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Maximum and Minimum Harmonisation

Member States' Room for Manoeuvre in Achieving Higher Protection Standards

by

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Table of content

- 1. Introduction**
- 2. Positive and negative harmonization**
- 3. Free movement of biocidal products and possibility for Member States to adopt restrictive measures relating to commercial and advertising practices**
- 4. Possibility for a Member State to derogate from the ban on active substances posing high risks to bees**
- 5. Free movement of GMOs and national co-existence measures**
- 6. Higher excise duties rates under the Energy Taxation Directive and the prohibition of tax discrimination**
- 7. Conclusions**

1. Introduction

Although industrial and energy production remains an important source of pollution emissions, the growth in pollutants and greenhouse gas emissions has been consumption-related. Indeed, there is a correlation between the rise in consumption of products and environmental impairment. Through their life cycle, all products cause environmental degradation in some way. Depending on their production method, their composition, and how they are transported, used, consumed, re-used, recycled, or discarded, products can become a source of pollution. Focusing since the early 1970s on the regulation of “point-sources” of pollution, environmental policy has gradually shifted through the 1990s towards the control of diffuse pollution thanks to product-environmentally related measures.

Furthermore, the rise of EU environmental policy was undeniably born out of the concern to avoid distortions of competition between undertakings. To give 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. In the absence of EU harmonization measures, several Western Member States have been adopting since the 80s a flurry of product environmentally-related measures. However, protecting the environment through national measures limiting the placing on the market or the use of hazardous products and substances might constitute a plausible alibi for reinforcing competitiveness of national undertakings. What is more, such a strategy can be made even more insidious by the use of measures that apply without distinction to both domestic and imported goods. If secondary law is not necessary to the implementation of free movement of goods within the internal market, it remains complementary to it. Given that positive harmonization determines more precisely

the room for manoeuvre left to the Member States than a changeable adjudicatory approach, it has been preferred by the EU institutions in environmental related matters as well as in consumer safety to negative harmonization. For this reason, over the last thirty years or so, numerous legal acts have been adopted by the lawmaker of the European Union with a view to harmonising the conditions under which products posing a risk to the environment or to human health can be placed on the market.

The purpose of this chapter is not to revisit the controversies arising from the interpretation of the different TFEU provisions on free movement of goods,¹ but to explore, in light of recent Court of Justice of the European Union (CJEU) cases, the widely varying room for manoeuvre left by primary and secondary law to Member States. This discussion is crucial to the legitimacy and operation of EU law as a whole, in relation to the environment, precisely because, as explained in chapter one, environmental protection is not the only aim underpinning EU governance. Environmental policy constantly competes with other public policies. To fully understand how the EU courts contribute to the legitimacy of this governance system, therefore, it is crucial to examine how they attempt to balance environmental protection with other goals of the Union legal order.² This chapter sheds light on this by examining the reasoning which the CJEU endorses when balancing environmental protection, and the free market.

Sections 1 and 2 analyse cases recently adjudicated by the CJEU concerning harmonisation measures related to the marketing of biocidal and plant protection products. These acts - the Biocides Regulation and the Plant Protection Products Regulation³ - have been adopted on the basis of Article 114 TFEU and are based on similar administrative and scientific principles.⁴ Whenever these regulations expressly enshrine the precautionary principle, the Court makes use of it. In section 3, we will look at the ways in which GMOs law restricts Member States' room for manoeuvre. In view of the limited space available for our contribution, we have confined our analysis to a few recent CJEU judgments that have hardly been commented on in law journals.

Our analysis will highlight that when the EU legislature harmonises the placing on the market of a hazardous product, it does not regulate all aspects of that marketing. The Member States are thus endowed with some room for manoeuvre, subject to compliance with the internal market's fundamental freedoms that are strictly interpreted by the CJEU. Regarding the restrictions placed on the marketing or on the use of hazardous products, the latitude left to the Member States is contained within limits which are not always very clear. In this case, the fact

¹ N. de Sadeleer, « Environmental Measures as an Obstacle to Free Movement of Goods in the Internal Market », in E. Maître, C. Dalhammar, H.C. Bugge (eds.), *Preventing Environmental Damage from Products. An Analysis of the Policy and Regulatory Framework in Europe* (Edgar Elgar, 2018)125-149.

² See Article 3 of the Treaty on the European Union.

³ Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (OJ 2012 L 167/1).

⁴ Regulation (EC) No 1107/2009 of 21 October 2009 concerning the placing of plant protection products on the market (OJ 2009 L 309/1).

that the domestic measures hindering free movement of goods are underpinned by the principles of prevention and precaution may make some of these conditions more flexible.

Finally, in section 4 we address the way in which the polluter pays principle is applied in the aftermath of the Green Deal to energy products. This once again raises the question of the extent of harmonisation and the room for manoeuvre that remains for the Member States.

Taken together, the question of the ‘room for manoeuvre’ which Member States have in respect of environmentally-relevant measures, puts into sharp relief the tensions in legitimacy that are explored in chapter one. On the one hand, the Court of justice here is policing *not only* the balance between the environment and trade, but also the relationship between the Union itself and the Member States. In the reasoning of the Court in these cases there are therefore two pressures at play. On the other hand, the outcomes of these cases have significant consequences for how far environmental protection measures can be pursued. The Court’s role in allocating power as between the Member States and the Union has important consequences on the ground that it allows or precludes a higher level of environmental protection than the harmonised EU standards.

2. Positive and negative harmonization

In order to explore the relationship between environment protection rules instigated by Member States, and the Union’s own legal measures, it is necessary to set the ground for how harmonisation of product standards is achieved through the Union legal order. There are two ways in which to ascertain the compatibility of national environmentally-related product measures with the free movement of goods – from the perspective of positive harmonization or from that of negative harmonization. Either the domestic measure will be assessed only in the light of secondary legislation- as in the case of exhaustive harmonization - or it will be observed that the measure goes beyond the scope of existing Directives and Regulations, and its lawfulness will be assessed in the light of Treaty law. In this connection, Articles 28, 30, 34, 35 and 110 of the Treaty on the Functioning of the EU (TFEU) prohibit Member States from restricting free movement of goods (*negative harmonization*).

