Jean Monnet Working Paper Series

-

Environment and Internal Market

Vol. 2017/3

Free Movement of Goods and Environmental Product Standards

by

Prof. N. de Sadeleer,

Professor in EU Law, Jean Monnet Chair, University of St Louis

---

Published on http://www.desadeleer.eu

© Nicolas de Sadeleer, 2012

desadeleer@fusl.ac.be

Introduction

- **I. The Clashes between Environmental Law and Free Movement of Goods**
- **II. Negative Harmonization**
- **III. Positive Harmonization**
- **IV. Challenges Ahead**

Conclusion

Abstract

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 Dieselgate scandal shed the light on the hurdles faced by several car manufacturers to meet the Euro 5 and Euro 6 NOx emissions 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 at 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 chapter is attempting to set the scene to explain how the free movement of goods within the single market and national environmental product standards could be reconciled in the EU.

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 implement environmental policies. On the other hand, economic growth at all costs may result in greater pressures on ecosystems. The issue of how international trade and environmental protection could be reconciled has been the object of an immense amount of writing. As far as the EU is concerned, 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.

Focusing since the early 1970s on the regulation of "point-sources" of pollution - listed installations, discharges into water, incinerators, land-fills, brownfields, etc. -, environmental policy at both the national and international level has gradually shifted through the 1990s towards the control of diffuse pollution. Indeed, there has been a growing awareness in the course of that decade that the traditional focus on production processes and end-of-the-pipe solutions was no longer appropriate to safeguard the environment. Several Member States have been implementing new product policies paying heed upon resource efficiency. This new trend entails the risk of clash between these environmental measures and one of the four freedoms enshrined in the Treaty on the Functioning of the EU (TFEU), the free movement of goods. In effect, given that this freedom is one of the cornerstone of the internal market, exceptions must be interpreted narrowly.[1] This prompts a number of questions. Is the object or effect of domestic environmental measures to protect domestic industries? Should domestic environmental rules, even if applied in a non-discriminatory fashion, be swept aside by the fundamental principle of free movement of goods? Given that the Treaty provisions on free movement have to be construed broadly, is the CJEU called upon to interpret narrowly those environmental measures? Does internal market law hangs a Damoclean sword over every genuine national environmental measure? How should the environmental justification of the measure at issue be weighed against its impact on free trade? Does the somewhat undefined concept of sustainable development avert such conflicts? To what extent should positive harmonisation of product standards be promoted in order to stymie these conflicts?

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. Either the measure will be assessed only in the light of secondary legislation (directives or regulations) as in the case of complete harmonization, or it will be observed that the measure goes beyond the scope of existing directives and regulations, and its lawfulness will be assessed directly in the light of Treaty law, in particular Articles 34 to 36 TFEU.

[1] Case 265/65 *Commission v. France* [1997] ECR I-6959.

The aim of this chapter is not to revisit the controversies arising from the interpretation of the different TFEU provisions on free movement of goods,[2] but rather to explore the ways in which they apply to a broad range of environmental measures.

I. The Clashes between Environmental Law and Free Movement of Goods

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 (eco-labels, product standards, restrictions on the use of hazardous substances, etc.) that are likely to impact on free trade in goods.

That being said, the harmonisation process is likely to reduce the risk of confrontation between domestic environmental measures and free trade in goods. In fact, the EU has been regulating 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. Adopted pursuant to Article 114 TFEU, these EU regulations are carving out a common playing field.[3] Indeed, the harmonization of product measures in accordance with the internal market provisions favours economic integration to the detriment of regulatory diversity. Firstly, total or complete harmonization in the area of products standards is achieved thanks to the adoption of regulations instead of directives.[4] Secondly, by authorising with the endorsement of the European Commission the maintenance or adoption of more stringent national measures than the ones laid down in the harmonisation measures, the recourse to Article 114 TFEU avoids the spectre of the creation of a multi-speed Europe on environmental questions.[5]

---

[2] See C. Barnard, *The Substantive Law of the EU,* 3rd ed. (Oxford, OUP, 2007), L. Gormley, *EU Law of Free Movement of Goods and Customs Union* (Oxford, OUP, 2009), P. Oliver, *Oliver on Free Movement of Goods in the European Union*, 5th ed. (Oxford, Hart, 2010).

[3] Article 114 TFEU is not construed around specific policies but around the purpose of establishing and enhancing the functioning of the internal market. The measures referred to in that provision are 'intended to improve the conditions for the establishment and functioning of the internal market and must genuinely have that object, actually contributing to the elimination of obstacles to the free movement of goods or to the freedom to provide services, or to the removal of distortions of competition'. Case C-491/01 *BAT* [2002] EU:C:2002:741, para. 60.

[4] This is particularly the case of hazardous substances : Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) ; 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 and repealing Council Directives 79/117/EEC and 91/414/EEC ; 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.

[5] N. de Sadeleer, 'Procedures for Derogations from the Principle of Approximation of Laws under Article 95 of the EC Treaty' (2003) 40 *CMLR* 889-915; I. Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market* (Cheltenham, Edward Elgard, 2013).

