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TRADE V. ENVIRONMENT LAW IN THE EU

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With a number of innovative measures ranging from green certificates with a view to boosting green electricity production to the circular economy aiming at reducing waste, the European Union (EU) environmental policy has been gathering momentum. What is more, the recent Dieseltgate scandal shed the light on the discrepancies between the US and the EU fuel and car standards. A central feature of EU environmental law is its multi-level character. Another feature is its uncanny relationship with the internal market. Given that the core of the EU integration process lies the internal market which is underpinned by free movement principles removing obstacles to free trade and free competition, the relationship between economic integration and environmental protection has always been fraught with controversy. This paper is attempting to set the scene to explain how economic growth and environmental protection could be reconciled in the EU.

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INTRODUCTION

The relationship between economic integration and environmental protection has always been fraught with controversy. It has been argued that, trade liberalization and free competition increase the wealth of trading nations so they are able to afford to implement environmental policies. On the other hand, economic growth at all costs may result in greater pressures on ecosystems.

One of the main difficulties environmental law has been facing is related to the fact that the legal order of the EU is conceptualized in terms of economic integration. At the core of economic integration lies, the internal market that is based on the free movement provisions promoting access to the different national markets and on the absence of distortions of competition. It is the aim of this article to explore some of the key issues arising in this discussion.

I. THE CHALLENGE OF AN EU ENVIRONMENT POLICY

It must ought to be remembered that the EU is a union of twenty-eight independent member states. It follows that the EU is neither a state¹ nor a typical international organization. As the Court of Justice of the EU (CJEU) has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established ‘a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals’.² Accordingly, the EU is deemed to be a unique international organization that is endowed with its own system of government (reckoning upon seven supranational institutions and a swathe of organs and agencies), that has been allocated by its 28 Member States a constellation of competences ranging from international trade to energy, and that has developed its own legal system that differs from both domestic and international law. The powers and responsibilities conferred to the EU institutions are laid down in the Treaties, which are the constitutional foundations of the EU. Care should be taken to distinguishing the different sources of EU law. Traditionally, academics distinguish two key sources of law within the EU legal order:

- primary law, in the shape of the Treaties such as the Treaty on

¹ Opinion 2/13, paragraph 156.

² See, in particular, judgments in *van Gend & Loos*, 26/62, EU:C:1963:1, p. 12, and *Costa*, 6/64, EU:C:1964:66, p. 593, and Opinion 1/09, EU:C:2011:123, paragraph 65.

European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the Charter of Fundamental Rights (EUCFR). These treaties are carving out a specific constitutional framework.

- secondary law made up of different binding instruments—regulations, directives and decisions—and non binding instruments—opinions and recommendations—(Article 288 TFEU).

Primary law originates from the 28 Member States in their role of *Masters of the Treaty* whereas secondary law is the product of the EU institutions (European Commission, Council, European Parliament). What is more, the fact that both primary and secondary law of this autonomous legal order take precedence over 28 national legal orders³ emphasizes the key role played by the EU in Europe regarding an array of subject-matters. Besides, the CJEU plays a key role in ensuring that EU law is observed ‘in the interpretation and application’ of the Treaties (Article 19(1) TEU). The Court reviews the legality of the acts of the institutions of the EU, ensures that the Member States comply with their obligations under treaty law, and interprets EU law at the request of the national courts and tribunals.

Although it was not mentioned in the 1957 Treaty of Rome, a European environmental policy has gradually emerged in treaty law. It has even become a core objective of the EU, given that it has been placed on equal footing with economic growth and the internal market (Article 3(3) TEU). In addition, a broad range of objectives and obligations—sustainable development, high level of protection, integration clauses, policy principles, and fundamental rights—are enshrined in the TEU, the TFEU, the EUCFR and thus occupy a high place in the hierarchy of EU norms. What is more, entirely devoted to the environment, Title XX of the TFEU confers the EU a specific competence in environmental matters: it sets out goals (prudent and rational use of natural resources, fight against climate change, etc.), states principles (high level of protection, precautionary principle, prevention, rectification at source of the environmental damage, the polluter-pays)⁴, and establishes criteria (available scientific and technical data, environmental conditions in the various regions of the Union, cost benefit analysis, etc.). Given the protean nature of the concept of environment, it is difficult to define exactly its boundaries. A specific EU environmental policy does not preclude that other measures aiming at protection the environment may be adopted under the auspices of the internal market policy, the Common Commercial Policy (CCP), the Common Agricultural Policy (CAP),

³ *Costa v. Enel* 6/64 [1964] ECR 585.

