05 R *Vischim v Commission* [2006] ECR II-3841, para. 223; Case T-334/07 *Denka International v Commission* [2009] ECR II-4205, para. 200; and Case T-31/07 *Dupont de Nemours* [2013] OJ C 156, para. 205.

ization,[21] environment policy entails constant cooperation between all institutional players.

In a nutshell, the aim of the principle of subsidiarity is not to allocate powers, but rather to regulate the use of powers.[22] In particular, the focus is on whether the EU is the most appropriate decision-maker. 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 separate, albeit related, issues must be distinguished.

The first concerns the objectivity of these two tests. Neither of them establish objective points of comparison.[23] As regard environmental protection, what is 'better' is embroiled in controversy. Does it mean more effective, more protective, more democratic, more social, cheaper, more consistent with internal market obligations or with international obligations, etc? At first glance, no easy answer can be given.[24] That said, there are a number of good reasons to support the view that EU environmental measures easily pass the hurdle of subsidiarity. Several arguments can be mustered in this regard.

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, and so on. As a result, regulating these issues should be a matter for the EU and not chiefly for the Member States.

On the other hand, subsidiarity does not preclude the EU lawmaker from regulating issues that do not have a cross-frontier element, such as urban noise, household waste, or contaminated land remediation. Given the significant discrepancies between the Member States regarding the stringency of their environmental policies, EU harmonization ensures that a level playing field exists in all Member States in a way which ensures 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.

In addition, 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 until now never declared void an EU legislative act on the ground that it contradicts subsidiarity. Accordingly, it is likely to reject the claim that existing environmental legal acts violate the principle. In this

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

[22] 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.

[23] Estrella (n 22), 95.

[24] L. Krämer, *EC Environmental Law*, 6th edn (London: Sweet & Maxwell, 2007), 19.

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.[25] This prompts the question whether subsidiarity is no more than a mere pre-legislative requirement.

Nevertheless, with the entry into force of the Lisbon Treaty, 'ineffective' *ex post* judicial review has been supplemented by *ex ante* political control that is likely to increase the accountability of the EU's lawmaking bodies.[26] Brief mention should also 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. Clearly, some parliaments may have a strong interest in ensuring that the EU abides by the principle. 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 said, whether this review mechanism will lead to closer national checks on the exercise of EU competence as regards the protection of the environment remains to be seen.

The third issue concerns the political impact of subsidiarity. Although it is doubtful whether this principle could become a serious ground for review of environmental measures, EU environmental policy bears the mark of subsidiarity. First, the policy is highly decentralized since control of its implementation is left, by virtue of Article 192(4) TFEU, to the Member States. In particular, the enforcement of EU harmonized measures is entirely left to the Member States.[27] This means that decisions whether to grant a licence for operating a plant, conducting an EIA, regulating waste, designating protected areas, protecting vulnerable species, or prosecuting environmental crimes are matters for national, regional, and even local authorities not for the Commission. Hence, 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[28] and in order to punish infringements.[29] Given that the mechanics of enforcement are likely to diverge significantly between 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 level of control over the proper implementation of EU secondary law.[30]

[25] 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.

[26] M. Dougan, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts' (2008) 45 *CML Rev* 659.

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

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

[29] See European Parliament and Council Directive 2008/99/EC on the protection of the environment through criminal law [2008] OJ L328/28, replacing 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.

[30] 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*

By the same token, the financing of environmental projects is, by virtue of Article 192(4) TFEU, also a matter for the Member States. Remarkably enough, although the social and economic pillars of sustainable development dispose of funds made available for these purposes,[31] the title dedicated to the environment does not make any provision for structural financing. Moreover, the significance of the socio-economic funds dwarfs the LIFE Programme that is deemed to be one of the spearheads of EU environmental funding.[32] Furthermore, other programmes of importance to the protection of the natural environment depend on the willingness of the Member States to provide matched funding. Although contributions to the agri-environmental schemes, provided for under Regulation (EC) No. 1698/2005 on rural development, may be as low as 15 per cent—unlike the first pillar of the Common Agricultural Policy (CAP), these schemes are subject to co-financing—this appears to be sufficient deterrent for financial intervention by the State.[33]

Another practical observation must be made: the intent to repatriate in the name of subsidiarity some legislation on water protection has not been successful.[34] Indeed, not a single piece of major environmental legislation has been repealed thus far. Instead, subsidiarity-led thinking has been an exercise of simplification and deregulation of existing environmental legislation.

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 State 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).[35] Accordingly, self-regulation should be promoted owing 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.[36] It is submitted that the view that the question of whether

[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.

[31] Council Regulation (EC) No. 2012/2002 establishing the European Union Solidarity Fund [2002] OJ L311/3.

[32] Launched in 1992, LIFE has financed 3,115 projects contributing in €2.2 billion to the protection of the environment. The latest Financial Instrument for the Environment (LIFE +) was adopted through Regulation (EC) No. 614/2007 concerning the Financial Instrument for the Environment (LIFE +) [2007] OJ L149/1. See Communication from the Commission, Mid-term review of the LIFE + Regulation, COM (2010) 516 final.

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

[34] A. Weale et al., *Environmental Governance in Europe* (Oxford: OUP, 2000) 359, 461.

[35] B. E. Olsen, 'The Subsidiarity Principle and its Impact on Regulation' in B. E. Olsen and K. E. Sorensen (eds), *Regulation in the EU* (Copenhagen: Thomson-Sweet & Maxwell, 2006) 57.

[36] N. de Sadeleer, 'Particularités de la subsidiarité dans le domaine de l'environnement' (2012) 80 *Droit et Société* 73–90.

environmental goals could be better achieved by self-regulation or by deregulation falls within the scope of the principle of proportionality and not subsidiarity.[37]

2.3 Interaction with other competences

2.3.1 *Introductory comments*

The dividing of various subject areas into different categories of competence matters significantly since this categorization determines the extent to which the EU has the power to legislate. By virtue of shared competence in that area, environmental policy stands out from policies subject to exclusive competence by virtue of Article 3 TFEU as well as complementary competence listed under Article 6 TFEU. However, as discussed previously, the concept of environment must be understood broadly and flexibly.[38] The fact that environmental competence is rather broad does not mean that the EU institutions may encroach upon exclusive or complementary competences. Given that the EU environmental policy also embraces health issues, the management of natural resources, and territorial management, and to some extent worker protection, other areas classified as having shared competence are likely to interact with environmental policy. It is necessary to draw a dividing line between these different areas.

2.3.2 *Interaction with exclusive competence*

Competence over environmental policy is shared, which marks it out from other EU policies with exclusive competence. Article 3(1) TFEU lists a restricted number of areas that fall within the scope of exclusive EU competence, several of which have little connection with environmental issues. That said, whenever exclusive competence interacts with environmental issues, the border with shared competence in this area is somewhat blurred. This is particularly so with the Common Commercial Policy (CCP) that we will address in the following section. Furthermore, under the terms of Articles 3 and 4 TFEU, it should be noted that 'the conservation of marine biological resources under the common fisheries policy' falls exclusively under EU competence, whilst the environment—which includes the conservation of natural resources and biodiversity—is included in shared competences, alongside agriculture, fishing, energy, consumer protection, and common safety concerns in public health.

2.3.3 *Interaction with other shared competences*

2.3.3.1 Health issues

The fact that environmental policy takes account of health protection raises the problem of its delineation with regard to other EU policies, given that health, alongside

[37] G. Winter 'Constitutionalizing Environmental Protection in the EU' (2002) 2 *YbEEL* 86.
[38] See the discussion in Chapter 1, Section 2.