By contrast, EU environmental policy allows for differentiation thanks to the adoption of framework directives based on Article 192 TFEU.[6] Firstly, by prescribing broad objectives but leaving the choice of implementing to Member State authorities, framework directives are well tailored to take into account the diversity of administrative and legal culture in the EU. In so doing, the lawmaker increases the discretion of national authorities regarding the choice of the form and appropriate means for implementing EU law. Secondly, in virtue of Article 193 TFEU, any Member State may at any time freely decide to maintain or adopt more stringent standards than those provided for under an act adopted on the basis of Article 192 TFEU.[7] Here, since environmental objectives are predominant, considerations regarding the internal market become secondary. It follows that in tolerating, let alone encouraging administrative diversity, these framework directives are keeping uniformity at bay. Accordingly, Member States are endowed with more leeway in transposing directives providing for green certificates[8] or promoting the circular economy[9] than in enforcing internal market regulations on hazardous substances.

What is more, the level of protection achieved at EU level thanks to harmonisation either in accordance with Article 114 or Article 192 TFEU[10] does not always meet with unanimous approval.[11] The European Parliament, the Council as well as several Member States come regularly to grips with the European Commission's proposals. Indeed, national authorities may contend with the level of protection afforded under harmonised EU rules. 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)[12] to restrictions placed on additives in fuels.[13]

By way of illustration, the active substance glyphosate is still authorised under the Pesticides and the Biocides regulations in spite of the fact that in March 2015 the International Agency for Research on Cancer classified that substance as 'probably carcinogenic to humans'.[14] Contending with the absence of harmonised EU restrictions, several national

[6] M. Bogaart, "The Emergence of the Framework Directive in EU Environmental Policy", in M. Peeters and R. Uylenburg (eds.), *EU Environmental Legislation* (Cheltenham, Edgard Elgar, 2015) 48-79.

[7] See Case C-510/99 *Tridon* [2001] ECR I-7777, para. 45; Case C-100/08 *Commission v Belgium* [2009] ECR I-140, para. 60.

[8] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, OJ L 140/16.

[9] Proposal for a Directive of the European Parliament and of the Council amending Directive 2008/98/EC on waste, COM/2015/0595 final.

[10] N. de Sadeleer, 'Environmental Governance and the Legal Bases Conundrum' (2012) *YEL* 1–29.

[11] 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.

[12] N. de Sadeleer, 'Marketing and Cultivation of GMOs in the EU. An Uncertain Balance between Centrifugal and Centripetal Forces', *EJRR*, 2015(4) 532-558.

[13] N. de Sadeleer, 'Harmonizing Car Emissions, Air Quality, and Fuel Quality Standards in the Wake of the VW Scandal: How to Square the Circle?', *EJRR*, 2016(1) 16-17.

[14] The IARC's Group 2A category is applied when there is limited evidence of carcinogenicity in humans and sufficient evidence of carcinogenicity in experimental animals. According to the IARC 2015 assessment, there was limited evidence of carcinogenicity in humans for non-Hodgkin lymphoma whereas there is convincing evidence that glyphosate can cause cancer in laboratory animals. However, on 15 March 2017 ECHA's

authorities (France, Malta, The Netherlands, Belgium, etc.) recently decided to ban the use of that substance. By the same token, though the Maize MON 810, which attracted a great deal of media attention, has been authorized by the European Commission, several Member States have been banning its cultivation in invoking safeguard clauses.[15]

Likewise, some Member States are likely to restrict export of waste on the grounds that such exports may disrupt domestic waste treatment operations.[16] By the same token, as several Member States adopt increasingly stringent waste management standards, Member States applying less stringent requirements are becoming targets fort the disposal of waste. Accordingly, the export of hazardous waste raise environmental concerns.

Besides, as long as the EU lawmaker has not pre-empted the field (exhaustive, full, or complete harmonisation), Member States are empowered to regulate either their trade or their use with the aim of protecting the environment. Though these measures may hinder free trade in goods, they can be justified either by one of the reasons written in Article 36 TFEU, or by a mandatory requirement.[17] By way of illustration, before the entry into force of REACH regulation, EC legislation did not preclude Sweden from regulating the industrial use of trichloroethylene, a chemical substance classified as a category 3 carcinogen.[18]

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 conservancy,[19] the tensions with trading interests are likely to become more severe where the public authorities, be it at national, be it at municipal level, are laying down product standards, energy production and distribution requirements, and waste management requirements.

Through their life cycle, all products cause environmental degradation in some way.[20] Depending on their composition, their production method, and how they are transported, used, consumed, re-used, recycled, or discarded, products can become a source of pollution. What is more, the rise in consumption of products increases the pressure on the environment. Indeed, product consumption compounds the extraction and exploitation of natural resources, operations that have a wide range of negative environmental impacts.

Committee for Risk Assessment concluded that the available scientific evidence did not meet the criteria to classify glyphosate as a carcinogen.

[15] For instance, maize T25 and MON810 are prohibited in Austria, maize Bt-176 is prohibited in Austria, Germany and Luxemburg, colza Topas 19/2 is prohibited in France and Greece, and colza MSI-RF1 is prohibited in France. The CJEU had to review several of these bans: Case C-236/01 *Monsanto Agricoltura Italia* [2003] ECR I-8105; Joined Cases C-58/10 to C-68/10 *Pioneer Hi Bred Italia* [2011] ECR I-7763, para. 21. See M. Weimer, "The Right to Adopt Post-Market Restrictions of GM Crops in the EU" (2012) *EJRR* 447.