⁴ N. DE SADELEER, ENVIRONMENTAL PRINCIPLES (Oxford: OUP 2002).

criminal law, and nuclear law (the European Atomic Energy Community).⁵

Given that the EU is endowed with a shared competence for protecting the environment, it has the power to legislate and to adopt legally binding acts in the environmental area. Starting from a range of action programmes, EU environmental law has progressively grown from a sparse set of directives to a vast body of regulatory measures aiming both to regulate the main forms of pollution (waste, water and air emissions, chemicals, etc.) as well as to protect the main ecosystems (air, water and soil) along with some of their composite elements (habitats, wildlife, etc.). Today it is possible to count more than three hundred regulatory measures, that is around 8% of EU law. Several EU agencies, twenty eight Member States, hundreds of Regions and Länder, thousands of municipalities now implement EU secondary environmental law through a complex web of regulations that affect virtually every aspect of our life's.

Two key factors explain the success of this policy.

Firstly, given the Member States' inability to solve environmental issues having a transboundary nature, such as ozone depletion, climate change, biodiversity, air and water pollution, etc., the EU has been better placed to regulate these issues than the 28 Member States.

Secondly, given the significant discrepancies among the Member States regarding the stringency of their environmental policies, EU harmonization ensures that a common playing field will apply in all Member States in a way ensuring a high level of environmental protection. In the absence of such a common regulatory approach, the efforts made by the most zealous Member States would easily be frustrated by the passivity of the others. This common playing field makes sense on the account that environmental policy entails significant costs. Accordingly, as a matter of solidarity, each Member State should commit itself to invest in environmental infrastructures (water treatment plants, recycling plants, etc.) and to set up environmental agencies that do monitor, control and sanction environmental risks. The absence of common standards is a serious economic mistake. Tougher harmonized regulations on products, renewables, nature conservation, and energy efficiency are not only good for the environment but also for the competitiveness of the Member States economies. By way of illustration, air pollutants are responsible in the EU for more than 400,000 premature deaths⁶ and up to Euro 940 billion in health costs per year. Accordingly, tougher regulations on air pollution

⁵ N. de Sadeleer, *Environmental Governance and the Legal Bases Conundrum*, OXFORD YEARBOOK OF EUROPEAN LAW 1-29 (2012).

⁶ EEA, EUROPE'S ENVIRONMENT 73 (Copenhagen 2007).

would not only save life but would also boost the EU economy.

However, environmental policy is not vested exclusively in the EU. The EU institutions are empowered to harmonize in as much as they comply with the principle of subsidiarity. Accordingly, all environment issues cannot be regulated at EU level. In addition, insofar as the EU has not taken action (eg brownfields), the Member States maintain their competences, provided that they act in accordance with EU law. As a result, both the EU and Member States may act in order to protect the environment (eg GMOs).

Thanks to this EU policy, much has been achieved over these last thirty years: ban on lead in petroleum products, phasing out ozone depleting substances, reduction of Nitrogen oxide emissions from road transport, improvement of waste water treatment and water quality, reduction of acidification, and improvement of some aspects of air quality.⁷ These significant progresses demonstrate that environmental policy and law work provided the Member States are committed to enforce the harmonized rules.

However, despite these progresses that were made in the course of these last decades, the results of the environmental policy have at the very least been muted.⁸

Sad to say, environmental degradation is manifest everywhere given that the European continent is transformed by industrial, urban, agricultural, transport, mining activities. But the less visible but potentially drastic threats are manifold (climate change, health impairment resulting from exposure to chemical substances, radiations, etc.). The Member States are still facing a daunting agenda of unfinished business as well as a swathe of new challenges. By way of illustration, air pollution still reduces significantly life expectancy,⁹ major rivers are still heavily polluted, the 2010 biodiversity conservation targets have not been met, and the amount of waste increases.¹⁰ As regard new challenges, the most pressing one is climate change whose impacts are becoming ever more frequent. Indeed, the overarching target to limit climate change to temperature increases below 2 °C globally during this century¹¹ is unlikely to be met, in part because of

⁷ EEA, THE EUROPEAN ENVIRONMENT. STATE AND OUTLOOK 19 (Copenhagen 2005).