Against this background, a significant number of measures which have a direct impact on the internal market, and particularly those which lay down product standards, have been adopted on the base of the former Article 100a EC, 95 EC (replaced by Article 114 TFEU) within the perspective of the completion of the internal market. Accordingly, the EU measures addressing

the environmental risks of chemical substances,⁵ GMOs,⁶ biocides,⁷ objects or substances likely to become waste⁸ as well as acts encouraging the ecodesign of products⁹ have been founded exclusively on Article 114 TFEU.¹⁰ Accordingly, the regulation of a flurry of hazardous products, ranging from GMOs¹¹ to motor vehicles,¹² is thus governed by Directives and Regulations adopted by the EU institutions (*positive harmonization*), in the framework provided for in the TFEU.

On the other hand, a residual category embraces all regulatory measures for which an analysis of their aim and their content shows that they seek to achieve a high level of environmental protection and that they at most affect the establishment of the internal market in a peripheral manner. 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.¹³ This is the case of the Directives aiming at protecting wildlife, different ecosystems, soils, marine, underground as well as surface water, air, and climate.¹⁴ In addition, the acts regulating the pollution emitted by listed installations and waste management¹⁵ have also been adopted on the basis of this provision.

⁵ See among others: Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (OJ 2009 L 396-851).

⁶ With respect to GMOs, see Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms, OJ L 106/1; Regulation (EC) No 1831/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms (OJ L 268/24).

⁷ Regulation (EU) No 528/2012 above.

⁸ Proposal for a regulation of the European Parliament and of the Council on packaging and packaging waste, COM/2022/677 final.

⁹ Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products, OJ L 285/10.

¹⁰ The recourse to Article 114 TFEU does not preclude the possibility to adopt an act on other legal bases such as Articles 43 and 168(4) TFEU. See Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market, OJ L 309/1.

¹¹ Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (OJ L 268/ 1).

¹² Regulation (EU) 2019/2144 of the European Parliament and of the Council of 27 November 2019 on type-approval requirements for motor vehicles and their trailers, and systems, components and separate technical units intended for such vehicles, as regards their general safety and the protection of vehicle occupants and vulnerable road users (OJ L 325/ 1).

¹³ Case C-155/91 *Commission v Council* [1993] ECR I-939; and Case C-187/93 *European Parliament v Council* [1994] ECR I-2857, paras. 24 à 26.

¹⁴ For an overview of the different acts founded on Article 192 TFEU, see N. de Sadeleer, *Commentaire Mégret. Environnement et marché intérieur* (Brussels, ULB, 2010) 247-329; L. Krämer, *EU Environmental Law*, 8th ed. (Sxeet & Mawwell, 2016) 223-267; P. Thieffry, *Traité de droit de l'environnement et du climat*, 4th ed. (Brussels, Bruylant, 2020) 627-785

¹⁵ N. de Sadeleer, *Droit des déchets de l'UE. De l'élimination à l'économie circulaire* (Brussels, Bruylant, 2016) 39-56.

Given that the EU law-maker has adopted a vast body of legislation harmonizing the conditions under which goods are entitled to be placed on the market and to circulate within the EU, Member States' room for manoeuvre appears to be rather limited as regard the adoption of product standards. What room for manoeuvre is left to the national authorities? Can they adopt stricter standards than those provided for in EU secondary law? A priori, when Directives and Regulations have been adopted on the basis of Article 192 TFEU, they are empowered to adopt stricter standards by virtue of Article 193 TFEU. Therefore, the choice between Article 114 and Article 192 TFEU is of crucial importance given that internal market harmonization precludes Member State regulatory autonomy¹⁶ whereas Article 193 allows Member States to adopt more stringent measures,¹⁷ although they may be reluctant to exert their powers.

However, the possibility of adopting stricter standards is far more complex, as shown by the cases we will analyse below. As a matter of law, the free discretion of national authorities will be limited as harmonization deepens. 'Exhaustive' or 'full' harmonisation¹⁸ precludes the ability of the Member to enact more stringent measures. It is settled case-law that, where a matter has been the subject of exhaustive harmonisation at EU level, any national measure relating thereto must be assessed in the light of the provisions of that harmonising measure and not in the light of primary law.¹⁹

Thus, to know whether the national measure falls within the scope of EU secondary law or Treaty law, it is necessary to assess the extent to which the regulation or the directive at issue is giving rise to an exhaustive or an incomplete harmonisation. It follows that the assessment of the consistency of national environmental measures with regard to TFEU provisions requires a constant classification of the measures at stake, which may lead to difficulties regarding hybrid national measures, such as measures combining taxation and technical aspects. This is not an easy task. For instance, it is possible that an EU Directive or Regulation governs only some aspects of an issue, or only certain products, or only some stages in the life-cycle of those products. Furthermore, the unilateral adoption of technical standards is also subject to a specific procedural regime. Member States must, in order to allow preventive control under the provisions on the free movement of goods and, in particular, in relation to the justification of the obstacles that could be created in that regard, communicate to the European Commission before their entry into force the draft provisions by which technical specifications are given binding effect.²⁰

¹⁶ Article 114 (4) to (10) TFEU allows Member States to provide for reinforced protection under specific conditions. See N. de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford, OUP, 2014) 359-380.

¹⁷ N. de Sadeleer, *EU Environmental Law and the Internal Market*, above, 350-358.

¹⁸ The CJEU uses the two terms.

¹⁹ Case C-573/12, *Ålands Vindkraft* [2014] EU:C:2014:2037, para 57 and the case-law cited.

²⁰ Cases C-433/05 *Sandström* [2010] EU:C:2010:184, para 42, and C-26/11 *Belgische Petroleum Unie and Others* [2013] EU:C:2013:44, paras 49 and 50

3. Free movement of biocidal products and possibility for Member States to adopt restrictive measures relating to commercial and advertising practices

This section considers the rules relating to limitations on how, when, and through what advertising means, biocidal products can be sold within the Union. In these rules, the ways in which Member State freedoms to restrict modes of selling are set against the goal of establishing the internal market, even with respect of products in which general Union-wide controls are in place.