[16] Case 203/96 *Dusseldorp* [1998] ECR I-4075, Case C-209/98 *Sydhavens* [2000] ECR I-3743.

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

[18] Case C-473/98 *Kemikalieinspektionen v. Toolex Alpha* [2000] ECR I-5681, paras. 27 to 33.

[19] N. de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford, OUP, 2014) 175-224.

[20] M. Onida, « Products and the Environment", in R. Maccrory (ed.), *Reflections on 30 Years of EU Environmental Law. A High Level of Protection?* (Groeningen, Europa Law publishing, 2005) 236-7.

Against this background, new product policies paying heed upon resource efficiency may reduce environmental impacts stemming from products and sustain socio-economic progress in a world of finite resources and ecosystem capacity. In particular, the EU 7th Environment Action Programme identifies stepping up resource efficiency as one of its key policy objectives.[21] Besides, resource efficiency offers significant opportunities in terms of competitiveness, cost reductions, improved productivity and security of supply.[22]

Accordingly, the environmental impacts of products have been progressively regulated at national level,[23] although many of these standards (chemicals, pesticides, biocides, etc.) are derived from EU secondary law.[24] 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, resource efficiency, etc. Accordingly, by virtue of their cross-cutting nature, these national environmental standards constantly interact with the internal market. What is more, the national product standards are likely to restrict the access of foreign products.

It comes thus as no surprise that in spite of the on going harmonisation process environmental protection levels still vary significantly from one Member State to another.

Given the different product regulatory approaches being developed across the EU, there has been fear of the emergence of new barriers to free trade in goods. For some, a neo-protectionist policy underlies national and regional measures regulating products 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 thorny with the implementation of measures that make no distinction between domestic and imported goods. In effect, national measures can become all the more insidious where no distinction is made between domestic and imported goods. Accordingly, there is a risk that the most stringent national regulation would hinder free trade in goods. Yet, if legislation in the recipient State is less permissive than that of the exporting State, the former will hinder free circulation of goods even if it does not provide for any difference of treatment between domestic and imported products. In such case, the courts are called on to review the justification and the proportionality of the domestic measures at issue.

In these clashes, the internal market has an advantage based on its seniority. The freedom in trading in goods is ingrained in the EU DNA. Ni effect, the principle of free movement of goods flowing from Articles 34 and 35 TFEU – provisions prohibiting obstacles to the trade

---

[21] Article 4, Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', OJ L 354/171. In addition, the EU Roadmap to a Resource Efficient Europe (2011) outlined the policy targets and actions to 'produce more value with less input, use resources in a sustainable way and manage them more efficiently throughout their life cycle'.

[22] Decision No 1386/2013/EU, Annex, 6.

[23] EEA Report No 10/2016, *More from less — material resource efficiency in Europe*.

[24] Product standards are those which set limits on pollution or nuisance levels and may not be exceeded both as regards the product's composition as well as its emissions.

in goods - has been proclaimed by the CJEU as a fundamental principle of EU law.[25] It follows that the environmental exceptions to this fundamental principle must be interpreted restrictively. What is more, traders can invoke the economic rights enshrined in the TFEU 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, the relationship between the internal market law backed by a powerful business constituency and the environmental policy supported by a diffuse public is also asymmetrical.

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

II. Negative Harmonization

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 wildlife),[26] the provisions of the TFEU on free movement of goods – Articles 34 to 36 TFEU among others - are directly applicable.[27]

At this stage, it is necessary to give a brief outline of these provisions. Articles 34 and 35 prohibit Member States from restricting free movement (*negative harmonization*). Accordingly, domestic environmental measures must ensure that the economic freedoms enshrined in Treaty law are not breached. The striking feature of Article 34 is its sheer breadth.[28] Since its *Dassonville* judgment of 11 July 1974, the Court of Justice (CJEU) has broadly interpreted the concept of measure having equivalent effect to quantitative restrictions (MEEQR). According to the wording of the judgment, 'all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions. [29] Later on, in *Cassis de Dijon*, the Court clarified that MEEQRs, not limited to measures directly affecting imports, were encompassing measures that are 'applicable without distinction' to foreign and domestic goods, as a foreign producer may find it more difficult to respect these rules than the national producer. According to settled case law, 'in the absence

---

[25] According to the Court's settled case-law, Article 34 TFEU, in prohibiting all measures having equivalent effect to quantitative restrictions on imports, covers any national measure which is capable of hindering, directly or indirectly, actually or potentially, intra-Community trade (see, inter alia, *Dassonville*, 8/74, EU:C:1974:82, para. 5, and *PreussenElektra*, C-379/98, EU:C:2001:160, para.69).

[26] N. de Sadeleer, « Trading in Wildlife under the Habitats and Birds Directives. Restricted Movement of Species v Free Movement of Goods», in Born and al. (ed.), *The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?* (London, Routledge, 2014) 160-177.

