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The Foundations of EU Environmental Law: History, Aims and Context

> Economic expansion is not an end in itself: its first aim should be to enable disparities in living conditions to be reduced … It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment so that progress may really be put at the service of mankind.
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> Paris Declaration of the Heads of State or Government of the EEC Member States, 20 October 1972

History and Development of the European Union's Environmental Policy

The original EEC Treaty contained no express mention of environmental policy, in part due to the essentially economic aims of that Treaty, and in part because, when the Treaty was drawn up in the late 1950s, the field of 'environmental' law, in the sense of a discrete body of rules governing the way that we interrelate with our natural surroundings, barely existed in the signatory Member States (though national laws had long existed governing certain aspects of the current field, in the form of rules on private property and public health).[1] At international level, a collection of rules was just beginning to emerge in discrete environment-related areas, a process which had begun with the bilateral fisheries treaties of the mid-nineteenth century and in which the 1949 United Nations Conference on the Conservation and Utilisation of Resources (UNCCUR) was a landmark event. These developments undoubtedly contributed to the subsequent emergence of Community environmental law.

While environmental discourse became increasingly prevalent in the late 1950s and in the 1960s at international level,[2] there was little appetite for Community activity in the environmental field, as the institutions and Member States alike were immersed in the task of defining the Community legal and political order in this period. Nonetheless, a small amount of Community legislation was adopted in these years on what would now be considered to be environmental matters. In this period, and up to the entry into force of the Single European Act in 1987, two legal bases were used for such legislation, each requiring unanimity of voting

[1] See Richard Lazarus, *The Making of Environmental Law* (University of Chicago Press, 2004). See e.g. in the UK, which joined the Community in 1973, Sections 101–107 of the Public Health Act 1936, which were replaced by the Clean Air Act 1956.

[2] See Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (3rd edn., Cambridge University Press, 2012), chapter 2.

in the Council. The first was Article 100 (now, in amended form, Article 115 TFEU). The second was Article 235 (now, in amended form, Article 352 TFEU). The Community's first legislative attempt to address environment-related issues was the 1967 adoption of a Directive on the classification, packaging and labelling of dangerous substances:[3] as it was based on Article 100, however, it was expressed to be aimed at removing the hindrances to trade caused by differing national legislation on the matter, rather than at environmental protection *per se*.[4] This early legislation, therefore, was premised on economic, rather than environmental, reasoning – any achievement of environmental improvement by Community legislation was, in principle, a side effect.

The first real sign of a distinct Community environmental policy came in the run-up to the landmark 1972 United Nations Conference on the Human Environment in Stockholm, convened in 1968 by the United Nations General Assembly.[5] In this way, the birth of Community environmental law occurred simultaneously with the beginning of a new period in international environmental law: as concern mounted for the 'continuing and accelerating impairment of the quality of the human environment',[6] the impetus for international and regional environmental action grew. Thus, while Article 2 of the Treaty of Rome, which set out the EEC's aims, had listed among these aims 'a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, and accelerated raising of the standard of living', the 1972 Paris Summit of the European Council made clear, as the quote at the start of this chapter indicates, that to focus solely on economic growth was wrong-headed, and that particular attention would be given within the EEC to 'protecting the environment so that progress may really be put to the service of mankind'.[7]

The Commission had already, however, got the ball rolling: the Paris Declaration followed the Commission's 1970 announcement that it would draw up a Community action programme on the environment and the 1971 Commission Communication on Community environmental policy, in which it proposed using Article 235 (now, in amended form, Article 352 TFEU) as a legal basis for potential Community environmental measures.[8] In 1973, the first Action Programme for the Environment was adopted, in the form of a political declaration by the Council and the representatives of Member States' governments meeting in the Council, sparked by France's concern that the Treaty provisions were, in their then form, not an appropriate basis for a European environmental

[3] Directive 67/548, OJ 1967 L 196/1 (subsequently amended).
[4] However, protection of public health was mentioned as an aim in the preamble.
[5] UNGA Res. 2398 (XXIII) (1968).
[6] Resolution adopted in July 1968 and a precursor to the convening of the Stockholm Conference: ECOSOC Res. 1346 (XLV) (1968).
[7] Paris Declaration of the European Council, cited in the preamble to the First Action Programme on the Environment, OJ 1973 C 112/1.
[8] Commission Communication on a Community policy for the environment SEC(71)2616 (22 July 1971).

policy.[9] In setting out the Community's environmental programme for the next four years, the First Action programme specified that the Community's Article 2 task of promoting throughout the Community a harmonious development of economic activities and a continuous and balanced expansion 'cannot now be imagined in the absence of an effective campaign to combat pollution and nuisances or of an improvement in the quality of life and the protection of the environment'.[10]

By thus reading in environmental protection as a necessary component of the aim of achieving economic growth, despite the fact that it was not expressly mentioned as an Article 2 aim of the Community, the programme opened the way for the adoption of Community environmental legislation.