⁸ EEA, EUROPE'S ENVIRONMENT. THE DOBRIS ASSESSMENT 599-611 (Copenhagen 1995); EEA, THE EUROPEAN ENVIRONMENT. STATE AND OUTLOOK 18, 20, 30 (Copenhagen 2005); EEA, EUROPE'S ENVIRONMENT. THE FOURTH ASSESSMENT 22 (Copenhagen 2007); European Commission, *Environment Policy Review 2008*, COM 304 (2009); EEA, PROGRESS TOWARDS THE EUROPEAN 2010 BIODIVERSITY TARGET 17-21 (Copenhagen 2009); EEA, THE EUROPEAN ENVIRONMENT 2010. STATE AND OUTLOOK 15 (Copenhagen 2010); OECD, ENVIRONMENTAL OUTLOOK TO 2050 (Paris 2012).

⁹ EEA, THE FOURTH ASSESSMENT 73 (Copenhagen 2007).

¹⁰ EEA, THE EUROPEAN ENVIRONMENT 2010, above, 71-5.

¹¹ Communication from the Commission, *2020 by 2020, Europe's Climate Change Opportunity*, COM 30 (2008) final.

greenhouse gas emissions from other parts of the world.¹² A closer look at greenhouse gas emissions within EU reveals mixed trends: whereas emissions from large point sources have been reduced, at the same time emissions from some mobile and diffuse sources, especially those transport-related, have increased substantially.¹³

Of particular importance in this respect is the resilience of the ecosystems. Increasingly fragmented by transport infrastructures, subject to intensive urbanisation, cultivation or cattle grazing, polluted and eutrophised, the ecosystems in Europe are sinking to the lowest common denominator, losing their cultural and natural specificity.¹⁴ For animal and plant species, this results in a fragmentation and isolation of their habitats, constituting one of the most serious threats to their long-term survival. As a result of this, they are suffering an unprecedented rate of extinction on account of the degradation of their habitats, which is only exacerbated by additional threats (poaching, excessive hunting, damage inflicted by tourism). To make matters worse, global warming and the depletion of the ozone layer are likely to precipitate much more profound changes to the distribution, structure and functions of European ecosystems. The European Environment Agency is of the view that Europe points towards a number of systemic environmental risks ‘which can be triggered by sudden events or built up over time, with the impact often being large and possibly catastrophic’.¹⁵ Whatever the causes, the environmental crisis is perceived as a serious problem in Europe, because ecosystems provide a wide array of services that are usually taken for granted until they have gone missing.

Every step forward—such as reductions in industrial pollution—appears to be cancelled out by the appearance of new phenomena—mass consumption, more diffuse source of pollution proving more difficult to control—or unforeseen risks—biotechnology, nanotechnology, endocrine disruptors, etc.

Last but not least, the environmental impacts are closely linked to other challenges, such as unsustainable consumption patterns, economic growth, etc. As environmental challenges become more complex in a more populated and wealthy Europe, the uncertainties and the risks associated with them have increased.¹⁶

¹² EEA, *THE EUROPEAN ENVIRONMENT 2010*, above, 27.

¹³ EEA, *THE EUROPEAN ENVIRONMENT 2010*, above, 34.

¹⁴ N. de Sadeleer, *The State of Biodiversity in Europe*, in Michael I. Jeffery & Karen Bubna-Litic, eds., *Biodiversity Conservation, Law and Livelihoods: Bridging the North-South Divide*, 181-92 (IUCN Academy of Environmental Law Research Studies 2007).

¹⁵ EEA, *THE EUROPEAN ENVIRONMENT, STATE AND OUTLOOK 2010*, p. 20.

¹⁶ EEA, *THE EUROPEAN ENVIRONMENT, STATE AND OUTLOOK 2010*, p. 20.

II. THE CLASHES BETWEEN ENVIRONMENTAL LAW AND THE INTERNAL MARKET

The relationship between trade and environmental issues are somewhat different at EU level than in the World Trade Organisation (WTO). At the core of EU integration lies, the internal market (Article 26 TFEU) that is based on the free movement provisions promoting access to the different national markets and on the absence of distortion of competition.