Table 3.1 Categorization of competences relating to health and the environment

Environment	Article 4(2)(e)TFEU	Shared competence
Common concerns in public health matters	Article 4(2)(k)TFEU	Shared competence
Protection and improvement of human health	Article 6(a)TFEU	Supplementary competence

he environment, is a cross-cutting concern permeating, by virtue of Articles 168(1) TFEU and 35 EUCFR, all other EU policies.[39]

Account must be taken of the fact that there are significant differences between environmental and health policies. First, it should be noted that on an institutional level the framers of the EC Treaty and later 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 the one hand, pursuant to Article 4(2)(e)–(k) TFEU, both competences as regards 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 by virtue of Article 6(a) TFEU (see Table 3.1).

Moreover, this imbalance is accentuated where there is a need to create exceptions to rules harmonizing the internal market, as new measures may be taken in order to curb an environmental risk, but not a strictly health-related concern (Art. 114(5) TFEU).[40]

2.3.3.2 Worker protection issues

The boundary problems we have seen in the previous subsection are all the more evident in relation to 'social policy', for the aspects defined in the TFEU on account that it encompasses the 'improvement in particular of the working environment to protect workers' health and safety'.[41] Indeed, the relationship between environmental policy and health and safety policy for workers is not easy to trace. The working environment focuses on working conditions. That said, several worker protection directives aim at reducing risks relating to exposure to biological agents and chemicals at work.[42] In so doing, they oblige the Member States to abide by rather similar safety obligations to the ones stemming from the environmental directives adopted under Article 192 TFEU. Moreover, the principle of substitution stands astride both environmental and worker protection.[43]

Furthermore, whilst the health and safety of workers is generally subject to measures different from those taken in order to protect residents living near industrial installations, it may however occur that the same instrument lays down internal control

[39] 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.

[40] Chapter 3, Section 3.2. [41] Arts 4(2) and 153(1)(a) TFEU.

[42] European Parliament and Council Directive 2000/54/EC on the protection of workers from risks related to exposure to biological agents at work [2000] OJ L262/21; European Parliament and Council Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work [2004] OJ L229/23.

[43] Case C-473/98 *Kemikalieinspektionen and Toolex* [2000] ECR 5681, para. 45.

measures concerning worker protection at the same time as external control measures applying to listed installations. Given that it straddles both worker and neighbourhood protection against major accident hazards involving dangerous substances, the Seveso III Directive is a good case in point.[44]

2.3.3.3 Energy issues

Given the absence from the former EC Treaty of a chapter specifically dedicated to energy policy, certain measures promoting renewable energy were adopted on the basis of Article 175 EC (Art. 192 TFEU).[45] This gap has finally been filled by the Treaty of Lisbon. Pursuant to Article 4(2)(i) TFEU, energy has been placed on an equal footing with the other ten categories of shared competence. As a consequence, Article 194(1) TFEU stresses that the Union policy on energy interacts both with 'the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment'. Admittedly, much emphasis has been placed on interaction with environmental policy.[46] One of the four objectives to be pursued is the 'promotion of energy efficiency and energy saving and the development of new and renewable forms of energy'. Given the emphasis placed on climate change under Article 192(1) TFEU, energy measures aiming at preventing climate change should be adopted by virtue of both Articles 192(1) and 194(2) TFEU.

2.3.4 *Interaction with animal welfare*

Article 13 TFEU brings into the limelight animal welfare issues. Although the concept of environment must be distinguished from that of 'animal welfare', its boundaries are not always easy to draw. Some environmental directives enacted on the basis of ex Article 130s EEC (Art. 192 TFEU) contribute to animal welfare.[47] Moreover, Member States justify some measures having equivalent effect to a quantitative restriction on both biodiversity and animal welfare imperative requirements.[48]

2.3.5 *Interaction with supporting, coordinating, and supplementary competences*

A variety of 'supporting', 'coordinating', and 'complementary' competences are bought together in one category under Article 6 TFEU. These competences allow the EU to intervene merely to flank national policies without limiting the national authorities'

[44] European Parliament and Council Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances [2012] OJ L197/1.

[45] European Parliament and Council Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L283/33.

[46] P. Thieffry, 'Les politiques européennes de l'énergie et de l'environnement: rivales ou alliées?' (2009–10) 4 *RAE-LEA* 783–809; K. Kulovesi, E. Morgera, and M. Munoz, 'Environmental Integration and Multi-Faceted International Dimensions of EU Law: Unpacking the EU's Climate and Energy Package' (2011) 48 *CML Rev* 829–91.

[47] Council Directive 1999/22/EC relating to the keeping of wild animals in zoos [1999] OJ L94/24.

[48] Case 100/08 *Commission v Belgium* [2009] ECR I-140, paras 91–3.

In concluding mixed environmental agreements, the EU usually passes their obligations on to its Member States in the form of directives or regulations. As a matter of practice, where the international agreement lays down trade-related measures, the EU generally adopts regulations. Although these regulations enhance a homogeneous application of international environmental law, they do not always deprive Member States from enacting more stringent measures.[107]

3.6 Concluding remarks

In sum, the developments noted previously mean that the division of competences regarding the external competence of the EU in environmental protection matters manifests itself in three stages.[108]

First, since the EU has exercised its express shared competence over external relations in the environmental sector, there is no longer any need to invoke the theory of the exercise of internal competence in order to justify the conclusion of an agreement. This is the case where the object and purpose of the mixed agreement essentially relate to environmental matters.

Second, where the object and goal of an agreement do not necessarily relate to the environment within the meaning of Article 191 TFEU, but to other matters, Article 191(4) TFEU no longer applies. Where there is no other explicit external competence, the agreement must be concluded, in accordance with *ERTA* case law, on the basis of an implicit external competence. Moreover, where an area of law has been completely harmonized (which is often the case for instruments regulating the internal market that contribute to environmental protection pursuant to Art. 114(3) TFEU), competence may become exclusive, having regard to the risk of implications for secondary law.

Third, where harmonization is minimal, which is often the case for instruments the main objective of which is protection of the environment, the Member States may conclude international agreements which touch on EU harmonization rules. In the event of disputes between the Member States, the latter must respect the obligations applicable to them pursuant to Article 4(3) TEU (duty of cooperation) and Article 344 TFEU (obligation to respect the exclusive competence of the Court of Justice to rule on all disputes concerning the interpretation and application of EU law).

4. Choice of Legal Bases

4.1 Introductory remarks

Few sectors of EU law still elude the growing reach of environmental concerns. Hence, whilst before the entry into force of the Lisbon Treaty the majority of rules which aim

[107] European Parliament and Council Regulation (EC) No. 850/2004 on persistent organic pollutants [2004] OJ L158/7.

[108] I. Macleod, D. Hendry, and S. Hyett, *The External Relations of the European Communities* (Oxford: OUP, 1996) 327.

to protect the environment fell under the aegis of the first pillar (formerly the Treaty establishing the European Community), the two other pillars have not remained untouched by this cross-cutting issue. The frameworks put in place for military operations, which fall under the Common Foreign and Security Policy (formerly the second pillar; currently Title V EU), have impacts on the environment.[109] Similarly, the need to combat environmental crime effectively has resulted in the policy for Police and Judicial Cooperation in Criminal Matters (formerly the third pillar; currently Arts 82–89 TFEU) opening itself up to this issue.[110] Furthermore, by virtue of the integration clause enshrined in Article 11 TFEU,[111] measures taken in order to protect the environment have progressively merged with an array of other policies. Due to their cross-cutting nature, environmental questions are much broader and interact constantly with different EU policies, the legal bases of which have proliferated as a result of successive revisions to the founding Treaties. To some extent, these other EU policies also contribute to improving environmental protection.

It must not be lost from view that each piece of EU 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 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 self-evident. As emphasized later, identification of the act's centre of gravity may prove particularly difficult.

On the 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 imprecision of the concept environment, it is difficult to lay down the exact limits of the areas covered by the policy.[112] As a result, genuine environmental measures adopted by virtue of Article 192 are likely to encroach on other EU policies.