Following the first Action programme, three further Action programmes were adopted between 1972 and 1987.[11] More than 150 pieces of Community environmental legislation were passed between 1972 and 1987, covering such diverse areas as environmental impact assessments, waste control, the protection of flora and fauna, and water and air quality.[12] In addition, the Community signed its first international environmental treaties in this period.[13] Such legislation was, by necessity, based on either Article 100 (where it could be argued that the legislation aimed to help achieve the common market)[14] or Article 235 (where no common market rationale could reasonably be found, but there were non-economic reasons for action at Community level);[15] indeed, most legislation was based on both articles.[16] In 1985, the Court of Justice of the European Union (CJEU) in the landmark *ADBHU* case confirmed the validity of using Article 235 EC as a legal basis for environmental legislation on the basis that environmental protection was 'one of the Community's essential objectives' justifying certain limits on the principle of freedom of trade.[17]

[9] See Ludwig Krämer, *EU Environmental Law* (8th edn., Sweet & Maxwell, 2015), chapter 1.
[10] Preamble to the First Action Programme on the Environment, OJ 1973 C 112/1.
[11] Second Programme (1977–1981), OJ 1977 C 399/1, Third Programme (1982–1986), OJ 1983 C 46/1, Fourth Programme (1987–1992), OJ 1987 C 328/1.
[12] See e.g. Directive 85/337 on environmental impact assessments, OJ 1985 L 175/40; Directive 75/442 on waste, OJ 1975 L 194/23; Directive 79/409 on the conservation of wild birds, OJ 1979 L 103/1; Directive 75/440 on surface water, OJ 1975 L 194/26; Directive 84/360 on the combating of air pollution from industrial plants, OJ 1984 L 188/20.
[13] See e.g. the Paris Convention for the Prevention of Marine Pollution from Land-Based Sources, Decision 75/437, OJ 1975 L 194/5.
[14] For example, Directive 80/778 on drinking water, OJ 1980 L 229/11; and Directive 73/404 on detergents, OJ 1973 L 347/51. The practice of basing such legislation on Art. 100 was in principle confirmed as compatible with the Treaty by the ECJ in Case 92/79 *Commission* v. *Italy* ECLI:EU:C:1980:1.
[15] See e.g. Directive 79/409 on the conservation of wild birds, OJ 1979 L 103/1.
[16] See e.g. Directive 85/337 on environmental impact assessments, OJ 1985 L 175/40, Directive 84/360 on combating air pollution from industrial plants, OJ 1984 L 188/20, and Directive 78/319 on toxic and dangerous waste, OJ 1978 L 84/43.
[17] Case 240/83 *ADBHU* ECLI:EU:C:1985:59, para. 13.

The rather uncertain status of Community environmental policy was formalised by Article 25 of the Single European Act (SEA) 1986, which inserted a new Title VII on the Environment into the Treaty,[18] making environmental protection an express objective of the Community. While it was clear that this remained an ancillary flanking policy to the primary Community aim of achieving the internal market, the Title nonetheless contained a specific legal basis for environmental legislation (Article 130s), making it unnecessary to find an economic justification for the legislation or to use the 'catch-all' Article 235 provision. Voting remained, however, subject to unanimity under Article 130s, though Member States could maintain or introduce more stringent protective measures than those passed on the basis of Article 130s, if compatible with the Treaty and notified to the Commission (under Article 130t, one of the so-called 'environmental guarantee' or safeguard provisions).

Crucially, however, the SEA introduced a new Article 100a allowing internal market legislation (with some exceptions) to be passed by qualified majority. Environmental measures based on internal market objectives were therefore subject to qualified majority voting in the Council and thus could be adopted with more ease. Moreover, environmental measures passed under this provision had to take 'as a base a high level of environmental protection'[19] and Member States had the possibility of notifying the Commission if they deemed it necessary to 'apply' national provisions in order to protect the environment despite the adoption of Community harmonising legislation (another environmental guarantee provision).[20]

The insertion of Article 100a led to a myriad of legal basis disputes before the CJEU on the question whether a given piece of environmental legislation ought to have been passed on the basis of Article 130s (unanimous voting, consultation of the Parliament) or Article 100a (qualified majority voting, cooperation procedure with the Parliament).