The internal market and environmental policy have traditionally focused on apposite, albeit entangled, objectives: deregulation of national measures hindering free trade, in the case of internal market, and protection of vulnerable resources through regulation, in the case of environmental policy. In other words, whereas the internal market is concerned with liberalizing trade flows, environmental policy encourages the adoption of regulatory measures that are likely to impact on free trade (eco-labels, product standards, restrictions on the use of hazardous substances, etc.). In addition, the internal market favours economic integration through total harmonization (setting up a common playing field) whilst environmental law allows for differentiation. Given that environmental protection levels still vary significantly from one Member State to another, there is a risk that the most stringent national regulation would hinder free trade in goods and services. Yet, if legislation in the recipient State is less permissive than that of the exporting State, the former will hinder free circulation of goods and services even if it does not provide for any difference of treatment between domestic and imported products and services. In such case, the courts are called on to review the justification and the proportionality of the domestic measures at issue.

Needless to say, these differences play themselves out in concrete disputes ranging from the use of safeguard clauses in order to ban genetically modified organisms (GMOs)¹⁷ to restrictions placed on additives in fuels.¹⁸ In these clashes, internal market has an advantage based on its seniority. Freedoms in trading in services and goods are ingrained in the EU DNA. By way of illustration, the principle of free movement of goods flowing from Articles 34 and 35 TFEU—provisions prohibiting obstacles to the trade in goods—has been proclaimed by the CJEU as a fundamental principle of EU law. It follows that the environmental and health exceptions

¹⁷ N. de Sadeleer, *Marketing and Cultivation of GMOs in the EU. An Uncertain Balance between Centrifugal and Centripetal Forces*, 4 EJRR 532-58 (2015).

¹⁸ N. de Sadeleer, *Harmonizing Car Emissions, Air Quality, and Fuel Quality Standards in the Wake of the VW Scandal: How to Square the Circle?*, 1 EJRR (2016).

to this fundamental principle must be interpreted restrictively. What is more, traders can invoke the economic rights enshrined in the EU Treaties before their domestic courts whereas the victims of pollutions are deprived of a right to environmental protection stemming from the EU Treaties. The relationship is thus asymmetrical.

In addition, internal market law empowers the European Commission—the executive agency of the EU—to control the Member States wishing to adopt specific or more stringent environmental standards (prior notification and authorisation procedures under Article 114 TFEU). By contrast, national authorities are known to be reluctant to implement genuine environmental EU instruments (directives aiming at nature, water, soil and air protection; directives on climate change and listed installations, etc.). Here it is necessary to face hard facts: the main weakness of EU rules is, as recognized by the European Commission, their lack of efficacy, with directives appearing as paper tigers due to the hesitancy, criminal activities, or even bad faith, on the part of certain national authorities and the difficulties encountered by the Commission in pursuing infringements before the CJEU.

To conclude with, the relationship between the internal market law backed by a powerful business constituency and the environmental policy supported by a diffuse public is somewhat asymmetrical.

III. THE RISE OF PRODUCT STANDARDS AND THE RISK OF HINDERING FREE TRADE

Though environmental issues encompass a broad range of measures ranging from regulation of fisheries, marine pollution, climate change, cross-compliance in agriculture, waste management, control of hazardous substances, listed installations, or wildlife conservancy¹⁹, the tensions with trading interests are likely to become more severe where the public authorities, be it at international, be it at municipal level, are laying down product standards, energy production and distribution requirements, and waste management requirements.

In spite of the fact that industrial and energy production still remains an important source of pollution in the EU, the rise in consumption of products and services by European consumers has increased pressure on the environment. Throughout their life cycle, all products cause environmental degradation in some way: depending on their composition, their production

¹⁹ N. DE SADELEER, *EU ENVIRONMENTAL LAW AND THE INTERNAL MARKET* 175-224 (Oxford: OUP 2014).

method, and how they are transported, used, consumed, re-used, recycled, or discarded, products can become a source of pollution. The environmental impacts of products have thus been progressively regulated at a national level, although many of these standards (chemicals, pesticides, biocides, etc.) are derived from EU secondary law. For instance, EU regulations set out the sulphur or lead content of petrol, the list of chemical substances which may not be placed on the market, as well as imposing restrictions relating to the composition of packaging, the phosphate content of detergents, and the maximum noise level for some types of appliance. Were the EU institutions unable to develop a genuine product policy, the Member States will have to do the job with the aim of boosting energy efficiency, renewables, recycling, reuse of discarded products, etc. Accordingly, by virtue of their cross-cutting nature, these national environmental standards constantly interact with the internal market.