Keck and subsequent case law narrowed down the scope of Article 34 TFEU in removing ‘certain selling arrangements’ - sales at a loss, rules on advertising, opening of stores on Sundays, etc. - from the scope of that provision as long as these arrangements are equal in impact on both domestic and foreign traders (1st condition) and on domestic and imported goods (2nd condition).²¹ In so doing, the Court drew a distinction between selling arrangements and product requirements. On the one hand, the selling arrangements fulfilling the *Keck* conditions do not fall within the scope of Article 34 and, as a result, are not subject to any sort of justification. On the other, measures concerning the dimensions, weight, form, size, composition, designation, labelling, information about health effects and hazardousness, and presentation of goods do fall within the scope of Article 34. The following table distinguishes between the two sets of case law.

	Selling arrangements (<i>Keck and Mithouard case law</i>)	Principle of mutual recognition (<i>Dassonville case law</i>)
Scope	<i>De jure</i> or <i>de facto</i> restrictions on where, when, and where and by whom hazardous substances may be sold	Product requirements to be met by goods that have been ‘lawfully manufactured and marketed’ in other MS, even if those rules are indistinctly applicable.
Compatibility with Article 34 TFEU	Presumption of legality provided that the arrangements apply to all traders operating within the national territory and affect in the same manner in law and in fact the selling of domestic products and of those from other MS	Given that these indistinctly applicable standards barr the access to the domestic market to foreign goods, they breach Article 34 TFEU, so long as they are not justified by an overriding general interest (Article 36 TFEU)

²¹ Joined cases C-267 and C-268/91 *Keck* [1993] ECR I-6097.

Illustrations	E.g. restrictions to sell hazardous goods to qualified undertakings, advertising restrictions	E.g. product standards related to form, size, dimension, weight, trade description, composition, packaging, labelling and presentation of goods, safety requirements, thresholds of hazardous substances, dangerous properties
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The rationale for this distinction is that these two categories have a different impact upon intra-Union trade. The functioning of the internal market would be hindered if goods which comply with the legislation of the Member State of origin, also need to comply with product requirements elsewhere in the Union. The impact of selling arrangements, on the contrary, is much more limited. Arguably, given that the purpose of the latter measures is not to regulate trade, they are less likely to impose extra costs on the importers.

In so far as EU product environmentally-oriented regulations primarily concern the characteristics of a good such as the toxicity of a chemical product, the origin or rarity of a plant or animal species,²² the hazardousness of waste,²³ the labelling, the concentration of hazardous substances, specifications on health and environmental grounds concerning the flash point of diesel fuel,²⁴ rather than selling arrangements, the CJEU has seldom been faced with the case of national measure on the selling arrangements for hazardous goods. For instance, the Court found that legislation requiring the marking of heavy metal concentration in batteries and accumulators before their sale in the Member State of origin, and thus before their marketing in the Member State of said legislation, did not concern selling arrangements.²⁵ Indeed, such legislation entails an adaptation and new wrapping of the goods.

On January 19th 2023, the CJEU applied, for the first time, its ‘selling arrangements’ doctrine with respect to measures prohibiting commercial practices and commercial advertising for hazardous substances. With a view to enhancing public health and environmental protection, the French lawmaker decided that rodenticides and insecticides, two categories of biocidal products, cannot be the object of certain commercial practices, and restricted their advertisement. French trade committees operating in the essential oils sector and biocides manufacturers initiated an action for annulment against the measures at hand before the Council of State. The Highest Administrative Court (to avoid to repeat Council of State) harboured

²² Case C-510/99 *Tridon* [2001] EU:C:2001:77 ; case C-659/20 *Ministerstvo životního prostředí* [2022] EU:C:2022:642.

²³ Joined Cases C-241/12 and C-242/12 *Shell Nederland Verkoopmaatschappij BV and Belgian Shell NV* [2013] EU:C:2013:821.

²⁴ Case C-251/14 *György Balázs* [2016] EU:C:2015:687.

²⁵ Case C-143/03 *Commission v Italy*, above, para. 29.

doubts as to whether the Biocides Regulation²⁶ has achieved exhaustive harmonisation precluding the national rules at issue and considered, if such exhaustive harmonization had not been achieved, under what conditions those rules may be adopted. Of relevance was Article 1(1) of the Biocides Regulation, which states that the Regulation aims at improving ‘the functioning of the internal market through the harmonisation of the rules on the making available on the market and the use of biocidal products, whilst ensuring a high level of protection of both human and animal health and the environment’. The Council of State referred the matter to the CJEU.

In addressing this case, the CJEU reasoned, first, that the French law prohibited certain commercial practices for biocides: discounts, price reductions, rebates, gift of free units, etc.²⁷ The CJEU found that the Biocides Regulation was sufficiently broad to cover commercial practices ‘linked to the sale of those products’.²⁸ However, the Regulation, which provides for a system of prior authorisation allowing biocides to be placed on the market and for uniform risk assessment principles, does not harmonise all aspects of the marketing of the products concerned.²⁹ The Biocides Regulation therefore does not preclude the French prohibition at issue.³⁰ In other words, exhaustive harmonization has not been achieved in this case.

Given that harmonisation is incomplete, the CJEU therefore had to assess the compatibility of the French measures in the light of Article 34 TFEU. It first had to determine whether the measures at issue fell within the scope of the *Keck and Mithouard* case law, that precludes Article 34 TFEU. After recalling the conditions for implementing this case law,³¹ the CJEU referred back to the national court the task of assessing whether the ban on commercial practices had a greater effect on access to the French market for biocidal products originating from other Member States.³² To carry out such an assessment, the referring Court was required to assess whether the ban covers a narrow range of marketing methods for the biocidal products concerned and whether, consequently, marketing methods which are not prohibited by those provisions ensure that products from other Member States are able to gain access to the domestic market.³³ If the answer is that such products will not be able to gain access to the domestic market, the French ban is liable to constitute a measure having equivalent effect within the meaning of Article 34 TFEU. Accordingly, the referring Court would then have to determine whether the contested measures could be justified either on the basis of Article 36 or on the basis of the rule of reason.³⁴ Article 36 TFEU refers to the protection of human life and health must be taken into account³⁵ whereas the rule of reason encompasses the protection of the

²⁶ Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products (OJ 2012 L 167/1).

²⁷ Article L. 522-18 of Environmental Code.

²⁸ Case C-147/21 *CIHEF* [2023] EU:C:2023:31, para 33.

²⁹ *Ibidem*, para 33.