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

[109] According to the 2007 Annual Report of the Council to the European Parliament on the main aspects and basic choices of the CFSP, 'energy security, climate change and the scarcity of resources will continue to grow in importance within the CFSP context'. See European Communities, Council document on the main aspects and basic choices of the Common Foreign and Security Policy (CFSP) presented to the European Parliament in application of para. G (para. 43) of the Interinstitutional Agreement of 17 May 2006 (2007) 13.

[110] See in particular Case C-176/03 *Commission v Council* (n 29); and Case C-440/05 *Commission v Council* [2007] ECR I-9097.

[111] See the discussion in Chapter 1, Section 5.

[112] See, by analogy, the protean nature of other EU policies, such as economic and social cohesion. See Opinion AG Poiares Maduro in Case C-166/07 *Parliament v Council* [2009] ECR I-7135, para. 81.

competences which the EU holds under the terms of other provisions contained in either the TEU or the TFEU.

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

First, in defining the scope of EU's intervention, the legal base enables the EU to exercise its legislative competence in a given field.[113] Moreover, the basis chosen determines not only which institution has competence to take action but also the procedure to follow and the objective pursued. It also determines the types of act that can be adopted.[114]

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.[115] Indeed, the choice between a basis which requires unanimity within the Council and a basis which requires only a qualified majority is fundamental,[116] as too is the choice between a basis implying an ordinary legislative procedure (OLP) and a special legislative procedure (SLP).[117] Admittedly, an incorrect choice of legal basis does not therefore constitute a purely formal defect. Although the Treaty of Lisbon has generalized to some extent the OLP, situations in which the special legislative procedure applies remain sufficiently numerous to result in institutional conflicts. Unsurprisingly, given that the choice of legal base shapes the decision-making process and influences its political outcomes, the institutions seek to choose the legal basis that provides the procedure most advantageous to them.[118] The fact that such a choice is deemed to be of constitutional importance is likely to guarantee institutional equilibrium.

[113] Art. 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.

[114] K. St C. Bradley, 'The European Court and the Legal Basis of Community Legislation' (1998) *EL Rev* 379; N. Emiliou, 'Opening Pandora's Box: the Legal Basis of Community Measures Before the Court of Justice' (1994) *EL Rev* 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) 225–40; 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 législation communautaire: enjeux constitutionnels et principes directeurs' (2007) *Europe* 4–10; Jans and Vedder (n 55), 59–94; N. de Sadeleer, 'Environmental Governance and the Legal Bases Conundrum' (2012) *YEL* 1–29.

[115] R. Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis of EU Legislation' (1993) 30 *CML Rev* 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 *CML Rev* 1243.

[116] If QMV prevails, recalcitrant Member States opposing the adoption of the proposed measure could be sidelined.

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

[118] Chalmers, Davies, and Monti (n 114), 95.

In a recent case regarding the validity of a Council position to be adopted on behalf of the EU in a body established by CITES, the Court of Justice placed particular emphasis on the obligation 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.[119]

Second, although 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.[120] In effect, when regulating activities impairing the environment, the EU does not act in a policy vacuum. Indeed, as regards the vertical division of competence, the choice significantly affects the room for manoeuvre left to the Member States. Using Article 207 TFEU as the legal base for a regulation regulating trade in hazardous substances implies that the act is a matter of exclusive competence.[121] Conversely, using Article 192(1) TFEU to adopt such an act implies that the act is a matter of shared competence.[122] In addition, 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 as these measures are compatible with the Treaties.

This fourth section unfolds in seven subsections. Before embarking on an analysis of the conflicts between environmental policy and other EU policies, it is necessary to recall in Section 4.2 the principles which govern the choice of legal bases and the review by the Court of its exercise. Section 4.3 examines the different legal bases encapsulated in Article 192 TFEU. Sections 4.4 to 4.8 cover conflicts between environmental policy and the internal market, the CCP, the CAP, criminal law, and nuclear law. Underpinning this analysis of the case law is the view that environmental issues are progressively addressed within a broad range of EU policies. This evolution is testament to the influence of the key objective of sustainable development.

4.2 Principles governing 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 its foundation. 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.

The choice of the legal base is not a purely formal question, but rather one of substance, being a matter of 'constitutional significance'[123] that is regularly ruled on by

[119] C-370/07 *Commission v Council* [2009] ECR I-8917, paras 37, 39, 46, and 48. It should be noted that AG Kokott stressed in addition to these obligations the principle of transparency (paras 37 and 38).
[120] Wennerås (n 64). [121] Art. 3(1)(e) TFEU. [122] Art. 4(2)(e) TFEU.
[123] Opinion 2/00 (n 2), para. 5.

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'.[124] Instead, the determination of the legal base is amenable to judicial review, which includes in particular the aim and the content of the measure.[125]

If it is established that the act simultaneously pursues different objectives or has several components that are inextricably 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.[126] 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 is likely to found the proposed measure and to distinguish the core objectives and components from those which are ancillary. By way of example, the mere fact that the act contributes simultaneously to the internal market and environmental policy is insufficient to take 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.[127] In other words, this will call for recourse to a dual or multiple legal base, provided that the corresponding procedures are compatible.

The fact that EU action may have a different legal base poses barely 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.[128] By the same token, in order to adopt an act promoting the use of renewable energy with the aim of combating climate change—objectives laid down under Articles 191(1) and 194(1)—the legislature ought to have recourse to both Articles 192(1) and 194(2) TFEU, both of which require recourse to the OLP.

However, where there are differences between the procedures, the decision-making process becomes 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

[124] Case C-300/89 *Commission v Council* ('*Titanium Dioxide*') [1991] ECR I-2867, para. 10.

[125] See, inter alia, *Titanium Dioxide* (n 124), para. 10; Case C-269/97 *Commission v Council* [2000] ECR I-2257, para. 43; Case C-211/01 *Commission v Council* [2003] ECR I-8913, para. 38; and Case C-338/01 *Commission v Council* [2004] ECR I-4829, para. 54.

[126] 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; Case C-211/01 *Commission v Council* (n 125), para. 39; Case C-281/01 *Commission v Council* [2002] ECR I-12049, para. 57; Case C-338/01 *Commission v Council* (n 125), para. 55; and Case C-91/05 *Commission v Council* [2008] ECR I-3651, para. 73.

[127] *Titanium Dioxide* (n 124), para. 13; Case C-336/00 *Huber* [2002] ECR I-7699, para. 31; Case C-281/01 *Commission v Council* (n 126), para. 35; Case C-211/01 *Commission v Council* (n 125), para. 40; Case C-91/05 *Commission v Council* (n 126), para. 75; and Opinion 2/00 (n 2), para. 23.

[128] European Parliament and Council Regulation (EC) No. 1829/2003 on genetically modified food and feed [2003] OJ L268/1.

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.*[129] This relative strict view entails the risk that in some cases it would not be possible to give priority to the OLP.[130] As a result, 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 as they provide for the adoption of a measure by the ordinary legislative procedure.*[131] 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.'[132] In addition, the use of two different legal bases is also liable to affect the Member States' right to enact more stringent measures.[133]

The case law has recently undergone a certain change in emphasis. Aware of such difficulties, the Court of Justice has held that *an act could be based on the dual legal base* inasmuch as it is not impossible from the point of view of legislative technique.[134] However, that situation is deemed to be exceptional.[135] It follows that it is only where the procedures are incompatible from the point of view of legislative technique that a dual legal base is impossible and a choice has to be made between them.

That said, the difficulties raised by recourse to a dual legal base may also encourage the institutions to split the act into two distinct acts, one based on the legal base that is more favourable for the European Parliament and the other on a base which is less favourable for it or one that leads to minimal harmonization and the other to maximal harmonization. However, this dissociation may compromise consistency of EU action.[136]

4.3 The environmental legal bases

4.3.1 *Measures under Article 192(1) TFEU: ordinary legislative procedure*

Following the entry into force of the Treaty of Amsterdam, the co-decision procedure from the first paragraph of Article 175 EC (Art. 192 TFEU) has been brought into line

[129] *Titanium Dioxide* (n 124), paras 17–21; Joined Cases C-164/97 & C-165/97 *Parliament v Council* [1999] ECR I-1139, para. 14; Case C-338/01 *Commission v Council* (n 125), 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.