[27] It is beyond the scope of a brief chapter such as this to explore the impacts of other TFEU provisions on free movement of goods (Art. 28, 30, and 110 TFEU) on the national environmental measures. See N. de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford, OUP, 2014) 241-258.

[28] P. Oliver, 'Of Trailers and Jet-Skis: is the Case Law on Article 34 TFEU Carrering in a New Direction' (2010) *Fordham Intl L J* 4.

[29] Case 8/74 *Dassonville* [1974] ECR I-837.

of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods' constitute MEEs prohibited by Article 34 TFEU.[30] Last but not least, the Court held that 'any other measure which hinders access of products originating in other Member States to the market of a Member State' fell within the scope of Article 34.[31] In contrast, with respect to obstacles on exports of goods, the CJEU held that 'only the national measures having as their specific object or effect the restrictions of patterns of exports and thereby the establishment of a difference in treatment between the domestic trade of a Member State and its export trade, in such a way as to provide a special advantage for national products or for the domestic market of the State in question'.[32] Accordingly, the Court has refused to extend the *Cassis* case law to restrictions on exports.

That being said, Articles 34 and 35 TFEU do not enshrine a general freedom to trade or the right to the unhindered pursuit of one's commercial activities.[33] It follows that a MEEQR may be justified by one or several of the public interest grounds listed in Article 36 TFEU or by overriding requirements. In effect, 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.). In addition, the Court approved a flurry of environmental measures on the basis of mandatory requirements of general interest.[34]

Accordingly, Member States are allowed 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, in accordance with the principle of proportionality, be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective.[35]

Non-tariff barriers to the free movement of goods	
Quantitative restrictions	Articles 34-35 TFEU
Measures having an equivalent effect to quantitative restrictions	Articles 34-35 TFEU
Exemptions to the prohibition of quantitative restrictions and measures having an equivalent effect to quantitative restrictions	Articles 36 TFEU

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

[30] Case C-120/78 *Cassis de Dijon* [1979] ECR 649.
[31] Case C-110/05 *Commission v. Italy 'Trailers'* [2009] ECR I-519, para. 37; Case C-142/05 *Mickelsson and Roos 'Swedish Watercrafts'* [2009] ECR I-4273, para. 24.
[32] Case 155/80 *Oebel* [1981] 1993, para. 15; Case 172/82 *Inter-Huiles* [1983] ECR I-555, para. 12 ; and Case 203/96 *Dusseldorp* [1998] ECR I-4075, para. 40.
[33] Case C-292/92 *Hünermund* [1993] ECR I-6787, 6813.
[34] See notably Case 302/86 *Commission v. Denmark* [1988] ECR I-4604, para. 9; Case C-389/96 *Aher Waggon* [1998] ECR I-4473; Case C-213/96 *Outokumpu* [1998] ECR I-1777, para. 32; Case C-176/03 *Commission v. Conseil* [2005] ECR I-7879, para. 41; and Case C-320/03 *Commission v. Austria* [2005] C:2005:684, para. 72.
[35] See, inter alia, C-573/12, *Ålands Vindkraft* [2014] EU:C:2014:2037, para. 76 and the case-law cited.

characterized by coherence.[36] 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.[37] Moreover, the case law has thrown up more questions than it resolves on issues such as the validity of eco-taxes,[38] measures having an extra-territorial dimension, measures restricting the use of products,[39] and the scope of mandatory requirements.[40]

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 Læsø*,* the Court considered that 'measures to preserve an indigenous animal population with distinct characteristics contribute to the maintenance of biodiversity by ensuring the survival of the population'.[41] 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 Læsø 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 CJEU 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 out with specially designated waterways. The possibilities for use of the watercraft were extremely marginal at the time the questions were referred to the Court.[42] As regards the justification of regulations on the use of watercrafts 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.[43]

---

[36] H. Vedder, 'Integrating rather than juxtaposing environmental policy and the internal market', in P. Koutrakos and J. Snel (eds.) *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar, 2017) 171.
[37] For a comprehensive table of the EU case law on environment and trade disputes, see http://www.tradevenvironment.eu/documents-case-law/
[38] N. de Sadeleer, *EU Environmental Law and the Internal Market,* 249-251.
[39] Ibid., 284-320.
[40] Ibid., 286-320.
[41] Case C-67/97 *Bluhme* [1998] ECR I-8033, para. 33.
[42] Case C-142/05 *Mickelsson and Roos* [2009] ECR I-4273.
[43] Case C-142/05 *Mickelsson and Roos*, para. 34.

More recently, in both *Alands Vindkraft* and *Essent Belgium* [44], 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 originating from other Member States. Accordingly green certificates awarded in Finland or in France to green electricity producers are worthless in Sweden or in the Flemish region. The Court held 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.[45] 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 Article 34.

A more balanced weighing of these antagonistic interests can be explained by the fact that the case law mirrors the changes brought to the EU treaties. In fact, the treaties have lately struck a better balance between the internal market and sustainable development. Sustainable development is enshrined in Article 3(3) TEU as one of the key objective of the EU legal order.[46] From the perspective of sustainable development, the objective of environmental protection cannot be dissociated from the internal market. Given that these two objectives have been placed on an equal footing, they have become entangled. Moreover, Article 3(3) instructs the Union to aim at a high level of environmental protection whereas Article 191 TFEU lists the main principles of EU environmental law (such as the precautionary principle and the polluter-pays principle). 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. Consequently, they must be analysed more in terms of reconciliation than of opposition.