³⁰ *Ibidem*, paras 31-35.

³¹ *Ibidem*, paras 40 to 46.

³² *Ibidem*, paras 42 to 45.

³³ *Ibidem*, para 47.

³⁴ *Ibidem*, paras 49 to 58.

³⁵ *Ibidem*, para 50.

environment, that constitutes an overriding reason in the public interest capable of justifying a measure having an effect equivalent to a quantitative restriction.³⁶

Thereafter, the CJEU set out the classic conditions – necessity and proportionality - for examining exceptions to the general prohibition of measures having equivalent effect.³⁷ Although it is for the referring Court to verify the fulfilment of these various conditions,³⁸ the CJEU itself carried out this analysis, referring to the arguments put forward by the French Government, the opinion of Advocate General Emiliou and the indications of the referring Court.³⁹ The CJEU stressed that the measure at hand was appropriate to achieve its health and environmental objectives. Indeed, in reducing the exposure of the public, animals and the environment to the biocidal products concerned, the French ban aimed to prevent the accumulation of those products in the environment and the water pollution which may result.⁴⁰

On the basis of these various considerations, the CJEU concluded that Articles 34 and 36 TFEU do not preclude French legislation which prohibits certain commercial practices. Thus, the application of the principle of prevention through restrictions placed on certain commercial practices corroborated the proportionality of the measure at hand.

On 21 April 2023, France's Conseil d'Etat ruled that while the French arrangements may restrict the total volume of sales of biocidal products, or even limit the market entry of new products, there was no evidence to consider these national measures to be such as to restrict access to the market of the biocidal products concerned originating in other Member States to a greater extent than that of such products originating in France.⁴¹ Given that these arrangements fell under the *Keck* case law, there was no need to verify whether they violated Article 34 TFEU.

As regards the ban on all advertising to the general public for certain categories of biocides,⁴² the CJEU reasoned in a similar way. The Court stressed that the EU lawmaker did not intend to regulate all aspects relating to the advertising of such products.⁴³ In particular, the legislature did not expressly exclude the possibility for Member States to prohibit advertising to the general public.⁴⁴ In the absence of exhaustive harmonisation, the French measures had to be examined in light of Articles 34 and 36 TFEU.⁴⁵ Once again, the *Keck and Mithouard* case law on selling conditions applies.⁴⁶ As regards the *de facto* effect of the French ban on advertisement of imported products, the CJEU held that national legislation which restricts or prohibits certain

³⁶ *Ibidem*, paras 51 to 52.

³⁷ *Ibidem*, para 53.

³⁸ *Ibidem*, para 54.

³⁹ *Ibidem*, paras 55 to 58.

⁴⁰ *Ibidem*, paras 55 and 56.

⁴¹ Conseil d'État, 5th and 6th Chambers [2023] 433889.

⁴² Article L. 522-5-3 of the Environmental Code provides that 'All commercial advertising shall be prohibited for certain categories of biocidal products defined by [Regulation No 528/2012].

⁴³ Case C-147/21 *CIHEF* [2023] EU:C:2023:31, paras 69.

⁴⁴ *Ibidem*, paras 68 to 70.

⁴⁵ *Ibidem*, paras 71 to 83.

⁴⁶ *Ibidem*, paras 72 to 75.

forms of advertising for certain products may be liable to restrict their sales volume and consequently may have a greater impact on products from other Member States.⁴⁷ However, that finding is conditional on identification of a ‘specific difficulty characterising a given product market with which an operator is confronted in order to enter the national market’.⁴⁸ France's Conseil d'Etat ruled also that these arrangements cannot be regarded as being such as to restrict access to the French market of biocidal products concerned originating in other Member States to a greater extent than that of such products produced in France and that, consequently, they are not contrary to Articles 34 to 36 TFEU.⁴⁹

Last, in sharp contrast to the previous measures, CJEU held that a specific measure requiring the inclusion of a statement to professionals in addition to that provided for in Article 72 of the Biocide Regulation was precluded. Article 72 is intended to regulate, in a detailed and comprehensive manner, the wording of statements on the risks of using biocidal products which may appear in advertisements for those products.⁵⁰ Following the CJEU judgment in *CHIEF*, the French Conseil d'Etat has annulled the French label on the grounds that it requires additional information to that provided for in Article 72 of Regulation (EU) No 528/2012 for advertising aimed at professionals.

From this case law, it is clear that the Court has utilised the environmental principles to shape the ways in which environmental risks are handled in the harmonisation process. By emphasising environmental protection within the proportionality test, the Court sees the Member States and the EU as working in tandem in that respect. Where the protective measure has already been decided in EU secondary law in an unambiguous way, as in the case of risk warnings, there is no need for the Member State to provide their own additional warnings.

4. Possibility for a Member State to derogate from the ban on active substances posing high risks to bees

A similar ‘environment first’ approach is in evidence in relation to attempts by Member States not to impose more protective measures, but rather to balance that environmental protection as against other relevant concerns, such as agricultural competitiveness and food production. Furthermore, in considering the ban of neonicotinoids, the fact that most products have an impact on the environment, meaning that environmental measures seek more to regulate their environmental risks rather than eliminate them completely, comes to the fore. As a result, product standards only rarely contain absolute prohibitions on harming the environment. Where regulations do enact a regime of prohibitions, it is generally subject to a flurry of derogations.⁵¹ Environmental law is thus made of unresolved compromises. As a result, courts are constantly

⁴⁷ Ibidem, para 78.

⁴⁸ Ibidem, para 78. See Case C-405/98 *Gourmet International Products* [2001] EU:C:2001:135, paras 19 and 21; case C-148/15 *Deutsche Parkinson Vereinigung* [2016] EU:C:2016:776, para 25; and case C-190/20 *DocMorri* [2021] EU:C:2021:609, para 41.

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⁵⁰ Case C-147/21 *CIHEF* [2023], para 69.

⁵¹ See, for instance, Article 60(4) REACH Regulation.

called upon to weigh up the interests in play, in considering and relying upon the principle of proportionality. However, in this case, the Court perhaps shifts its interpretive stance somewhat, to see the environment less as a factor to be balanced, and more as a goal to be reached which is not on an equal footing with other concerns at play. The proportionality assessment is thereby shifted to increase the weight of the environmental concerns in the weighing of interests, at least where the prioritisation of such protection emerges from a Union-wide measure.