In *Commission* v. *Council (Titanium Dioxide)*, for instance, the CJEU annulled Directive 89/428/EEC on titanium dioxide waste, which had been based on Article 130s.[21] In holding that the Directive should have been based on Article 100a, the CJEU noted that, while the aim and content of the measure displayed features relating to the protection of the environment as well as achievement of the internal market, a joint legal basis was not possible due, in particular, to the different Council voting rules and the differing role of the European Parliament

[18] Arts. 130r–t; in amended form, present Arts. 191–193 TFEU. [19] Art. 100a(3).

[20] See Art. 100a(4), 'If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Art. 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions. The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

[21] Case C-300/89 *Commission* v. *Council (Titanium Dioxide)* ECLI:EU:C:1991:244.

entailed by the Article 100a and Article 130s procedures. The CJEU went on to observe that (at paras. 22–24):

- Article 130 r(2) of the Treaty (the precursor to present Article 11 TFEU, discussed in Chapter 3) provided that 'environmental protection requirements shall be a component of the Community's other policies';
- As national environmental rules may place a burden on industry, 'action intended to approximate national rules concerning production conditions in a given industrial sector with the aim of eliminating distortions of competition in that sector is conducive to the attainment of the internal market'; and
- The Commission was itself obliged by then Article 100a(3) to take as a base a 'high level of protection in matters of environmental protection' in bringing forward legislative proposals based on Article 100a (now Article 115 TFEU).

Titanium Dioxide, therefore, was based on a strongly integrationist approach which expressly recognised the close interface between the EEC's economic and environmental goals.

The SEA expressly set out the objectives of the newly formalised Community environment policy in Article 130 r(1), namely, preserving, protecting and improving the quality of the environment, contributing towards protecting human health, and ensuring a prudent and rational utilisation of natural resources. Importantly, it also set out a number of what it termed 'principles', which were to form a foundation of the Community's environmental policy (Article 130 r(2)), namely: the preventive principle, the source principle, and the polluter pays principle, each discussed below. The SEA also included a type of integration principle requiring that environmental considerations be 'a component of the Community's other policies', which was the first formalisation of the obligation of environmental policy integration, discussed further below, at Treaty level. Although not forming part of Article 130 r(2), another *de facto* 'principle' of environmental law formalised by the SEA was that of subsidiarity (Article 130 r(4)).[22] The SEA also made express provision for the Community to participate in international environmental agreements (Article 130 r(4)).

These developments had a momentous effect on the development and formalisation of the Community's environmental policy. The changes led, amongst other things, to a steady increase in the amount and scope of Community environmental legislation, and to the creation of a separate

[22] Art. 130r(4) provided that, 'The Community shall take action relating to the environment to the extent to which the objectives [of Community environmental policy, set out above] can be attained better at Community level than at the level of the individual Member States.' The notion of subsidiarity had been present from the beginning in the Community's environment policy, featuring prominently in the Community's First Environment Programme.

Directorate-General for the Environment (DG XI) in the Commission.[23] This was followed by the creation of the European Environment Agency (EEA), which is tasked with gathering data on the state of the EU's environment.[24]

The entry into force of the Maastricht Treaty brought with it a subtle upgrade in the perceived importance of the Community's environmental policy compared to other policies. The most significant (at least politically) was the first insertion into Article 2 EC, i.e. the fundamental objectives of the Community, of an express reference to environmental protection, including as one of the objectives of the Community 'the promotion, throughout the Community, of a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment'. Maastricht also introduced substantial, more practical, changes for the Community's environmental policy – most notably, the introduction of qualified majority voting for the environment legal basis (Article 130s EC, subject to certain express exceptions);[25] the formalisation of the status of the environmental action programme; and the addition of the precautionary principle to the principles of the Community's environmental policy. The principle of subsidiarity, which had been inserted by the SEA into the title on the environment, was elevated to Part One of the Treaty, on the fundamental '*Principles*' of the Community (Article 3b). In addition, Community financial support for environmental projects was bolstered by the insertion of Article 130d(2) (present Article 177(2) TFEU), providing for a Cohesion Fund to be set up in the field of the environment.

The Treaty of Amsterdam marked a further promotion and concretisation of the Community's environmental aims. Specifically, it introduced the promotion of a 'high level of protection and improvement of the quality of the environment' as an Article 2 EC objective of the Community, and modified the wording of Article 2 EC to refer to the aim of promoting a 'harmonious, balanced and sustainable development of economic activities' (in place of the SEA's reference to 'balanced development' and 'sustainable growth'). The Treaty on European Union was amended to include among its objectives the promotion of 'economic and social progress and [of achieving] balanced

[23] Significant legislation passed included legislation creating the European Environment Agency and legislation introducing an eco-label for environmentally friendly products (Regulation 1210/90 on the Establishment of the European Environment Agency and the European Environment Information and Observation Network, OJ 1990 L 120/1, Regulation 880/92 on a Community eco-label award scheme, OJ 1992 L 99/1).