[130] Case C-155/07 *Parliament v Council* (n 129).

[131] Case C-178/03 *Commission v European Parliament and Council* (n 129); Case C-155/07 *Parliament v Council* (n 129), para. 37.

[132] *Titanium Dioxide* (n 124), para. 20; and Case C-65/93 *Parliament v Council* [1995] ECR I-643, para. 21.

[133] Wennerås (n 64), 70.

[134] Case C-155/07 *Parliament v Council* (n 129), para. 79. Regarding the combination between the OLP referred to in Art. 159(4) EC (Art. 175 TFEU) and the requirement that the Council should act unanimously in accordance with Art. 308 EC (Art. 352 TFEU), see Case C-166/07 *Parliament v Council* [2009] ECR I-7135, para. 69, noted by T. Corteau (2011) 48:4 *CML Rev* 1271–96. According to Cremona, the Court takes the view that safeguarding the Parliament's rights by using the OLP does not undermine the Council's right to be the sole lawmaker. See M. Cremona, 'Balancing Union and Member State Interests: Opinion 1/2008, Choice of Legal Base and the Common Commercial Policy under the Treaty of Lisbon' (2010) 35 *EL Rev* 686.

[135] Case C-411/06 *Commission v Parliament* [2009] ECR I-7585, para. 49.

[136] See Opinion AG Kokott in Case C-155/07 *Parliament v Council* (n 129), para. 89.

with the provisions governing the completion of the internal market. Following the entry into force of the Treaty of Lisbon, pursuant to Article 192(1) TFEU measures of secondary law aiming at environmental protection must now be adopted in accordance with the OLP that is replacing the co-decision procedure.[137] However, there is a formal difference between the standard procedure regulated by Article 192 TFEU and that governed by Article 114 TFEU, a legal basis which takes on considerable importance with regard to the impact of products on the environment. Article 192 TFEU stipulates that the Committee of the Regions be consulted, a requirement flowing from the regional impact of EU environmental policy.[138] In substantive terms, it should be noted that Article 114 TFEU provides that the Council adopt 'measures for the approximation of provisions laid down by law', whereas Article 192 TFEU enables the Council and the Parliament to 'decide what action is to be taken by the EU in order to achieve the objectives referred to in Article 191 TFEU'. The generic term 'action' covers the adoption of regulations, directives, and decisions; EU lawmakers hence dispose of a significant margin of appreciation with regard to the choice of technique most appropriate for harmonization, which may be made in accordance with the specific circumstances in the area of environmental matters. Finally, Article 193 TFEU authorizes the Member States to take more stringent protection measures than those decided by the Council, which Article 114 TFEU does not, in principle, allow.[139]

4.3.2 *Measures under Article 192(2) TFEU: special legislative procedure*

The SLP[140] or, in other words, the requirement for unanimity within the Council following consultation with the European Parliament, is maintained for a certain number of sectors regarded as sensitive. First, decisions regarding 'provisions primarily of a fiscal nature' are subject to a SLP. Second, and surprisingly, several important aspects relating to quality of life are not covered by the OLP. These include 'measures affecting town and country planning, quantitative management of water resources or affecting, directly or indirectly, the availability of those resources, and land use, with the exception of waste management'. Finally, 'measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply' also fall within the scope of the SLP.

However, a *passerelle* clause empowers the European Council to apply the OLP instead of the SLP. As a result, it will imply the introduction of QMV in Council instead of unanimity and place the Parliament on an equal footing with the Council. The *passerelle* clause does not require the prior approval of national parliaments.[141]

[137] Arts 289 and 294 TFEU.

[138] The Treaty of Lisbon reflects a shift towards greater recognition of the role of regional and local self-government. On the one hand, in accordance with Art. 4(2) TEU the Union is called upon to respect the national identities of regional and local self-government, on the other, the new wording of Art. 5(3) TEU on the subsidiarity principle refers to the various levels of government within a Member State: central, regional, and local.

[139] Chapter 7, Section 2.

[140] Arts 192(2) and 289(2) TFEU.

[141] However, in its *Lisbon* judgment, the German Federal Constitutional Court prescribed positive confirmation of the use of the *passerelle* clause by the German parliament. Judgment of 30 June 2009, 2BvE 2/08, 2BvE 5/08, 2BvR 1010/08, 2BvR 1022/08, 2BvR 1259/08, 2BvR 182/09.

Due to the fact that paragraph 2 has been worded in an extremely convoluted manner, the extent of these exceptions is difficult to determine. This calls for a closer analysis of the boundaries of these exceptions.

4.3.2.1 Fiscal provisions

Decisions regarding 'provisions primarily of a fiscal nature' are not subject to the OLP. This exception goes hand in hand with other TFEU provisions requiring unanimity on fiscal matters.[142] In cases where the principal goal of the measure is redistributive, the action must therefore be taken unanimously under the terms of paragraph 2; on the other hand, where the fiscal aspects are simply ancillary to the legislative act, the principal objective of which is to protect the environment, the OLP will apply. The requirement for unanimity prevented in particular the adoption of an EU tax on CO_2 emissions in the particularly sensitive area of taxation.

4.3.2.2 Land use

As regards 'measures affecting town and country planning, . . . , and land use', it should be noted that the SLP applies to large areas traditionally reserved to the Member States.[143] This exception is justified by the fact that land use and land planning are primarily a national, regional, or even local issue. However, the dividing line between environmental policy *stricto sensu* and that of town and country planning is particularly difficult to identify. Clearly, the interpretation of these terms raises significant difficulties.

Land use decisions have a significant environmental dimension: in allocating areas for housing, industrial activities, infrastructure, and agriculture, these decisions reduce the available natural space, thus significantly impinging upon the conservation of habitats and species. In the eyes of regional and local authorities, town and country planning undoubtedly amounts to environmental law tools *lato sensu*.[144]

Also, in numerous regions of Europe, land is so built up that natural areas occupy nothing more than insignificant portions of land. Given population density in continental Europe, it is without doubt a limited resource, which must accordingly fall under the aegis of the SLP.

However, this expansive interpretation of the SLP would jeopardize the more democratic nature of the OLP. An expansive interpretation of the special procedure should, it is submitted, be precluded. Insofar as contemporary town and country

[142] Arts 113 and 194(3) TFEU.

[143] In spite of its impact on planning activities across the EU, the European Spatial Development Perspective (ESDP)—a framework for policy guidance to improve cooperation between EU sectoral policies—is part of the social and economic cohesion policy rather than the environmental policy. Moreover, the ESDP is merely an intergovernmental, non-binding instrument serving as a framework for decision-making by the Member States, their regional and local authorities, as well as the Commission. See J. Holder, 'Building Spatial Europe: An Environmental Justice Perspective' in Scott (n 98), 100–1.

[144] In AG Léger's view, measures which must be adopted on the basis of Art. 191 TFEU in conjunction with Art. 192(2), first subpara., second indent TFEU 'are those whose aim is the preservation or improvement of the quality of the physical, social or cultural human environment. They concern in particular town and country planning, and the establishment of transport and communication networks adapted to changing lifestyles'. See Opinion AG Léger in *Spain v Council* (n 126), para. 106.

planning rules now place more of an emphasis on 'qualitative aspects' than quantitative ones, with a view to promoting sustainable development, the harmonization of these measures must be governed by the OLP. In other words, town and country planning today has more a qualitative than a quantitative aspect.