Neonicotinoids are active substances used as insecticides in agriculture for the purpose of seed coating. After authorizing undertakings to place these active substances on the market, the European Commission first issued restrictions in 2013,⁵² and then prohibited the marketing and use of seeds treated with these active substances in 2018.⁵³ The CJEU dismissed actions for annulment brought by industry federations and companies against national bans on the marketing of neonicotinoids,⁵⁴ as well as against the restrictions imposed by the European Commission.⁵⁵ Given that EU ban on marketing and use of neonicotinoids was not absolute, the CJEU had to rule on the possibility for a Member State to derogate from that ban.

In 2020-2021, the invasion of aphid colonies in sugar beet plantations had had major economic consequences for the sugar beet industry. Around ten Member States applied to activate the derogation provided for in Article 53(1) of the Plant Protection Products Regulation. In 2018, the Belgian authorities, relying on the temporary derogation regime provided for in Article 53(1), temporarily authorised the placing on the market of plant protection products containing two neonicotinoids - clothianidin and thiamethoxam - for the treatment of sugar beet seeds. In an annulment case based upon Article 53(1), considering such national measures, the Belgian Council of State referred questions to the CJEU for a preliminary ruling on the conformity of such a derogation. The referring Court expressed doubts as to the scope of Article 53 and the scope of the derogation for which it provides. Article 53 of the Plant Protection Products Regulation allows Member States to authorise ‘in special circumstances’ the placing on the market, ‘for a period not exceeding 120 days’, of plant protection products that are in principle banned, ‘for limited and controlled use, where such a measure appears necessary because of a danger which cannot be contained by any other reasonable means’.

In her opinion, Advocate General Kokott proposed that a balance be struck between protecting animal health and the environment, on the one hand, and pest control and agricultural competitiveness, on the other. This led the AG to accept the possibility of derogating from the

⁵² Commission Implementing Regulation (EU) No 485/2013 of 24 May 2013 amending Implementing Regulation (EU) No 540/2011 as regards the conditions of approval of the active substances clothianidin, thiamethoxam and imidacloprid, and prohibiting the use and sale of seeds treated with plant protection products containing those active substances (OJ 2013 L 139, p. 12).

⁵³ Commission Implementing Regulation (EU) 2018/784 of 29 May 2018 amending Implementing Regulation (EU) No 540/2011 as regards the conditions of approval of the active substance clothianidin (OJ 2018 L 132, p. 35); Commission Implementing Regulation (EU) 2018/785 of 29 May 2018 amending Implementing Regulation (EU) No 540/2011 as regards the conditions of approval of the active substance thiamethoxam (OJ 2018 L 132, p. 40).

⁵⁴ Case C-514/19 *Union des industries de la protection des plantes* [2020] EU:C:2020:803.

⁵⁵ Case C-449/18P *Bayer CropScience and Bayer v Commission* [2021] EU:C:2021:36.

Commission's ban on the use of these products, provided that the benefits and risks of the products in question were weighed against each other. She concluded that Member States were authorised, in principle, to allow the use not only of active substances which have not yet been approved by the Commission but also the use of approved active substances which the Commission has expressly excluded by way of a restriction.⁵⁶

However, the CJEU did not follow her opinion.⁵⁷ As it was firmly committed to defending the values associated with environmental protection, the Court endorsed a rigorous interpretation of the rules of secondary law reckoning upon the principle of strict interpretation of derogations.

First, on the basis of the wording of the Regulation, the Court rightly concluded that the Member States could not derogate from provisions expressly prohibiting the placing on the market and the use of these plant protection products.⁵⁸

In addition, a contextual analysis led the Court to rule that the EU lawmaker had in no way intended, through the possibility of derogation, to authorise the Member States to call into question an explicit ban on seeds treated with neonicotinoids.⁵⁹ The prohibitory measures laid down in the Commission's implementing decision were adopted 'bearing in mind the need to ensure a level of safety and protection consistent with the high level of protection of animal health that is sought within the EU'.⁶⁰ Such prohibitions were thus consistent with the objective of Pesticides Regulation⁶¹ which is to ensure a high level of protection of human and animal health and the environment.⁶² The opposite reasoning would render the European Commission ban nugatory.

Furthermore, the CJEU's reasoning was underpinned by the precautionary principle, which is one of the bases of the policy of a high level of protection pursued by the European Union in the field of the environment.⁶³

Accordingly, as is clear from the explanatory memorandum to the Pesticides Regulation, the objectives of protecting human and animal health and the environment must take precedence over the aim of improving plant production. As a result, the traditional weighing of competing interests which a proportionality test would provoke,⁶⁴ should be discarded in such cases. It follows that the national authorities must demonstrate, before the plant protection products are placed on the market, not only that they present a clear benefit for plant production⁶⁵ but also

⁵⁶ Para 59.

⁵⁷ Case C-162/21, *Pesticide Action Network Europe* [2023] EU:C:2023:30.

⁵⁸ *Ibidem*, para 36.

⁵⁹ *Ibidem*, para 42.

⁶⁰ *Ibidem*, para 45.

⁶¹ Article 1(3) and (4) and recital 8

⁶² Case C-162/21, para 46.

⁶³ Case C-162/21, para 47. See Case C-616/17, *Blaise and Others* [2019] EU:C:2019:800,

⁶⁴ N. de Sadeleer, *EU Environmental Law and the Internal Market*, above, 308-318.

⁶⁵ Recital 24.

that they do not have any harmful effect on human or animal health.⁶⁶ This conclusion was all the more justified given that the marketing and use of the products concerned had been the subject of very clear prohibition measures following the scientific assessment of the European Food Safety Authority.⁶⁷

The Court's conclusion is, therefore, crystal clear: Member States cannot authorise the placing on the market of plant protection products for seed treatment containing approved active substances which the Commission has excluded by way of a restriction or condition of approval. In this sense, the Courts have shown a clear willingness to police the relationship between the Member States 'priorities' (in this case, protection of their farming industry) and those of the Union (in this case, the environment) by utilising the environmental principles to support a restrictive field of autonomy for the Member States.