Given the different product regulatory approaches being developed across the EU, there has been fear of the emergence of new barriers to free trade. For some, a neo-protectionist policy underlies EU, national and regional measures regulating products and services for the protection of the environment. Indeed, better protection of the environment through limiting the placing on the market or the use of hazardous products and substances could constitute a plausible motive for reinforcing the competitiveness of national undertakings. Additionally, such a strategy can become all the more insidious with the use of measures that make no distinction between domestic and imported goods. National measures can become all the more insidious where no distinction is made between domestic and imported goods.

Should such domestic rules be swept aside by the fundamental principles of free movement of goods and services? Given that the Treaty provisions on free movement have to be construed broadly, is the CJEU called upon to interpret narrowly those environmental measures caught by the TFEU provisions on free movement of goods and services? Does internal market law hang a Damoclean sword over every genuine national environmental measure?

Given the sheer complexity of the EU integration process, the answer to these questions is rather nuanced. As a matter of law, there are two ways in which to ascertain the compatibility of environmental measures taken by Member States with fundamental economic freedoms enshrined in the EU Treaties: negative and positive harmonization. However, before commenting upon these two categories of harmonization, attention should be drawn to the improvements brought by the Treaty of Lisbon, which

amended in 2009 the former EU Treaties.

IV. TREATY OF LISBON, THE PATH TOWARD RECONCILIATION

Given that the EU started off as a markedly economic project, it enshrined expressly an environmental protection policy only in 1987.

Today, thanks to the changes brought to the original treaties, a broad range of environmental objectives and obligations occupy a high place in the hierarchy of EU norms.

Sustainable development is enshrined in Article 3(3) TEU as one of the key objective of the EU legal order.²⁰ From the perspective of sustainable development, the concept of the environment has, in addition to its hard core, an economic dimension as well as a social dimension. In particular, in view of Article 3(3) TEU, sustainable development, and hence the objective of environmental protection, cannot be dissociated from the internal market. Paragraph 3 of this provision places these objectives on an equal footing. Consequently, they must be analysed more in terms of reconciliation than of opposition.

Moreover, while Article 191 TFEU instructs the Union to aim at a high level of environmental protection and lists the main principles of EU environmental law (such as the precautionary principle and the polluter-pays principle). These different Treaty provisions empower EU institutions to adopt harmonised rules with a view to protecting the environment.

Furthermore, environmental policy is not locked into clinical isolation on the grounds that Article 11 TFEU provides that environmental protection requirements be integrated into the definition and implementation of the Union's policies and activities. Therefore, environmental concerns are not isolated; they do overlap with other economic policies.

To conclude with, the recognition of the obligation to protect the environment as a key objective has not been neutral.

V. NEGATIVE HARMONIZATION

In granting greater importance to the environmental values, the CJEU could be influential in reconciling trade and environmental interests. In the absence of harmonization through directives or regulations (eg risks stemming from nanotechnologies are not regulated at EU level), or if harmonization by EU measures is not deemed to be complete (eg trade in

²⁰ N. de Sadeleer, *Sustainable Development in EU Law. Still a Long Way to Go*, 6(1) JINDAL GLOBAL LAW REVIEW. SPECIAL ISSUE ON ENVIRONMENTAL LAW AND GOVERNANCE 39-60 (2015).

wildlife), the provisions of the TFEU on free movement of goods and of services are directly applicable (*negative harmonization*). These provisions prohibit Member States from restricting free movement of goods (Arts. 28, 30, 34, 35 and 110 TFEU) or services (Art. 56 TFEU). Accordingly, domestic environmental measures must ensure that the economic freedoms enshrined in Treaty law are not breached. The scope of these rules tends to differ according to the legal category to which they belong: to each barrier to the free movement of goods and services there is a corresponding prohibition governed by specific rules.²¹

However, the TFEU and the case law allow Member States to maintain or adopt domestic restrictive measures that differ from those of other Member States in as much as they are deemed to be justified and proportional. With respect to the free movement of goods, for instance, Article 36 TFEU expressly allows national measures aiming at the protection of plants and animals or the protection of the life and the health of human beings against environmental risks (pollution, exposure to chemical substances, radiation, etc.).

That being said, attempts by EU as well as national courts to reconcile the conflicts between these fundamental freedoms and environmental protection have not always been characterized by coherence.²² The overall impression generated by the heterogeneity of cases adjudicated so far, ranging from green certificates, public procurements, renewables, recycling, pesticides, to the conservation of biodiversity, is thus one of confusion. Moreover, the case law has thrown up more questions than it resolves on issues such as the validity of eco-taxes, measures having an extra-territorial dimension, measures restricting the use of products, and the scope of mandatory requirements²³.