The proposal made here will be illustrated with reference to various examples. A number of environmental directives directly impinge upon the ways in which planning competences are exercised. The most important are the Environmental Impact Assessment (EIA), Strategic Emissions Assessment (SEA), Landfill, Birds, and Habitats directives.[145] For instance, the establishment of the Natura 2000 network affects both town and country planning as well as land use. There is a question as to whether the harmonization measures taken in order to safeguard habitats should be covered by the SLP but it is important, it is submitted, to distinguish between principal and ancillary matters. Since this legal regime has the principal objective of safeguarding species threatened with extinction, it has more a qualitative than a quantitative dimension.[146] Moreover, given that they harbour endangered species at a continental level, the areas designated as habitats under the directive are ecologically important from an EU perspective rather than from a national point of view. Therefore, such a regulatory approach rightly falls within the ambit of the OLP.

Following the same line of argument, whilst Directive 2007/60/EC on the assessment and management of flood risks[147] was indeed adopted according to the former co-decision procedure, it cannot be denied that flood hazard maps and flood risk maps determine the concept of territorial management. As far as such cartography is concerned, lawmakers have sought to prevent polluting activities from being exploited in areas subject to flooding hazards. In other words, this planning does have an environmental dimension. Thus, it involves more the assessment and management of risks than territorial management *stricto sensu*.

To further complicate matters, paragraph 2 of Article 192 TFEU also covers 'land use, with the exception of waste management'. Consequently, waste management is subject to the OLP. By laying down criteria governing the establishment of installations for the disposal of waste, various directives adopted pursuant to Article 192(1) TFEU exercise a not insignificant influence on the choices to be made in the area of town and country planning and land use.[148]

4.3.2.3 Quantitative management of water resources

We now turn to the exception relating to 'quantitative management of water resources or affecting, directly or indirectly, the availability of those resources'. The wording of paragraph 2 resulted from the desire to clarify, when amending the Treaty of Nice, the scope of the earlier text as interpreted by the Court of Justice in 2001 in the

[145] M. Purdue, 'The Impact of EC Environmental Law on Planning in the UK' in J. Holder (n 19), 231; F. Haumont, *Droit européen de l'aménagement du territoire et de l'urbanisme* (Brussels: Bruylant, 2007).
[146] Opinion AG Léger in *Spain v Council* (n 126), para. 106.
[147] Directive 2007/60/EC on the assessment and management of flood risks [2007] OJ L288/27, Art. 6.
[148] Council Directive 1999/31/EC on the landfill of waste [1999] OJ L182/1.

Danube case.[149] The fact that the Convention on cooperation for the protection and sustainable use of the river Danube regulated the use of water from the Danube basin and their management in quantitative terms should *ipso facto* have led the Council to rule unanimously under the SLP. However, the Court held in *Council v Spain* that it was the measures regulating the 'quantitative aspects' of the use of water resources that were covered by the initial expression. In the eyes of the Court, it followed from the general economy of the Danube Convention that its main objective was the protection and improvement of water quality, 'although it also refers, albeit incidentally, to the use of those waters and their management in its quantitative aspects'.[150] This interpretation therefore confirmed the view that the Council had been right in ruling by qualified majority and was not required to vote unanimously under Article 192(1) TFEU. Accordingly, whenever an act gives greater emphasis to qualitative than to quantitative management, it falls within the scope of Article 192(1) TFEU.

4.3.2.4 Energy

When it comes to assessing the scope of the adjective 'significant' (para. 2(c)), in view of the interpretative difficulties which this standard raises, the Court of Justice will have to rule on the procedure from square one by virtue of its more democratic character. Despite their significant impacts on the Member States' choices regarding energy resources, various acts regarding the fight against global warming fall under environmental policy.[151] In laying down relatively modest objectives, these acts did not call into question the energy options set at a national level.

4.3.3 *Decisions under Article 192(3) TFEU: ordinary legislative procedure*

Under the terms of Article 192(3) TFEU, 'general action programmes setting out priority objectives to be attained' must also be adopted in accordance with the OLP, after consulting the Economic and Social Committee and the Committee of the Regions. This paragraph clearly underscores the importance the Treaty drafters have been accorded to subject the environment policy programming to legislative debate. Given that they are adopted in accordance with the OLP, these programmes have greater legitimacy than Commission communications.[152] It should be noted that most of the other policy programmes are not subject to such democratic debates—although the sixth programme was adopted by way of a decision, this instrument was distinct from the decisions taken pursuant to Article 249 EC (Art. 288 TFEU). Admittedly, the addressees of such decisions are not specified and its obligations are general on this

[149] *Council v Spain* (n 126), para. 50. [150] *Council v Spain* (n 126), para. 74.

[151] Council Decision 94/69/EC concerning the conclusion of the United Nations Framework Convention on Climate Change [1994] OJ L33/11; European Parliament and Council Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market [2001] OJ L283/33. By virtue of Art. 194(3) the adoption of tax measures on energy is also subject to the SLP.

[152] With the exception of research and trans-European networks (Arts 172 and 182 TFEU), no other EU policy programmes are subject to the OLP.

point, which means that they are not capable of having legal effects. These decisions have more of a political than a legal nature.[153]

Lastly, account should be taken of the fact that the first four programmes set out specific proposals for legislation that the European Commission was intent on later submitting to the Council. In so doing, the Commission provided an occasion to discuss the new outlines of its policy. In emphasizing 'shared responsibility' rather than the adoption of new legislations, the fifth action programme represented a significant change in direction from its predecessors.

4.4 Environment and internal market

As the historical analysis in Chapter 1 has evidenced, the rise of environmental policy was undeniably born out of concern to avoid distortions of competition between undertakings. To give the national authorities free rein to enact unilateral product and operating standards would entail the risk of a race to the bottom between States keen to attract polluting installations to the place where the cost of pollution is lowest. This would result in a generalized reduction of protection levels. Against this backdrop, a significant number of product-oriented directives were adopted on the basis of ex Article 100a EC (Art. 114 TFEU) within the perspective of the completion of the internal market.

However, some pieces of legislation may pursue inextricably and equally associated environmental and internal market objectives. This is particularly the case for operating standards. Although the impact of such measures on the functioning of the internal market may be attenuated in contrast to product-related standards, it is nonetheless still there.[154] In effect, national environmental operating standards are likely to place domestic industries at a competitive disadvantage. The variation of these standards can influence decisions by companies regarding plant location.[155] This is well illustrated by the case of the Titanum Dioxide Directive, a piece of legislation setting out rules prohibiting or requiring the reduction of waste discharges into soil and water. The Court held that this directive had to be adopted under ex Article 100a EC (Art. 114 TFEU) on the grounds, among others, that the third paragraph of that provision required internal market legislation to seek a high level of environmental protection.[156]

[153] M. Pallemaerts et al., *Drowning in Process? The Implementation of the EU 6th Environmental Action Programme* (London: IEEP, 2006). However, the fact that the Sixth Environment Action Programme, which was based on ex Art. 175 EC (Art. 192 TFEU), thematically shows numerous points of contact with European Parliament and Council Regulation (EC) No. 304/2003 concerning the export and import of dangerous chemicals ([2003] OJ L63/1) impinges upon the choice of Art. 192 TFEU as the proper legal base of the Regulation. Accordingly, the Court held that the regulation at issue was 'primarily an instrument of environmental policy, not an instrument of commercial policy'. See Opinion AG Kokott in Case C-178/03 *Commission v Parliament and Council* (n 129), paras 38–9.

[154] A. Weales et al., *Environmental Governance in Europe* (Oxford: OUP, 2000) 35.

[155] Eg there is a strong concern among undertakings subject to the EU GHG emission scheme about the costs incurred by the auctioning of allowances. See ETS Directive 2003/87/EC, Art. 13(1). So far, the impact of environmental concerns on the location of polluting industries has been rather limited in scale since environmental costs generally represent a small proportion of the overall production costs.