5. Free movement of GMOs and national co-existence measures

This restricted field can also be seen when we consider not only the object of any particular national measure, but also the logic underpinning it. This can be seen in relation to local restrictions on Genetically modified organisms (GMOs). GMOs have repeatedly been a matter of much controversy, especially in Europe. This scepticism of many NGOs and several regulatory agencies has focused both on their impact on human health (allergenicity, genes expressing resistance to antibiotics in use for medical or veterinary treatment), as well as the impoverishment of biodiversity which their cultivation could cause (wild species resisting GM plants, resistance to herbicides, hybrid plants, gene flow through pollen transfer, impacts upon soils, etc.).

Directive 2001/18 on the deliberate release into the environment of genetically modified organisms and Regulation No 1829/2003 have been adopted on the basis of Article 114 TFUE. Directive 2001/18 makes the placing on the market of GMOs in a product, food or feed subject to a system of prior authorisation established at EU level.⁶⁸ The objective of Directive 2001/18, as is clear from Article 1 thereof, is to approximate the laws, regulations and administrative provisions of the Member States and to protect human health and the environment when carrying out the deliberate release of GMOs into the environment, whether by placing GMOs on the market within the European Union as products or for any purposes other than such placing on the market.⁶⁹ In accordance with Regulation No 1829/2003, GMOs for feed use or

⁶⁶ Case C-162/21, paras 48 and 49.

⁶⁷ *Ibidem*, para 52.

⁶⁸ N de Sadeleer, 'Centrifugal and Centripetal Forces in the marketing and Cultivation of GMOs in the EU' (2016)1 *European Journal of Consumer Law* 48.

⁶⁹ Case C-24/21, *Regione Autonoma Friuli Venezia Giulia* [2022] EU:C:2022:526, para 40.

feed containing or consisting of GMOs, or feeds produced from GMOs, on the other, may not be placed on the market where no authorisation has been granted.⁷⁰

Although MON 810 maize may be freely marketed within the European Union, its cultivation may be restricted in accordance with different safeguard clauses.⁷¹ In particular, Article 26a of Directive 2001/18 empowers Member States to take appropriate measures to avoid the unintended presence of GMOs in other products.

In accordance with this provision, the Venetian region has been prohibiting the cultivation of GM maize on its territory in order to avoid the unintended presence of GMOs in conventional and organic maize crops. This regional ban was justified by the regional production models and farm structures that influence the degree of admixture between transgenic and non-transgenic crops.

The question arose as to whether this regional ban was consistent with Directive 2001/18, read in the light of Regulation No 1829/2003 and the European Commission guidelines for the development of national coexistence measures to avoid the unintended presence of GMOs in conventional and organic crops.⁷² In *Pioneer Hi Bred Italia*, the Court held that the cultivation of GMOs such as varieties of MON 810 maize cannot be made subject to a national authorisation procedure where the use and marketing of those varieties are authorised under Article 20 of Regulation No 1829/2003. Article 26a of Directive 2001/18 may give rise to restrictions, or even geographically delimited bans, only as a result of coexistence measures actually adopted in compliance with the purpose of such measures.⁷³ In *Fidenato*,⁷⁴ an Italian court asked the CJEU whether the national authorisation procedure applicable to the cultivation of varieties of MON 810 maize, authorised under EU secondary law, could itself constitute a coexistence measure for the purposes of Article 26a of Directive 2001/18 provided it was specifically intended to ensure compliance with the principle of coexistence. Along the same lines than in *Pioneer*, the CJEU interpreted Article 26a of Directive 2001/18/EC as not allowing a Member State to oppose the cultivation on its territory of GMOs that have already been authorised. Such a national authorisation procedure cannot amount to a restriction, or even a geographically delimited ban, aimed at avoiding the accidental presence of GMOs in other crops.

In case secondary law did not apply, the question arose as to whether that regional ban may constitute a measure having equivalent effect which is contrary to Articles 34 to 36 TFEU.

⁷⁰ N. de Sadeleer, « National Control of GMO Cultivation in the EU. The Path to Reconciliation of Opposed Interests », 2018(1) *Nordic Journal of Environmental Law* 27-54.

⁷¹ N. de Sadeleer, 'Marketing and Cultivation of GMOs in the EU. An Uncertain Balance between Centrifugal and Centripetal Forces' 2015(4) *European Journal of Risk Regulation* 532-558.

⁷² EC Recommendation of 13 July 2010 of 13 July 2010.

⁷³ *Pioneer Hi Bred Italia*, précité, para 75.

⁷⁴ Case C-542/12 [2013] EU:C:2013:298.

In *Regione Autonoma Friuli Venezia Giulia*, the CJEU stressed that the measures taken by the Member States, in accordance with Article 26a(1) of Directive 2001/18, must aim at avoiding the unintended presence of GMOs in other products, ‘in order to enable producers and consumers to have the choice between organic production, conventional production and production using GMOs’.⁷⁵ Accordingly, in enacting these regional preventive measures, the authorities cannot have as their aim the human health or the environment, since these objectives are already ensured by the harmonised authorisation procedures for the deliberate release of GMOs.⁷⁶

In so doing, the CJEU drew a line between, on the one hand, the harmonisation licensing process established by Directive 2001/18 and Regulation No 1829/2003, which make the grant of such authorisations subject to an environment and health risk assessment and, on the other hand, the avoidance of the unintended presence of GMOs in other products, that is subject to an incomplete harmonisation. The Court stressed that the measures aiming at the avoidance of the unintended presence of GMOs in other products ‘are intended to preserve the plurality of crops and, in particular, in so far as possible, the coexistence between GMOs, on the one hand, and organic and conventional crops, on the other. Therefore, they involve taking account of the economic challenges for organic and conventional producers of the admixture of GMOs in their crops’.⁷⁷ The table below distinguishes the key differences between the two regimes.

Approaches to ward off GMOs risks	Licensing process of GMOs	Avoidance of the unintended presence of GMOs in other products,
Legal Acts	Directive 2001/18 (Article 4) and Regulation No 1829/2003 (Articles 3 to 7)	Directive 2001/18 (Article 26a)
Goals	Protecting the environment and health	Enabling producers and consumers to have the choice between organic production, conventional production and production using GMOs
Measures	Authorisations subject to an environment and health risk assessment	Coexistence measure designed to avoid the unintended presence of GMOs in other crops (Article 26a of Directive 2001/18)

⁷⁵ Ibidem, para 47.