Nonetheless, lawyers have been noticing that a change of emphasis within the case law of the CJEU is underway. To the convenience of representation, we have chosen but a few examples related to measures enacted by the Danish and the Swedish authorities.

Consider, for the sake of illustration, the judgment of the CJEU in *Bhlume*. Regarding the prohibition laid down by the Danish nature conservancy authorities to import bees on the island of Laesø, the Court considered that ‘measures to preserve an indigenous animal population with

²¹ As to the manner in which environmental measures are caught by these economic freedoms, see N. DE SADELEER, *EU ENVIRONMENTAL LAW AND THE INTERNAL MARKET* 229-469 (Oxford: OUP 2014).

²² For a comprehensive of the EU case law on environment and trade disputes. Available at <http://www.tradeenvironment.eu/documents-case-law/>.

²³ N. DE SADELEER, *EU ENVIRONMENTAL LAW AND THE INTERNAL MARKET* 284-320.

distinct characteristics contribute to the maintenance of biodiversity by ensuring the survival of the population'.²⁴ The judgment has thrown into relief the importance of biodiversity given that the Court considered that, 'the establishment ... of a protection area within which the keeping of bees other than Laesø brown bees is prohibited', by reason of the recessive character of the latter's genes, constitutes an appropriate measure in relation to the aim' of biodiversity conservation. In addition, the population of bees at risk must not face an immediate danger of extinction for the exception to be justified.

Another case in point is *Swedish Watercraft*. A reference was made to the Court in the course of criminal proceedings brought by the Swedish Prosecutor's Office, against two boatmen for failure to comply with a prohibition on use of personal watercraft. The challenged measure concerned a general prohibition, mitigated by a regime of exceptions, on using watercraft in Sweden outwith specially designated waterways. The possibilities for use of the watercraft were extremely marginal at the time the questions were referred to the Court.²⁵ As regards the justification of regulations on the use of watercraft in Sweden, the Court reached the conclusion that the measure under review was justified by the objective of environmental protection as well as the protection of health and life of humans, animals, and plants. However, the parties argued that the Swedish authorities could have chosen a less severe regime which would in principle permit the use of such craft, provided that they were not used in areas considered to be sensitive, such as a limited number of nature sanctuaries and bathing areas. Nonetheless, the Court held that this alternative was not as effective as the prohibition ultimately put in place. In other words, restricting the use of watercraft to a limited number of designated waters is adequate for the purpose of protecting the environment.²⁶

More recently, in both *Alands Vindkraft* and *Essent Belgium*²⁷, the CJEU was called on to assess whether regional support schemes providing for the issuance of tradable green certificates for facilities situated in the region, concerned producing electricity from renewable energy sources could be compatible with the free movement of goods. At the outset, these schemes were running counter the internal market given that they were precluding the competent authorities to take account of guarantees of origin

²⁴ Case C-67/97 *Bluhme* ('Laesø bees') [1998] ECR I-8033, para. 33.

²⁵ Case C-142/05 *Mickelsson and Roos* ('*Swedish Watercraft*') [2009] ECR I-4273.

²⁶ *Swedish Watercraft*, para. 34.

²⁷ Case C-573/12, *Alands Vindkraft* (2014); Joined cases C-204/12 to C-208/12 (2014), *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteits - en Gasmarkt*.

originating from other Member States. Accordingly green certificates awarded in Finland to green electricity producers are worthless in Sweden. The Court took the view that, these territorial limitation requirements limiting the foreign green certificates for the electricity produced abroad were necessary in order to attain the objective promoting the use of renewable energy sources. In particular, the Court highlighted the difficulty to determine the nature of electricity once it has been allowed into the transmission or distribution system. Accordingly, the national schemes were deemed to be compatible with the internal market rules.

These developments in the case law have come about due to the fact that the EU Treaties, as discussed above, have struck a better balance under Article 3(3) TEU between the internal market and sustainable development; two objectives that have been placed on an equal footing. Given that the EU's goals are no longer solely economic, but also environmental, the proper functioning of the internal market must be accommodated with non-market values.