[156] *Titanium Dioxide* (n 124). See N. de Sadeleer, 'Le droit communautaire de l'environnement, un droit sous-tendu par les seuls motifs économiques?' (1991) 4 *Amén-Env* 217; K. St C. Bradley, 'L'arrêt dioxyde de

The Court's reasoning was underpinned by other conclusive arguments. The harmonization of operating standards requires the elimination of distortions of competition likely to be generated by excessively stringent environmental standards. In addition, the internal market procedure was at that time markedly more democratic than that laid down in Article 130s. The *Titanium Dioxide* judgment seemed to be inexorably pushing the whole sphere of environmental policy, as well as other policies such as health and consumer protection, into the purview of the internal market and strengthening total harmonization.

However, the lessons of the *Titanium Dioxide* judgment could apply only in cases where environmental protection was inextricably linked to completion of the internal market. In all other cases, the operative criterion had to remain the centre of gravity. In subsequent litigation on the legal bases of the Waste Framework Directive[157] and of the regulation of transfrontier waste shipments,[158] the Court took the opposite view. In spite of the fact that these acts secured the internal market objectives of free movement of waste, they were rightly based on Article 130s EC (Art. 192 TFEU). As a result, the mere fact that these pieces of legislations were likely to affect the internal market[159] was insufficient to justify the legal base being constituted by Article 100a EC. It is worthy of note that in sharp contrast to the *Titanium Dioxide* case, there was no question in the two subsequent cases of indissociably linked objectives and content but of prevailing environmental objective and content. This case law was approved on the ground that extending the rationale of the *Titanium Dioxide* judgment to other environmental measures would have rendered the Treaty provisions on environmental protection nugatory. The consequences of invalidating these acts would have been particularly irksome for those Member States which wished to maintain or to develop a more ambitious environmental policy.

In the light of this case law, it is possible to trace the dividing line between the provisions governing, respectively, the internal market and the environment. On the one hand, acts which have a direct impact on the internal market, and in particular

titane, un jugement de Salomon' (1992) 5–6 *CDE* 609; J. Robinson, 'The Legal Basis of EC Environmental Law' (1992) 4:1 *JEL* 109; P. Pilitu, 'Commentaire sous l'affaire C-300/89' (1991) *Foro it.* 369; T. Schroër, 'Mehr Demokratie statt umweltpolitischer Subsidiarität?' (1991) 4 *EuR* 356; U. Everling, 'Abgrenzung der Rechtsanleichung zur Verwicklung des Binnenmarktes nach Art. 100 A EWVG durch der Gerichtshof' (1991) *EuR* 179; C. Barnard, 'Where Politicians Fear to Tread?' (1992) *EL Rev* 127; A. Sawandono, 'Beginsel van democratie versus milieu' (1992) *NJB* 63; L. Krämer, 'Article 100A or 130S as a Legal Basis for Community Measures: Case C-300/89—Titanium Dioxide', *European Environmental Law Casebook* (London: Sweet & Maxwell, 1993) 21.

[157] Case C-155/91 *Commission v Council* (n 126). See N. de Sadeleer, 'Legal Basis of EC Environmental Legislation' (1993) 2 *JEL* 291; J. Bouckaert, 'Artikel 130S EEG als juridische basis voor afvalrichtlijn' (1993) 4 *TMR* 226; D. Geradin, 'The Legal Basis of the Waste Directive' (1993) 5 *EL Rev* 418. Case C-187/93 *European Parliament v Council* [1994] ECR I-2857.

[158] Case C-187/93 *European Parliament v Council* (n 157).

[159] Given that waste management is usually caught between genuine environmental concerns and the free movement of goods, it has always been difficult to draw the dividing line between the measures that ought to be adopted pursuant to Art. 192 TFEU and those related to the functioning of the internal market. The Packaging Directive 94/62/EC ([1994] OJ L365/10) is a good case in point. In increasing the collecting and recycling of discarded materials above EU thresholds, national authorities are likely to give a competitive advantage to their domestic recycling industries. Cheaper recycled products can therefore inundate other Member State markets where recycling operations are more costly. In so doing, the import of recycled products is likely to hamper these Member States from developing their own recycling facilities. Accordingly, this directive was founded on the internal market legal base.

those which lay down product standards, must be adopted in accordance with Article 114 TFEU. Accordingly, acts addressing the environmental risks of chemical substances,[160] GMOs,[161] biocides,[162] motor vehicles,[163] objects or substances likely to become waste,[164] as well as acts encouraging the ecodesign of products[165] have been founded exclusively on Article 114 TFEU.[166] It may also occur that certain provisions which do not directly relate to products are adopted on the basis of this provision.[167] In a nutshell, the establishment and the functioning of the internal market may be a contributory factor in developing EU environmental policy.

On the other side of the dividing line, a residual category embraces all acts for which an analysis of the aim and the content of the measure shows that they seek to achieve a high level of environmental protection and that they at most affect the establishment of the internal market on an ancillary basis. Despite their direct or potential impact on the functioning of the internal market, these acts should be adopted on the basis of Article 192 TFEU.[168] This is the case of directives aiming at protecting wildlife, different ecosystems, soils, marine, underground as well as surface water, air, and climate.[169] In addition, acts regulating pollution emitted by listed installations and waste management[170] have also been adopted on the basis of this provision.

However, in practice, it is not easy to sketch out the dividing line between these two types of provision.[171] Furthermore, in spite of their impact on the functioning of the internal market, several acts which regulate the placing on the market of products end up falling within the fold of environmental policy.[172]

[160] Regarding chemical substances, see among others: REACH Regulation [2006] OJ L396/1; European Parliament and Council Regulation (EC) No. 1272/2008 on classification, labelling and packaging of substances and mixtures [2008] OJ L373/1.

[161] With respect to GMOs, see European Parliament and Council Directive 2001/18/EC on the deliberate release of GMOs [2001] OJ L106/1; European Parliament and Council Regulation (EC) No. 1830/2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms [2003] OJ L268/24.

[162] European Parliament and Council Directive 98/8/EC concerning the placing of biocidal products on the market [1998] OJ L123/1.

[163] European Parliament and Council Directive 2006/40/EC relating to emissions from air-conditioning systems in motor vehicles [2006] OJ L161/12.

[164] Packaging Directive 94/62/EC [1994] OJ L365/10.

[165] European Parliament and Council Directive 2005/32/EC establishing a framework for the setting of ecodesign requirements for energy-using product [2005] OJ L121/29.

[166] Recourse to Art. 114 TFEU does not preclude the possibility of adopting an act on other legal bases such as Arts 43 and 168(4) TFEU. See European Parliament and Council Regulation (EC) No. 1107/2009 concerning the placing of plant protection products on the market [2009] OJ L309/1.

[167] European Parliament and Council Directive 2000/14/EC on the noise emission in the environment by equipment for use outdoors [2000] OJ L162/1.

[168] Case C-155/91 *Commission v Council* (n 126); and Case C-187/93 *European Parliament v Council* (n 157), paras 24–6.

[169] For an overview of the different acts founded on Art. 192 TFEU, see N. de Sadeleer, *Commentaire Mégret. Environnement et marché intérieur* (Brussels: ULB, 2010) 247–329.

[170] However, product-related waste standards—packaging, hazardous substances in technical equipment—are based on Art. 114 TFEU.

[171] According to L. Krämer, as regards the regulation of hazardous substances, the dividing line between the two provisions is somewhat blurred. See Krämer (n 24), 82.