[24] Council Regulation (EEC) No. 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European Environment Information and Observation Network, OJ 1990 L 120/1. In contrast to typical national environmental agencies, Member States have never been willing to give the EEA inspection or enforcement powers.

[25] Namely, fiscal measures and measures concerning town and country planning, land use other than waste management, and management of water resources remained subject to unanimity of voting.

and sustainable development'.[26] Further, the integration principle followed subsidiarity in being upgraded from its position in the Environment Title (former Article 130 r EC) to be included in Part One of the Treaty on the 'Principles' of the Community (what was then Article 6 EC).

No significant change was made to the environmental provisions by the Treaty of Nice. The Lisbon Treaty, however, made some changes deserving mention. Environmental values do not feature in the Article 2 TEU list of values upon which the Union is 'founded'. However, Article 3(3) TEU repeats the Treaty of Amsterdam's formulation of the balance between the EU's environmental, social and economic aims,[27] and it is for the first time specified that one of the goals of the Union's external relations policy is the 'sustainable development of the Earth' (Article 3(5) TEU). This is confirmed, and more detail added, by Article 21(2) TEU.[28] In the TFEU, Article 191(1) added the aim of combating climate change to the EU's environmental policy aims, and added a *passerelle* clause in the environmental legal basis provision, discussed further below.[29] Further, the newly inserted Title on Energy Policy includes 'the development of new and renewable forms of energy' within the aims of the EU's policy in this field (Article 194(1) TFEU).

Finally, Article 37 of the Charter of Fundamental Rights of the EU effectively repeats the integration requirement of Article 11 TFEU (previously Article 6 EC), providing that, 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'

[26] Art. 2, TEU, from the Maastricht version of promotion of 'economic and social progress which is balanced and sustainable'. Further important environmental changes brought about by Amsterdam were: (1) the 'environmental guarantee' provisions of what is now Art. 114 TFEU were expanded to specify that Member States could, despite the passing of Community harmonisation measures, maintain in force existing environmental measures *or* introduce new environmental measures, as long as the conditions set out therein were satisfied; and (2) the switch in decision-making procedures for (as it then was) Art. 130s EC (present Art. 192 TFEU) from the cooperation procedure to the co-decision procedure.

[27] The relevant extract provides that the Union 'shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment'.

[28] Art. 21(2) TEU includes within the aims of the EU's external action fostering the 'sustainable economic, social and environmental development of developing countries' (though this is explicitly 'with the primary aim of eradicating poverty') and helping to develop 'international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'.

[29] The *passerelle* clause of Art. 192(2) TFEU enables the Council, acting unanimously upon a proposal of the Commission and after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions, to make the ordinary legislative procedure (entailing QMV) applicable to provisions 'primarily of a fiscal nature' (Art. 192(2)(a) TFEU). At present, a special legislative procedure entailing unanimity of voting in the Council applies to environmental fiscal measures.

Aims of EU Environmental Policy

Article 3(3) TEU

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

The overarching aim of the Union's environmental policy is set out in Article 3(3) TEU, as further specified in Article 191(2) TFEU, which states that, 'Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union'.[30] This aim effectively subsumes the four further aims set out in Article 191(1) TFEU, which provides as follows.

Article 191(1) TFEU

Union policy on the environment shall contribute to pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment,
- protecting human health,
- prudent and rational utilisation of natural resources,
- promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

As already mentioned, the fourth aim in this list was added by the Treaty of Lisbon.

In terms of the EU's external aims, Article 3(5) TEU, inserted by the Treaty of Lisbon, includes within the EU's fundamental foreign policy aims that of contributing to the 'sustainable development of the earth'. Article 21 TEU, also inserted by the Treaty of Lisbon, adds further detail to this, specifying that the EU's external aims include 'the sustainable economic social and environmental development of developing countries, with the primary aim of

[30] See, similarly, Art. 114(3) TFEU. On the obligation to take into account 'the diversity of situations in the various regions of the Union', see the discussion of the environmental guarantee provisions below. The aim of achieving a high level of protection does not require an EU measure to aim for the highest level of protection that is technically possible: see Case C-341/95 *Bettati* v. *Safety Hi-Tech SRL* ECLI:EU:C:1998:353, para. 47.