III. Positive Harmonization

If secondary law is not necessary to the implementation of free movement of goods within the internal market, it remains complementary to it. 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 impairing the environment is often governed by directives or regulations adopted by the EU institutions, within the framework provided for in the TFEU.[47] Positive harmonization is likely to deprive to some extent the Member States of their regulatory powers. Indeed, they may no longer rely upon Article 36 TFEU or a mandatory requirement if secondary law has fully harmonised a field. By way of illustration, in *Nordiska Dental*, the Court stated that the

[44] Case C-573/12, *Alands Vindkraft* [2014] C:2014:2037; Joined cases C-204/12 to C-208/12 [2014] *Essent Belgium NV,* C:2014:2192.

[45] Joined cases C-204/12 to C-208/12 *Essent Belgium NV*, para 95.

[46] N. de Sadeleer, 'Sustainable Development in EU Law. Still a Long Way to Go', in *Jindal Global Law Review. Special Issue on Environmental Law and Governance* (2015) 6(1), 39-60.

[47] The starting point of the EU environmental policy was related to the need to adopt harmonized environmental product standards with a view to warding off the risk of market fragmentation resulting from disparate national regulation. Since the late 1960s a considerable body of EU legislation, ranging from GMOs to motor vehicles, has developed.

Swedish prohibition on exporting dental amalgams containing mercury was incompatible with Directive 93/42 concerning medical devices – a "new approach" directive – on the grounds that that directive covered environmental considerations.[48]

As far as internal market policy is concerned, Article 114 TFEU allows the EU lawmaker, in accordance with the ordinary legislative procedure, to harmonise national rules with a view to enhancing the functioning of the internal market. It states that measures proposed at EU level concerning health, safety, environmental, and consumer protection are to take as a base a high level of protection, taking account in particular of any new development based on scientific facts.[49] That provision may reconcile the environmental concerns with the internal market imperatives. Harmonisation of product standards, which in turn implies centralization of regulatory decision-making authority at a EU level, eschews the concern about a race to the bottom in environmental regulation.[50] What is more, high environmental standards foster innovation and, as a result, improve the competitiveness of European undertakings against their competitors. In addition, environmental measures can be much more effective when they are harmonized at EU level. 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 as well as a high level of protection; the global level of environmental protection should be reinforced as a result.

There have been developments in recent years, principally in the area of product safety where regulations adopted pursuant to Article 114 TFEU have been more prevalent. In particular, regulations have been privileged as a means of enhancing a common playing field for traders in particular with regard the harmonisation of the placing of certain goods posing environmental and health risks on the market and the control of the import, export or transfer of goods involving environmental risks. In effect, harmonization on the basis of Article 114 of national rules on the marketing of many products—such as dangerous substances,[51] GMOs,[52] fertilizers,[53] insecticides,[54] biocides,[55] cars,[56] as well as trucks[57] —creates a precise legal

---

[48] Case C-288/08 *Nordiska Dental* [2009] ECR I-11031, para. 30, noted by L. Krämer (2010)7:1 *JEEPL* 124-128

[49] 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'.

[50] R. B. Stewart, ' Introduction: Environmental Regulation in Multi-Jurisdictional Regimes', in R.L. Revesz and al., *Environmental Law, the Economy and Sustainable Development* (Cambridge, CUP, 2000) 3.

[51] Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, OJ L 353/1.

[52] 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.

[53] Regulation (EC) No 2003/2003 of the European Parliament and of the Council of 13 October 2003 relating to fertilisers, OJ L 304/1.

[54] 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.

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

[56] Regulation (EC) No 715/2007 of the European Parliament and of the Council of

of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, OJ L 117/1.

framework limiting Member States' ability to lay down their own product standards.[58] To a limited extent, the EU lawmaker also enacts directives. This has been the case of the harmonisation of standards for hazardous substances in electric and electronic equipment,[59] aircrafts[60] and watercrafts.[61] The preference for regulations based on Article 114 TFEU could also be explained by the fact that the more flexible nature of directive entails a genuine risk of market fragmentation. In this connection, a few examples would suffice. Last but not least, the inexorable trend has been towards greater centralization, in particular thanks to the delegated and implementing powers granted by the European Parliament and the Council to the European Commission pursuant to Articles 290 and 291 TFEU.

By way of illustration, REACH has become the hallmark of the EU chemical policy.[62] 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.[63] 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, 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 the European Chemical Agency (ECHA) how the substance can be safely used, and they must communicate the risk management measures to the users.[64] 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. In virtue of Article 128, 'Member States shall not prohibit, restrict or impede the manufacturing, import, placing on the market or use of a substance, on its own, in a mixture or in an article..'. However, REACH does not 'prevent Member States from maintaining or laying down national rules to protect workers, human health and the environment applying in cases where this Regulation does not harmonise the requirements on manufacture, placing on the market or use.' The CJEU held

---

[57] Regulation (EU) No 582/2011 of 25 May 2011 implementing and amending Regulation (EC) No 595/2009 of the European Parliament and of the Council with respect to emissions from heavy duty vehicles (Euro VI), OJ L 167/1.