[172] European Parliament and Council Directive 1999/94/EC relating to the availability of consumer information on fuel economy and CO_2 emissions in respect of the marketing of new passenger cars [1999] OJ L12/16; European Parliament and Council Regulation (EC) No. 443/2009 setting emission performance

But regardless of the appropriateness of this choice, it is the very nature of the integration process of the Member States that is at stake. By authorizing the maintenance or adoption of more binding measures with the endorsement of the Commission, Article 114 TFEU avoids the spectre of the creation of a multi-speed Europe on environmental issues. As was seen in the *Titanium Dioxide* case, this argument could be justified on economic grounds; differentiated policies could be a source for distortion of competition. Due to their implementation in a disorderly fashion, national initiatives also risk turning out to be largely ineffective, as pollution does not respect international borders. However, for acts adopted with this legal base, considerations relating to the internal market become predominant, whilst the political objective of guaranteeing optimum protection for the environment fades into the background.

On the other hand, recourse to Article 192 TFEU permits integration of a political nature to be pursued that consists in attainment of basic benchmarks common to the 28 Member States. Here, since environmental objectives are predominant, considerations regarding the internal market become secondary.

Nevertheless, the choice remains a delicate one. Is environmental protection best assured through the adoption of uniform legislation? Or is it necessary to guarantee this protection through minimum harmonization rules relying on Article 192 TFEU? One could answer these questions by stating that since they are reached on the basis of a consensus between 28 Member States, maximum harmonization rules adopted pursuant to Article 114 TFEU do not authorize the States to seek an absolute level of protection, even though in the wake of the Treaty of Amsterdam, the Council and the Parliament must endeavour to attain a high level of protection.[173] However, through the mediation of minimum harmonization rules, Article 192 TFEU leaves untouched the Member States' powers to adopt a higher level of protection than that set by the EU harmonization rule, even where this mechanism may result in the emergence of European environmental law à la carte.[174] Indeed, air, water, and soil quality, and emission standards are likely to differ from one Member State to another. Moreover, Member States with a low environmental profile are likely to argue for the adoption of EU harmonization standards lacking vigour, arguing that the more ambitious Member States could always work on more stringent standards in accordance with Article 193 TFEU.[175]

This all throws up a number of questions. Are the fears that economic cohesion may be undermined by more stringent national rules overstated? Should we conceive of environmental policy exclusively in terms of market unity? Does the fundamental nature of commitments and the importance of ecological challenges not imply, by contrast, that the Member States may move forward by adopting, if necessary, more stringent rules than the EU harmonization rule? In the final analysis, perhaps this is

standards for new passenger cars as part of the Community's integrated approach to reduce CO_2 emissions from light-duty vehicles [2009] OJ L140/1.

[173] See the discussion in Chapter 1, Section 7.2.

[174] Art. 193 TFEU. See the discussion in Chapter 7, Section 2.

[175] L. Krämer, *EC Environmental Law*, 6th edn (London: Sweet & Maxwell, 2007) 87.

adoption of acts falling under these two policies are the same, namely the OLP, albeit with minor procedural differences.[212]

4.6 Environment and CAP

So far, environmental protection has not numbered among the concerns of the CAP, the objective of which is still today of an exclusively economic or social nature. Needless to say, the objectives of Article 39 TFEU require, at the very least, serious grooming. The first, focusing on 'productivity', certainly does not meet current needs since it completely conceals concerns relating to the protection of the environment, consumers, and public health, to mention only the most obvious. Again, from an environmental point of view, this objective entirely disregards the more modern functions of agriculture, such as the nature protection function, improvement of the countryside, as well as tourism. Article 39 TFEU also disregards this multi-functional purpose of agriculture which the Union thus seeks to defend and to promote within the ambit of the World Trade Organization (WTO).[213] The integration clause would thus be nothing more than a last resort which would not make it possible to call into question productivity-focused objectives with regard to agriculture as pursued under Article 39 TFEU. This old-fashioned vision of agriculture is all the more striking since in an increasing number of legal systems agricultural law takes account of environmental and public health concerns.[214]

The Court of Justice has relaxed this apparent rigidity within the texts.[215] The broad interpretation of the objectives of the CAP within the context of the protection of public health has thus opened the way for the adoption of measures of an environmental nature on the base only of former Article 37 EC, that has been replaced by Article 43 TFEU. The CAP has thus provided an anchor point which measures intended to protect the environment could latch on to. Furthermore, the Court of Justice has ruled that various anticipatory protective health measures adopted either by the Commission or by the Council on agriculture could be justified by the precautionary principle encapsulated in the title on the environment.[216] The environment has therefore become a fully-fledged element of agriculture,[217] even though the procedure contemplated under the EC Treaty paid much less attention to the democratic role played by the European Parliament than the TFEU.

This means that regulations pursuing simultaneously objectives of agricultural policy and environmental protection, such as a regulation which limits the use of

[212] Pursuant to Art. 192(1) TFEU, the legislature is called on to consult the Economic and Social Committee and the Committee of the Regions which is not the case under Art. 207(2) TFEU.

[213] C. Blumann (ed.), *Commentaire J. Mégret. Politique agricole commune et politique de la pêche* (Brussels: ULB, 2011) 34.

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

[215] Case C-405/92 *Mondiet* [1998] ECR I-6133.

[216] Case C-180/96 P *UK v Commission* [1996] ECR 3903, para. 93; Case C-352/98 P *Bergaderm* [2000] ECR I-5291, para. 53. See N. de Sadeleer, *Environmental Principles* (Oxford: OUP, 1992) 119–21.

[217] *Huber* (n 127), para. 33; Case C-61/09 *Landkreis Bad Dürkheim* [2010] ECR I-09763, para. 47; Case C-152/09 *Grootes* [2010] ECR I-11285, para. 47; Case T-212/09 *Denmark v Commission*, [2012] OJ C373/2, para. 79. See also Opinion AG Trstenjak in Case C-428/07 *Horvath* [2009] ECR I-06355, para. 55.

driftnets and a regulation on agricultural production methods compatible with the requirements of the protection of the environment, are rightly covered by the CAP.[218] On the other hand, where an act specifically forms part of environmental policy, it must be adopted on the basis of Article 192 TFEU, even if it pursues the goal of improving agricultural production. This is the case for measures to protect forests against fires and atmospheric pollution.[219] The Court dismissed the view that agricultural policy objectives had any priority over those on environmental policy.

Since the entry into force of the Treaty of Lisbon, these tensions should subside, partially because the competences of the European Parliament have been enhanced as the adoption of acts falling under the CAP are subject to the OLP (Art. 43(2) TFEU).[220]

However, the integration clause encapsulated in Article 11 TFEU does not under any circumstances entail that it is acceptable to incorporate all environmental requirements into the CAP. In this regard, it is certain that it is not possible to integrate safeguarding mechanisms[221] or the exceptions provided for in relation to environmental policy into the CAP.

4.7 Environment and criminal law

Under the terms of the EC Treaty, the adoption of technical harmonization rules by the Council acting by qualified majority in co-decision with the European Parliament (first pillar) represented a significant break with the previous arrangements for unanimous voting within the Council (third pillar). Two judgments concerning the fight against pollution have clarified the extent of the Council's competences in criminal matters before these were transferred to the first pillar following the entry into force of the Treaty of Lisbon.[222] In spite of the changes introduced by the new Treaty, these judgments continue to arouse interest on a theoretical level.

Since criminal matters fell exclusively under the third pillar, the EC was not competent to harmonize criminal environmental law although most of the national rules were fleshing out EC secondary law obligations. As a result, the Council adopted Framework Decision No. 2003/80 on the protection of the environment through criminal law, in particular with a view to countering the designs of the European Commission which had proposed the adoption of a directive with a legal base in Article 175 EC (Art. 192 TFEU). In a judgment handed down by the Grand Chamber on 13 September 2005, the Court accepted the Commission's submission, holding that it may

[218] *Mondiet* (n 215), paras 25–7; and *Huber* (n 127), paras 25–7.

[219] Joined Cases C-164/97 & C-165/97 *European Parliament v Council* [1999] ECR I-1139.