⁷⁶ Case C-24/21, *Regione Autonoma Friuli Venezia Giulia*, para 47.

⁷⁷ Ibidem, para 47.

Harmonisation	Exhaustive. Impossibility for the MSt to reckon upon Articles 34 to 36 TFEU. to enact more stringent measures under Art. 193 TFEU	Incomplete. Judicial review of the necessity of the regional measure prohibiting cultivation of GMOs (case C-24/21)
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In brief, the regional measure at hand must pursue the objective of guaranteeing consumers and producers the choice between a production of genetically modified maize and productions of organic or conventional maize. In other words, Article 26a(1) is about consumer protection rather than environmental protection.

Given that the Venetian measures intended to preserve the plurality of crops were likely to hamper the authorization that has been granted by the European Commission to MON 810 maize, they were required to be reviewed by the Italian courts in light of the criteria determined by the CJEU:

- they cannot be based on considerations of protection of health or the environment,⁷⁸
- they must be necessary, a requirement that oblige Member States not go beyond what is necessary and are the least detrimental to the objectives and principles laid down by that directive,⁷⁹
- and they must satisfy the conditions attached to the guidelines annexed to the recommendation of 13 July 2010, which were adopted by the Commission on the basis of Article 26a(2) of that directive.⁸⁰

The CJEU seemed to be aware of the technical difficulties to implement such a ban with a view to enhancing consumer protection. Indeed, according to point 2.4 of the Commission guidelines, the degree of admixture is likely to vary according to various factors such as climatic conditions, topography, cropping patterns and crop rotation systems or farm structures, including surrounding structures.⁸¹

Against this background, the Court required the referring Court to take into account the degree of admixture of genetically modified maize and the probability of admixture between that genetically modified maize and organically or conventionally grown maize'.⁸² In particular, the referring Court was also required to pay heed to the sources of the risk of mixing and the effectiveness of the methods of crop separation, which must be assessed in the light of, inter alia, the geographical and climatic constraints and characteristics of the region and the methods of cultivation used there.⁸³ That being said, the determination of zones of exclusion from GMO cultivation, the separation of organic fields from that do not contain GMOs, and the

⁷⁸ Ibidem, para 46.

⁷⁹ Ibidem, para 49.

⁸⁰ Ibidem, para 50.

⁸¹ Ibidem, para 55.

⁸² Ibidem, para 56.

⁸³ Ibidem, para 57.

effectiveness of the prohibition of the cultivation all GMOs are embedded in uncertainty. Unlike the previous judgments on active substances, the Court of Justice did not make use of the precautionary principle, which is enshrined in the Directive.⁸⁴

In this case, therefore, we can see that the context of the particular decision at hand changes the mixture of reasons upon which the Court will rely. Whilst the precautionary principle was arguably very relevant here, the Court's primary concern was to delineate which areas of concern were appropriately the 'realm' of the Member States, and which had already been accounted for by the Union. The precautionary principle was, in this sense, part of the Union calculation which did not need to be called upon again in relation to the Member State's own freedoms.

6. Higher excise duties rates under the Energy Taxation Directive and the prohibition of tax discrimination

Finally, carbon taxes warrant special attention. There is no carbon tax in force today at EU level. The Emissions Trading Scheme (ETS)⁸⁵ is the only scheme where GHG emissions are subject to a price for the polluter, regardless of the origin, the activity, or the fuel. Currently, the ETS covers only around 45% of emissions from industrial activities. It does not encompass the emissions from other economic sectors such as SMEs, transport, or agriculture that are falling within the scope of the Effort Sharing Regulation.⁸⁶

In 2011, the European Commission attempted to revise the Energy Taxation Directive (ETD)⁸⁷ with a view to reinforcing its environmental character. The taxation of energy products would have had two different bases; a large share of the taxation being based on the product quantity and the other on the carbon content. However, seven years later, the Commission withdrew its proposal, due to the absence of political consensus.

The European Green Deal and the subsequent the Fit-for-55 package target all sectors where energy consumption is high. Against this background, in 2021 the European Commission considered revising the Energy Taxation Directive (ETD), which in itself is neither a carbon tax nor an environmental tax.⁸⁸ A new proposal has been submitted by the European Commission to the European Parliament and the Council, with a strong focus on achieving

⁸⁴ Articles 1 and 4, Annex IIB. As regards the application of the precautionary principle to this area, see N. de Sadeleer, *Environmental Principles*, 2nd ed. (Oxford, OUP, 2022) 232-247.

⁸⁵ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community (OJ L 275/ 32).

⁸⁶ Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 (OJ L156).

⁸⁷ Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ L 283/1).

⁸⁸ S. Wolff, *Should EU Energy Taxation Contribute More to Sustainability?* (UCLouvain, 2024)551.

substantive change in consumption patterns, implementing the polluter pays principle and increasing the price of some untaxed or less-taxed energy consumption. The proposal aimed, among others, at removing outdated exemptions and incentives for the use of fossil fuels, while promoting clean technologies. The proposal aimed also at fostering investment in new and innovative green industry. Moreover, the proposal aimed at facilitating the transition away from fossil fuels towards clean fuels and support the EU's delivery of its ambitious targets on the reduction of greenhouse gas emissions and energy savings.

Since the ETD was adopted on the basis of Article 113 TFEU, any modification is subject to a special legislative procedure, which requires unanimity within the Council of the European Union. It soon became apparent that the Member States disagreed with the European Commission's proposal.

Faced with the impossibility of increasing energy excise duty rates by amending the ETD, the European lawmaker implemented the polluter pays principle in certain energy-intensive economic sectors by amending the ETS. Given that Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the EU (ETS) has been adopted on the basis of Article 192(1) TFEU, that provides for the ordinary legislative procedure, a limited number of Member States could not impeach a qualified majority of Member States within the Council to apply the polluter pays principle. As a result, a new emissions trading system (ETS 2) was created, separate from the existing EU ETS.⁸⁹ This new carbon market, that will become operational in 2027, will oblige fuel distributors to hold allowances for all fuels released for consumption, independent of their final use (for heating or for propelling a vehicle).⁹⁰ Given the impossibility to increase excise duties in modifying the ETD, the polluter pays principle will be applied to the economic sectors that have not been achieving their emission reduction targets thanks to environmental harmonisation.