VI. POSITIVE HARMONIZATION

Second, instead of being at odds with one another, the two policies can also support each other through the adoption of harmonized EU standards integrating the environmental dimension. Accordingly, regulation of products and services impairing the environment is often governed by directives or regulations adopted by the EU institutions, within the framework provided for in the TFEU (*positive harmonization*). For instance, harmonization on the basis of the internal market competences of national rules on the marketing of many products—such as dangerous substances, fertilizers, insecticides, biocides, GMOs, cars, trucks, aircraft, watercraft, or electric and electronic equipment—creates a precise legal framework limiting Member States' ability to lay down their own product standards. The free discretion of national authorities will be limited as harmonization deepens.

By way of illustration, REACH has become the hallmark of the EU chemical policy. The regulation aims at improving the protection of human health and the environment from the risks that can be posed by chemicals, while enhancing the competitiveness of the EU chemicals industry.²⁸ REACH applies to all chemical substances; not only those used in industrial processes but also in our day-to-day lives (substances in cleaning products,

²⁸ Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

paints as well as in articles such as clothes, furniture and electrical appliances). In particular, the companies producing or importing chemical substances bear the burden of proof of the safety of their substances. They have to demonstrate to European Chemical Agency how the substance can be safely used, and they must communicate the risk management measures to the users. If the risks cannot be managed, the EU institutions can restrict the use of substances in different ways. In accordance with the principle of substitution, the most hazardous substances should be substituted with less dangerous ones.

Regulation (EC) No 1107/2009 of October 21, 2009 concerning the placing of plant protection products on the market provides also a striking evidence of the conciliation between health and environmental protection and the internal market. It aims amongst other things to ensure a high level of human, animal and environmental protection as well as to provide clearer rules to make the approval process for plant protection products more effective. On the one hand, the risks entailed by active substances of each plant protection product must be assessed by an EU country called Rapporteur Member State and the European Food Safety Agency. Subsequently, in accordance with the opinion of the Committee for Food Chain and Animal Health, the substance must be approved by the European Commission in order to be used in the EU. On the other hand, before any plant protection products—that are likely to contain at least one active substance—can be placed on the market or used, it must be authorised in the Member State concerned. Whenever it has been authorised by a single Member State, the product can be freely trade within the internal market.

Provided that the EU institutions are committed to achieve a high level of environmental protection, the advantages entailed by the positive harmonization through the adoption of regulations such as the ones discussed above are undeniable.

Firstly, for producers and distributors, it allows the setting, on the scale of the internal market, of environmental standards which then govern the marketing of products and services as well as their free circulation within that market. Given that positive harmonization determines more precisely the room for manoeuvre left to the Member States than a changeable adjudicatory approach, it is preferred to negative harmonization.

Secondly, as far as environmental product standards are concerned, harmonization by the EU lawmaker appears to be preferable than a changeable adjudicatory approach where the courts have to review the justification and the proportionality of an array of domestic measures.

Thirdly, harmonization is likely to reconcile the environmental

concerns with the internal market imperatives. For instance, environmental measures may benefit from the objective to harmonizing 28 different legal systems with a view to guaranteeing the free movement of goods and services as well as a high level of protection; the global level of environmental protection should be reinforced as a result.

Fourthly, paragraph 3 of Article 114 TFEU obliges EU institutions, for the purposes of establishing of the internal market, to pursue a higher level of protection ‘concerning health, safety, environmental protection and consumer protection’. While the level of protection guaranteed under EU law does not necessarily have to be the highest possible, this does not mean that it is non-existent, weak, feeble, or even intermediate. This obligation is additionally subject to judicial review.

However, despite the efforts of the EU institutions, the harmonization of standards is far from being perfect. Harmonization measures have been piled one on top of the other with any global vision. The instruments are subject to constant adjustment not only to scientific and technical progress, but also to decisions taken on an international level. Many product categories have not been harmonized so far. Therefore, the structuring of EU legislation is inspired less by the model of the symmetrical arrangement of French-style gardens familiar to the seventeenth-century landscape gardener André Le Nôtre, and rather more by the composition of a typical English park. This heterogeneity can end up leaving national authorities, businesses, and civil society utterly nonplussed.

VII. CHALLENGES AHEAD: ROLLING BACK ENVIRONMENTAL LEGISLATIONS WITH A VIEW TO CUTTING RED TAPE

One has to be aware that the EU is less likely in a near future to commit itself to foster ambitious environmental policies. In effect, it is when the legal principles underlying this branch of law are enunciated by the CJEU when ruling on hard cases and when the values are most clearly proclaimed in both the TEU and TFEU that the EU legislative output in environmental protection matters falters.