[220] With respect to the CAP, the difficulty in drawing the dividing line between the scope of the OLP and the *sui generis* procedure conferring on the Council the power 'to adopt measures on fixing prices, levies, aid and quantitative limitations' (Art. 43(2)(3) TFEU) should not be underestimated. Indeed, the structure of that provision seems to suggest that para. 2 should be interpreted as the main procedure whereas para. 3 should be seen as an exception likely to be interpreted narrowly. See R. Mögele and F. Erlbacher (eds), *Single Common Market Organisation—Article-by-Article Commentary of the Legal Framework for Agricultural Markets in the EU* (Munich/Oxford: C.H. Beck/Hart Publishing, 2011) 39–41.

[221] Art. 192(5) TFEU.

[222] Art. 83 TFEU.

That said, the choice of legal base of acts relating to systems for authorization, monitoring, inspection, and intervention in the event of a radiological emergency has been open to debate. In the aftermath of the nuclear accident at Chernobyl, the Council adopted by a qualified majority on the basis of Article 113 EEC (Art. 207 TFEU) a regulation on the conditions governing imports of agricultural products originating in third countries. Challenging that choice, Greece claimed that, by basing the contested regulation on Article 113 EEC, the Council infringed the EEC and EAEC Treaties on the ground that the regulation was concerned exclusively with protection of the health of the general public. Accordingly, the regulation should have been based on Article 31 EAEC or on Articles 130r and 130s EEC (Art. 192 TFEU). Both the aim and content of the impugned regulation pointed to the rule's primary purpose being to regulate trade between the Community and non-member countries, thus more properly falling within the scope of the CCP.[236]

In a further example, in *Chernobyl II* the European Parliament contended that Regulation No. 3954/87 laying down maximum permitted levels of radioactive contamination of foodstuffs and feeding stuffs following a nuclear accident was not legitimately based on Article 31 EAEC. In view of the prohibition on marketing contaminated goods, the European Parliament argued that this piece of legislation was an internal market measure which should therefore have been based on Article 100a EC (Art. 114 TFEU). However, the Court of Justice held that, according to its objective and its content, the regulation had 'only the incidental effect of harmonizing the conditions for the free movement of goods'.[237] The significance of this judgment lies in the fact that not every harmonization of national product standards should fall within the scope of Article 114 TFEU.

4.9 Concluding remarks

By virtue of their cross-cutting nature, environmental questions constantly interact with the internal market (Arts 114–118 TFEU), transport (Title VI TFEU), CCP (fifth part, Title II TFEU), public health policy (Title XIV TFEU), consumer protection (Title XV TFEU), trans-European networks (Title XVI TFEU), industry (Title XVII TFEU), economic and social cohesion (Title XVIII TFEU), as well as development (fifth part, Title III, Chapter 1 TFEU). Other policy areas thus do not remain untouched by the Treaty obligations to foster sustainable development and to integrate environmental requirements. As a result of this, the application of the centre of gravity test founded on identifying the main and incidental aims and content of the measure is becoming more challenging. Therefore, alongside the harmonization of legislation with a view to facilitating the establishment of the internal market, there is constant interaction between environmental policy and most policies mentioned in the TFEU. In order to achieve sustainable development in accordance with Article 3(3) TEU, these various EU policies must adopt an environmental dimension.

[236] *Chernobyl I* (n 185), para. 16.
[237] Case C-70/88 *Parliament v Council* [1991] ECR I-4561; p. 159, noted by N. de Sadeleer (1992) 3 *Amén-Env* 104.

As discussed previously, the question whether a measure aiming at protecting the environment should be based on Article 192 TFEU is anything but an academic exercise. The choice of the proper legal base has significant repercussions for institutional equilibrium and on the leeway enjoyed by Member States in implementing EMAs as well as secondary law. In effect, the legal base chosen can be of importance both for setting the content of the EU measure and its implementation in the national law of the Member States. Although a single base is still preferable to multiple bases, it comes as no surprise that the Court of Justice's resistance to dual or multiple legal bases is diminishing. Indeed, there is no shortage of acts founded on different legal bases. Although the *raison d'être* of a host of product-oriented and trade-oriented measures is clearly one of improving the state of the environment, they simultaneously pursue environmental and trade objectives which are inseparably linked without one being ancillary to the other.

Whether the proliferation of legal bases is likely to improve the environment remains to be seen but there is no shortage of grey area in which environmental competence ends and other competences begin to unfold. Accordingly, other institutional actors—Directorates-General of the Commission, parliamentary committees, Council configurations—than the traditional environmental protagonists[238] would be

Table 3.2 Legal bases of legislation contributing to protection of the environment

Policies	Scope of the measures	Legal bases	Procedures	Illustrations
CAP	Production and trading in agricultural products	Art. 43 TFEU (Art. 37 EC)	OLP or SLP	Chapter I, Title II of Regulation (EC) No. 1782/2003 establishing common rules for direct support schemes under the common agricultural policy
Transport	Common Transport Policy	Art. 91(1) TFEU	OLP	'Eurovignette' Directive 2011/76/EU
	Maritime and air transport	Art. 100 TFEU (Art. 80 EC)	OLP	Directive 2002/30/EC on the introduction of noise-related operating restrictions at Community airports; Regulation 417/2002/EC on the accelerated phasing-in of double hull
Approximation of provisions on indirect taxation	Harmonization of indirect taxes	Art. 113 TFEU (Art. 93 EC)	SLP	Proposed Directive on CO_2 taxation
Energy	Renewable forms of energy	Art. 194(1)c TFEU	SLP	Directive 2010/30 on the information of the production of energy; Directive 2010/31 on the energy performance of buildings

[238] See Chapter 4, Section 3.

Internal market	Establishment and functioning of the internal market	Art. 114 TFEU (Art. 95 EC)	OLP	Product standards regarding chemical substances, biocides, GMOs, etc
CCP		Art. 207(4) TFEU (Art. 133(4) EC)	OLP	Regulation (EC) No. 2173/2005/EC establishing a licence scheme for the import of timber into the EC
Health	Veterinary and phytosanitary measures	Art. 168(4)(b) TFEU (Art. 152(4)(b) EC)	OLP	Regulation (EC) No. 1774/2002/EC laying down health rules concerning animal by-products not intended for human consumption
Environment	General measures	Art. 192(1) TFEU (Art. 175(1) EC)	OLP	Quality standards, emission standards, operating standards, listed installation authorization schemes
	Harmonization touching upon Member States' residual powers	Art. 192(2) TFEU (Art. 175(2) EC)	SLP	Provisions primarily of a fiscal nature, town and country planning, quantitative management of water resources, land use
	General policy programmes	Art. 192(3) TFEU (Art. 175(3) EC)	OLP	Sixth action programme
Environment and CCP		Arts 192(1) and 207(4) TFEU (Arts 175(1) and 133(4) EC)	OLP	Regulation (EC) No. 842/2006/EC on certain fluorinated greenhouse gases; Regulation 689/2008/EC concerning the export and import of dangerous chemicals
Environment and development cooperation		Arts 192(1) and 209 TFEU (Arts 175 and 179 EC)	OLP	Regulation (EC) No. 2494/2000/EC on measures to promote the conservation and sustainable management of tropical and other forests in developing countries
Environment and, incidentally, internal market		Art. 192(1) as well as for a number of provisions Art. 114(1) TFEU	OLP	Directive 2009/28/EC on the promotion of the use of energy from renewable sources
Internal market and CCP		Arts 114 and 207(4) TFEU	OLP	Council Decisions on the conclusion of the agreements prohibiting the use of leghold traps
Agriculture, internal market, and health		Arts 43(2), 114, and 168(4)(b) TFEU	OLP	Regulation (EC) No. 1107/2009/EC concerning plant protection products
Agriculture, CCP, and environment		Arts 43(2), 207(4), and 192 (1) TFEU	OLP	Council Decision 98/392/EC concerning the conclusion of UNCLOS