[58] See L. Krämer, *EU Environmental Law, 8th ed*. (Sweet & Maxwell, 2016) 223-267.

[59] Directive 2002/95/EC of the European Parliament and of the Council of 27 January 2003 on the restriction of the use of certain hazardous substances in electrical and electronic equipment, OJ L 37/19.

[60] Council Directive 89/629/EEC of 4 December 1989 on the limitation of noise emission from civil subsonic jet aeroplanes, OJ L 363/27.

[61] Directive 2013/53/EU of the European Parliament and of the Council of 20 November 2013 on recreational craft and personal watercraft, OJ L 354/90.

[62] As regard the completeness of the annexes of REACH, see N. de Sadeleer, 'Room for Manoeuvre of the EC and EFTA Member States in the face of harmonization of chemicals' in N. de Sadeleer (ed.) *Implementing Precaution. Approaches from Nordic Countries, the EU and USA,* (London, Earthscan, 2007) 330-351.

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

[64] Case C-106/14 *Fédération des entreprises du commerce et de la distribution* [2015] EU:C:2015:576.

that it follows from those provisions that the EU legislature intended to harmonise those requirements in certain cases.[65] It follows that the harmonisation is not deemed to be total.

This makes sense given that Member States can lay down their own product requirements in the absence of full harmonisation in as much as they comply with the Treaty provisions on the free movement of goods. The question arises as to the areas that are likely to be covered by the Article 128 exception. D. Langlet and S. Mahmoudi are taking the view that with respect to substances that are subject to authorisation there is hardly any room for manoeuvre left to the Member States. On the other hand, the use of the regulated chemical substances could be regulated to some extent.[66] With respect to the substances that have only been registered, it must be borne in mind that there has not always been any genuine assessment of the risks by ECHA or the Member States. In *Canadian Oil Company Sweden,* the CJEU held that REACH does not preclude national legislation which requires an importer of chemical products to register those products with the competent national authority when that importer is already under an obligation under that regulation to register those same products with the European Chemicals Agency.[67] Nonetheless, a number of conditions have to be fulfilled by the Member State:

- the registration with the competent national authority does not constitute a pre-condition to the placing of those products on the market,
- the information to be submitted must be different from that required by REACH and contributes to the achievement of the objectives pursued by that regulation (a high level of protection of human health and the environment as well as the free movement of the substances subject to the additional notification in the internal market).

Another case in point is regulation (EC) No 1107/2009 concerning the placing of plant protection products on the market. It 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 a 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. In accordance with the principle of mutual recognition, whenever it has been authorised by a single Member State, the product can be freely trade within the internal market.

Motor vehicle emissions have originally been regulated by a swathe of directives to stepwise tighten the limit values of various pollutants. For heavy-duty vehicles, Directive 2005/55/EC[68]and Directive 2005/78/EC (implementing provisions)[69] define the emission

[65] C-358/11 *Lapin luonnonsuojelupiiri* [2016] EU:C:2013:142, para. 33.
[66] See D. Langlet and S. Mahmoudi, *EU Environmental Law and Policy* (Oxford, OUP, 2016) 321.
[67] Case C-472/14 *Canadian Oil Company Sweden* [2016] ECLI:EU:C:2016:171.
[68] Directive 2005/55/EC of the European Parliament and of the Council of 28 September 2005 on the approximation of the laws of the Member States relating to the measures to be taken against the emission of

standards currently in force. For light-duty vehicles, the emissions standards were laid down by directive 98/69/EC relating to measures to be taken against air pollution by emissions from motor vehicles, which was one of the Directives amending Directive 70/220/EEC. In 2007, Directive 70/220/EEC was repealed and replaced by Regulation (EC) No 715/2007 of the European Parliament and of the Council which harmonizes the technical emission standards - known as EC type-approval - for motor vehicles.[70] Tighter emission limits, known as Euro 5 and Euro 6, of atmospheric pollutants such as particulates and nitrogen oxide for vehicles sold in the EU market were established. Manufacturers are called on to prove that all new vehicles sold, registered or put into service comply with the emission standards set out in the regulation.

Given that these sectors are product related, it comes as no surprise that the EU institutions have been favouring regulations adopted pursuant to Article 114 TFUE.

Besides, product standards have also been harmonised thanks to regulations adopted under Article 192 TFEU in particular where it is necessary to implement obligations flowing from international agreements to which the EU is a party. This is the case for regulations aiming at banning the import of species threatened with extinction,[71] on the prohibition of the import of pelts, [72] and cetaceans products,[73] on the shipment of waste, [74] and on substances that deplete the ozone layer.[75]

A further observation must be made. Total harmonization pre-empts national regulators to enact more stringent measures whereas minimum harmonization permits Member States to maintain or to introduce more stringent standards than those prescribed by the EU lawmaker. It follows that the free discretion of national authorities will be limited as harmonization deepens. Therefore, as long as the EU lawmaker has not completely pre-empted the field (exhaustive, full, or complete harmonisation), Member States may invoke either one of the reasons written in Article 36 TFEU, or a mandatory requirement.76 By way of illustration, under the Waste framework directive 2008/98 waste may be classified as hazardous by a

---

gaseous and particulate pollutants from compression-ignition engines for use in vehicles, and the emission of gaseous pollutants from positive-ignition engines fuelled with natural gas or liquefied petroleum gas for use in vehicles, OJ L 275/163.