First, since the early 1990s, there has been a marked reduction of proposed environmental legislation. Second, the reduction in quantity of legislation went in parallel with a reduction of the binding character of new EU secondary law obligations. Third, there has been a marked tendency not to set out common environmental standards, such as emission values. In particular, there has been no willingness to fix limit values for discharges of hazardous substances into waters.

Lately, environmental law appears to be the sacrificial victim to recent political developments—Better Regulation, Smart Regulation, REFIT,²⁹ etc.—under which, according to the logic of deregulation, the law was called upon to climb down from its pedestal in order to engage with market requirements. The creed is to get rid of ‘burdensome regulation and red tape’.³⁰ Environmental and health regulations amount to regulatory burdens jeopardizing ‘the competitiveness and innovativeness of European industries’.

Accordingly, environmental law should no longer take the form of a system of unilateral constraints which impose on social actors a definition of the common good or the general interest. It should be merely soft law. Public law constraints are simply one of many instruments, the role of which is in any event called into question.

To make matters worse, with the new Juncker Commission, deregulating appears to be more fashionable in Brussels than ever. The European Environmental Bureau President stressed recently that the ‘biggest reorientation away from environmental priorities in decades’ is actually taking place. ‘The audacity of the attack on environment through the set-up of the new Commission has been breathtaking.’³¹ With a striking rise in temperatures, this picture is somewhat bleak to say the least.

Along the same lines, in the proposed inter institutional agreement on better regulation that was hammered out at the end of 2015, the European Parliament, the Council and the Commission (the three institutions taking part in the lawmaking process) commit themselves to promoting the most efficient regulatory instruments, such as harmonisation and mutual recognition, to avoid overregulation and administrative burdens (34b).

Furthermore, with respect to Brexit, in order to assuage the fears of the UK, the chief of State and governments adopted in February 2016 a decision regarding a new settlement for the UK within the EU. That decision calls on the relevant EU institutions and the Member States to ‘take concrete steps towards better regulation, This means lowering administrative burdens and compliance costs on economic operators, especially small and medium enterprises, and repealing unnecessary legislation ...’.³²

Needless to say, this far-reaching (smart) policy calls into question of the traditional functions of the State. The simplification process envisioned

²⁹ COMMUNICATION FROM THE COMMISSION ON THE REGULATORY FITNESS AND PERFORMANCE PROGRAMME, COM 368 (2014) final.

³⁰ EUROPEAN COMMISSION, BETTER REGULATION SIMPLY EXPLAINED (Brussels 2006).

³¹ J. Wates, *Regulatory Rollback Rampage*, METAMORPHOSIS 1 (Nov. 2014).

³² European Council, Conclusions of February 18 and 19, 2016, EUCO 1/16, 15.

by the EU institutions and the Member States leads to a genuine deregulatory trend, it is also a serious economic mistake. However, tougher harmonized regulations on products, renewables, nature conservation, and energy efficiency are not only good for the environment but also for the competitiveness of the Member States economies.

Last but not least, the trade and environment issue is already gathering momentum on both sides of the Atlantic given that environmental issues are likely to become one of the stumbling block in the negotiation of the *Transatlantic Trade and Investment Partnership* (TTIP) Agreement, that is likely to entail the harmonization or the mutual recognition of a broad range of product standards.³³ As a result, this forthcoming trade agreement might affect the balance struck down hitherto by the EU Treaties and the CJEU. However, the future agreement cannot undermine the balance struck in the EU Treaties. Environmental protection is not only a core objective of the EU but has also been placed in the founding Treaties of the EU on an equal footing with economic growth and the internal market.

CONCLUSION

The EU internal market is by its very nature not particularly susceptible to strong State regulation, which generally calls for the implementation of policies with the goal of protecting vulnerable environmental media such as aquatic ecosystems undergoing radical changes due to eutrophication, or species threatened with extinction. Although the Lisbon Treaty called for a more nuanced approach, Treaty law remains strongly wedded to a hierarchy of values favouring economic integration. In addition, whether the EU institutions are able to reconcile trade and environmental interests in secondary legislation remains to be seen.

³³ Directives of June 17, 2013 for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, ST 11103/13 Restreint UE/EU Restricted.