The mandatory surrendering of emissions allowances by operators for those activities is rather similar to the obligation to pay duties under the excise legal framework.⁹¹ The similarity between the two regulatory schemes is mainly related to the absence of connexion and time correspondence between the holding of the allowance and the release of the emissions in the environment.⁹²

While the obligation to submit the building and road transport sectors to a new carbon market restricts the Member State's room for manoeuvre, Member States still retain a large portion of their sovereignty in the field of taxation. Indeed, Article 110 TFEU does not prohibit them from adopting differentiated taxation regarding similar products, in so far as they aim to achieve legitimate economic and social objectives. EU law does not restrict the freedom of each

⁸⁹ Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union, Articles 3g-a.

⁹⁰ Directive (EU) 2023/959, Article 3ga.

⁹¹ S. Wolff, above, 491.

⁹² Ibid., 492.

Member State to establish a tax system which differentiates between certain products ‘on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed’.⁹³

Nevertheless, the 2003 ETD allows Member States to increase excise duties rates for energy. Consequently, tax harmonisation is not exhaustive. This raises the question of the compatibility of higher tax rates with the functioning of the internal market.

In this connection, *Outokumpu Oy* is a case in point. Finnish law provided for a differentiated taxation scheme for electricity depending on the nature of the energy used for its generation. A favourable tax treatment was granted for renewables, but only for electricity produced nationally. The CJEU condemned this system of differentiated taxation on the grounds that it taxed imported electricity at a flat rate. Though this flat rate was lower than the highest rate applicable to electricity of domestic origin, it could lead, ‘if only in certain cases, to higher taxation being imposed on imported electricity’.⁹⁴ The technical difficulty of applying differentiated rates to imported electricity was not taken into account.⁹⁵

Given that tax harmonisation in relation to excise duties is not exhaustive, Member States must ensure that they do not breach Article 110 when increasing their excise duties to implement the polluter pays principle.

Insofar as the Member States must implement several legal instruments, such as bans, excise duties, eco-taxes and carbon markets (ETS1 and 2), in order to achieve climate neutrality by 2050, it is important to identify the room for manoeuvre they have for each of these instruments. The table below compares the room for manoeuvre that EU harmonized product standards, excise duties and the ETS is leaving to Member States in relation to their climate change policy.

	Ban	Taxation	Cap-and-Trade
Legal acts	Fluorinate GHG Regulation 517/2014	Excise Duties Directive 2003/96	ETS Directive 2003/87
Legal basis and procedure	Article 192(1) TFEU; Ordinary legislative procedure	Article 113 TFEU; Special legislative procedure	Article 192(1) TFEU; Ordinary legislative procedure
Legal effects	Transposition	Directly applicable	Transposition
Harmonisation	Maximal de jure	Minimal rates	Maximal de facto
Personal scope	Economic operators placing on the market CFC	Consumers	Economic operators (listed installations, aviation, maritime transport, fuel)
Enforcement (control, criminal penalties)	Member States	Member States	Member States

⁹³ Case C-213/96 *Outokumpu Oy* [1998] ECR I-1777, para. 30.

⁹⁴ Case C-213/96, above, para. 41.

⁹⁵ *Ibid.*, para. 39.

7. Conclusions

Thanks to the Green Deal for Europe, the European Union is currently developing a new generation of legal instruments that will enable it to achieve climate neutrality by 2050. The implementation of these numerous regulations and directives will oblige Member States to do more to restore biodiversity, to mitigate the impacts of the climate crisis, and to develop a low-carbon and circular economy. The question will soon arise as to whether the Member States will be able to adopt measures that are stricter than the new EU standards in order to achieve climate neutrality by 2050.

The various judgements analysed in this chapter show just how complicated this exercise can be. The choice of legal basis can certainly have a significant influence on the possibility of adopting stricter domestic standards. However, as we have seen above, even in the context of the functioning of the internal market, several key EU rules only partially harmonise the matter. If the matter is not exhaustively harmonised, the question arises as to whether the national measure can be qualified as a selling arrangement and fall outside the scope of Article 34 TFEU. Whenever the conditions of the *Keck* case law are not fulfilled, the national measure likely to restrict the free movement of goods is to be regarded as a measure having equivalent effect within the meaning of Article 34 TFEU. Such a measure can only be justified if it is consistent with an objective of protecting human or animal health (Article 36 TFEU) or the environment (rule of reason). Furthermore, in contrast to the uniform authorization procedures stemming from the acts regulating the authorization of GMOs, regional bans on GMOs cultivation escapes a total harmonisation. Accordingly, the compatibility with EU law must be assessed in the light of Articles 34 to 36 TFEU.⁹⁶

A priori, it is not easy to meet the conditions required to demonstrate that the restrictive national measures are necessary and proportionate to achieve the preventive objectives. However, the judgments commented on above shows that the Court of Justice is sensitive to the preventive nature of these measures, which are often called upon to counter an uncertain risk. In addition, the Court restrictively interprets the derogations allowing Member States to allow the use of substances that have been banned by the European Commission. Finally, as it is impossible for the Council to amend a tax directive adopted on the basis of Article 113 TFEU, due to the absence of unanimity, it is now an economic instrument – ETS2 - that makes it possible to implement the polluter pays principle in relation to two energy-intensive sectors: buildings and land transport. The Member States' room for manoeuvre in this environmental area is severely limited.

Crucially, this demonstrates that the relationship between the free market and environmental protection is not always resolved either with the same balance struck, nor by reference to the same legal techniques. In some cases, the environmental principles come to the fore, resulting in an interpretation which finds an explicit Treaty-basis for the prioritisation of the environment in this balance. In others, the task of the Court appears to be less about the relationship between

⁹⁶ Case C-24/21, para 66.

trade and the environment, than it is about the relative allocation of power between the Union and the Member States. From the perspective of legitimacy, therefore, this means that the Courts are resolving a complex web of interconnected questions for which, as noted in chapter one, a simple 'legitimate' or 'illegitimate' conclusion is inadequate to address the ways in which legitimacy is enhanced or otherwise by the actions of the courts.