[69] Commission Directive 2005/78/EC of 14 November 2005 implementing Directive 2005/55/EC of the European Parliament and of the Council on the approximation of the laws of the Member States relating to the measures to be taken against the emission of gaseous and particulate pollutants from compression-ignition engines for use in vehicles, and the emission of gaseous pollutants from positive ignition engines fuelled with natural gas or liquefied petroleum gas for use in vehicles and amending Annexes I, II, III, IV and VI thereto, OJ L 313, p. 1.

[70] The specific technical provisions necessary to implement that Regulation were adopted by Commission Regulation (EC) No 692/2008.

[71] Regulation No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein No 338/97

[72] Regulation No 2037/2000 on substances that deplete the ozone layer; Regulation No 1013/2006 on the shipment of waste, OJ L 190/1; Regulation No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, OJ L 61/ 1.

[73] Council Regulation (EEC) No 348/81 of 20 January 1981 on common rules for imports of whales or other cetacean products ([1981] OJ L 39/1).

[74] Council Regulation prohibiting the use of leghold traps in the EU and the introduction into the EU of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping methods which do not meet international humane trapping standards ([1991] OJ L 308/1).

[75] Regulation No 2037/2000 on substances that deplete the ozone layer, OJ L 277/1.

[76]See M. Dougan, 'Minimum Harmonization an the Internal Market' (2000)37 *CMLRev* 855.

Member State despite not appearing in the EU list, as the framework directive does not create full harmonization.77 By the same token, as they do not apply to old vehicles, directives providing for anti-pollution emission standards to be respected upon registration of motor vehicles do not prohibit Member States from cancelling licence plates of foreign vehicles that do not respect emission standards, through the use of one of the derogations.[78]

What is more, legal acts adopted pursuant to Article 114 TFEU can enable a Member State to adopt stricter environmental standards. In this connection, two examples would suffice.

Though Directive 94/62/EC on packaging and packaging waste was adopted in virtue of Article 114 TFEU, it expressly allows Member States to pursue 'in the interest of a high level of environmental protection' more stringent national and recycling and recovery targets than the ones set out in the directive. Nonetheless, the Commission is called on to confirm these more ambitious targets, after having verified that they do not constitute an arbitrary means of discrimination or a disguised restriction on trade between Member States.79 Similarly, there is no full harmonization of national systems for the encouragement of packaging reuse, as Article 5 of the packaging Directive allows Member States to encourage, in conformity with the TFEU, reuse systems of packaging that can be reused in an environmentally sound manner. [80]

By the same token, Directive 98/70/EC relating to the quality of petrol and diesel fuels,[81] sets technical specifications on health and environmental grounds for fuels to be used for vehicles equipped with positive-ignition and compression-ignition engines.'[82] Departing from the principle of maximum harmonization, its Article 6 empowers Member States to enact more stringent environmental specifications: 'in specific areas, within its territory, fuels may be marketed only if they comply with more stringent environmental specifications than those provided for in this Directive for all or part of the vehicle fleet with a view to protecting the health of the population in a specific agglomeration or the environment in a specific ecologically or environmentally sensitive area in that Member State, if atmospheric or ground water pollution constitutes, or may reasonably be expected to constitute, a serious and recurrent problem for human health or the environment.' The Member State wishing to make use of this derogation is obliged to submit its request to the Commission. 'The justification shall include evidence that the derogation respects the principle of proportionality and that it will not disrupt the free movements of persons and goods.'[83]

Conversely, legal acts adopted pursuant to Article 192 TFEU may be exhaustive in nature and as a result preclude stricter national measures. That would be the case of former Waste Shipment Regulation on shipments of waste.[84] The Court held that several provisions

---

[77] Case C-318/98 *Fornasar* [2000] ECR I-4785, para. 46.
[78] Case C-524/07 *Commission v. Austria* [2008] I-187, paras. 46 to 47.
[79] Article 6(10) of Directive 94/62/EC on packaging and packaging waste.
[80] Case C-463/01 *Commission v. Germany* [2004] ECR I-11705, paras. 37 to 45.

[81] OJ L 350/58.
[82] Article 1. Directive 98/70/EC was amended by Directive 2009/30/EC of the European Parliament and of the Council of 23 April 2009 with the aim to dealing with the marketing of diesel fuels with a higher biofuel content.

[83] Article 6(2).
[84] [2006] L 190/1.

of Regulation 93/259/EC, now replaced by Regulation 1013/2006, had a ‘full’ character, [85] though this remains a complex question. [86]

However, despite the efforts of the EU institutions, the harmonization of standards is far from being perfect. According to L. Krämer, there is no consistent and coherent EU policy on products.[87] Indeed, harmonization measures have been piled one on top of the other with any global vision. To make matters worse, the environmental impacts of many product categories have not been harmonized so far. Moreover, the harmonisation measures are subject to constant adjustment not only to scientific and technical progress, but also to decisions taken on an international level. Therefore, the structuring of EU legislation laying down product standards with a view to protecting the environment 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.

IV. Challenges Ahead

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 standards 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,[88]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’.[89] Environmental and health regulations amount to regulatory burdens jeopardizing ‘the competitiveness and innovativeness of European industries. Along the same lines, the interinstitutional agreement on better law-making[90] that was hammered out in 2016 calls on the European Parliament, the Council and the Commission to commit themselves to

[85] Case 324/99 *DaimlerChrysler* [2001] ECR I-9897, para. 33.

[86]Originally the stance of the ECJ regarding the full character of harmonization was unclear as regards both the framework Directive on waste and Regulation 93/259/EC. See Case 203/96 *Dusseldorp* [1998] ECR I-4075, paras. 35 and 36.

[87] L. Krämer, *EU Environmental Law, 8th ed*. (Sweet & Maxwell, 2016) 223.

[88] Communication from the Commission on the Regulatory Fitness and Performance Programme, COM (2014)368 final.

[89]European Commission, *Better Regulation Simply Explained* (Brussels, 2006).

[90] Interinstitutional Agreement on Better Law-Making between the European Parliament, the Council of the European Union and the European Commission, OJ L 123/1.

promoting the most efficient regulatory instruments, such as harmonisation and mutual recognition, to avoid overregulation and administrative burdens'.

To make matters worse, with the Junker Commission, deregulating appears to be more fashionable in Brussels than ever.[91] Accordingly, environmental law should no longer takes the form of a system of unilateral constraints which imposes 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.

Needless to say, this far-reaching (smart) policy calls into question the traditional functions of the State. The simplification process envisioned by the EU institutions and the Member States leads to a genuine deregulatory trend, it is also a serious economic mistake. Indeed, tougher harmonized regulations on products, renewables, 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 has already gathered momentum on both sides of the Atlantic given that environmental issues were one of the stumbling blocks in the conclusion of the Comprehensive Economic and Trade Agreement (CETA) Agreement, that is likely to entail the mutual recognition of a broad range of product standards.[92] That treaty has been opposed by many environmentalists, who feared it would undermine environmental standards in the EU. Given that there was a risk to affect the balance struck down hitherto by the EU Treaties, CETA recognizes expressly the right of governments to regulate in the public interest, including setting what they deem to be an appropriate level of environmental protection.[93] In addition, with the aim of preventing a risk of a race to the bottom, the preamble stresses that the countries involved must not reduce their environmental standards in order to attract trade and investment. 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

Article 11 TFEU provides that environmental protection requirements be integrated into the definition and implementation of the Union's policies and activities. In addition, pursuant to Article 3(3) TEU as well as Articles 114(3) and 191(2) TFEU, the EU is obliged to achieve a high level of environmental protection. Nonetheless, in spite of these constitutional commitments, it has become increasingly clear that Europe's prevailing model of economic development — based on high resource use, waste generation and pollution — cannot be sustained in the long term. More fundamental changes of our production and consumption

[91]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 though the set-up of the new Commission has been breathtaking.' See J. Wates, 'Regulatory Rollback Rampage', *Metamorphosis* (Nov. 2014) 1.

[92] See Chapter 4 TBT, Article 4.4.

[93] 'CETA preserves the ability of the European Union and its Member States and Canada to adopt and apply their own laws and regulations that regulate economic activity in the public interest, to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment, public morals, social or consumer protection, privacy and data protection and the promotion and protection of cultural diversity'. Joint Interpretative Instrument, point 2.

systems are called for, with a focus on increased recycling, eco-design, reuse, repair and use of renewables. Therefore, environmental concerns cannot be considered in clinical isolation; they do overlap with other economic policies.

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. Accordingly, be it at EU level, be it at national level, a number of product standards are likely to hinder the free movement of goods.

In granting greater importance to the environmental values, the CJEU could be influential in reconciling trade and environmental interests. However, the room for manoeuvre left by the Court to the national authorities is contained within limits which are not always very clear. In fact, Articles 34 to 36 provide 'only minimal guidance' as to how this balance between the interest of ensuring the free movement of goods and the protection of the environment should be truck in an individual case.[94]

Furthermore, whether the EU institutions are able to reconcile trade and environmental interests in secondary legislation remains to be seen. A number of hazardous substances has been regulated by the EU institutions, though the level of protection afforded by secondary legislation is dogged by controversy. 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. Moreover, full harmonization avoids distortion of the common playing field. 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 as well as their free circulation within that market. Because negative harmonisation is typically piecemeal positive harmonisation may be preferred by institutional actors and undertakings alike.[95] Indeed, as far as environmental product standards are concerned, harmonization by the EU lawmaker determines more precisely the room for manoeuvre left to the Member States than a changeable adjudicatory approach where the courts have to review the justification and the proportionality of an array of domestic measures. To sum up, the practical problem of how to coordinate domestic environmental policies with the internal market shall remain topical for a number of years.

---

[94] H. Vedder, above, 171.

[95] S. Breyer and V. Heyvaert, 'Institutions for Regulating Risks' , in R.L. Revesz and al., *Environmental Law, the Economy and Sustainable Development,* above, 283-352.