eradicating poverty'.[31] Also included is the aim of helping to develop 'international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'.[32]

A 'High Level of Environmental Protection Taking into Account the Diversity of Situations in the Various Regions of the Union'

The aim of achieving a 'high level of environmental protection' was introduced into the Treaties by the Single European Act. Initially, it referred only to the Commission's internal market proposals concerning health, safety, environmental and consumer protection which took 'as a base a high level of protection'.[33] As noted above, Article 191(2) TFEU now guarantees that the Union policy on the environment aims at a high level of protection taking into account the diversity of situations in the various regions of the Union.[34] The aim is also embodied in Article 3(3) TEU, including within the general goals of the Union the achievement of a 'high level of protection and improvement of the quality of the environment'.[35]

Article 37 of the EU's Charter of Fundamental Rights, given binding force by the Treaty of Lisbon, further provides that,

> A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.[36]

The objective is also present in the principal legal basis provision for legislation aimed at achieving the internal market, Article 114 TFEU. Specifically, in putting forward legislative proposals pursuant to Article 114(1) TFEU concerning 'health, safety, environmental protection and consumer protection', the Commission is obliged to take 'as a base a high level of protection, taking account in particular of any new development based on scientific facts'.

Consistent with this importance given to the aim in the Treaty, it is frequently visible as an express aim of much of the EU's environmental legislation. The Industrial Emissions Directive, for instance, defines its subject matter as including 'rules designed to prevent or, where that is not practicable, to reduce emissions into air, water and land and to prevent the generation of waste, in order to achieve a high level of protection of the environment taken as a whole'.[37] Similarly, the Strategic Environmental Assessment Directive defines its objective as providing for 'a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and

[31] Art. 21(2)(d) TEU. [32] Art. 21(2)(f) TEU. [33] Art. 100a(3) SEA.
[34] Art. 191(2) TFEU. [35] Art. 3(3) TEU.
[36] On the environmental integration principle, see, further, Chapter 3.
[37] Directive 75/2010, OJ 2010 L 334/17, Art. 1. See, further, Chapter 9.

adoption of plans and programmes with a view to promoting sustainable development, by ensuring that an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.'[38]

The aim has also been taken into account by the CJEU in certain cases. In *ATAA*[39] (discussed further in Chapter 8), for instance, the Grand Chamber of the CJEU held that the application of the EU Emissions Trading Scheme (ETS) to third country airlines was compatible with international law and, in particular, with the principle of territoriality, given that the scheme only applies to commercial aircraft that arrive at or depart from a Member State airport.[40] Nor did the fact that the ETS applied to the whole of the aircraft's journey (not just that which occurred over EU territory) affect this conclusion, given the EU's objective under Article 191(2) TFEU of achieving a high level of environmental protection and its status as a party to the UNFCCC.[41]

Despite its frequent appearance throughout the text of the TEU, TFEU and Charter, the aim of achieving a 'high level of environmental protection' remains profoundly ambiguous in character. Indeed, as with many of the broad aims of the Union, this is perhaps the key to its success as an aim with which all Member States can agree, despite significant ongoing differences in opinion as to the relative importance of environmental policy as compared to, say, economic policy. It is clear, for instance, that the aim does not require Member States to strive for the 'highest' level of environmental protection.[42] Nevertheless, it underlies the Treaties' acceptance that Member States may, subject to certain conditions, be permitted to go beyond the environmental standards agreed upon at EU level, in order to achieve a higher level of environmental protection. These provisions, known as the environmental 'guarantee' provisions, are discussed further below. The need for a certain 'flexibility' of environmental aims is also inherent in the wording of Article 191(2) TFEU itself: the aim is to achieve a high level of protection 'taking into account the diversity of situations in the various regions of the Union'.

This is not a new phenomenon: flexibility has been embedded in the EU's environmental law and policy from its very beginnings. Indeed, the Commission's proposal for the EEC's very first Environmental Action Programme shows that Brussels considered from the outset that, whatever kind

[38] SEA Directive 2001/42, OJ 2001 L 197/30, Art. 1. See, further, Chapter 11.
[39] Case C-366/10 *ATAA* ECLI:EU:C:2011:864. [40] *Ibid.*, para. 127.
[41] *Ibid.*, para. 128.
[42] Case C-233/94 *Germany* v. *Parliament and Council* ECLI:EU:C:2000:544, para. 48, where, concerning the analogous aim for consumer protection, the CJEU held that 'although consumer protection is one of the objectives of the Community, it is clearly not the sole objective … Admittedly, there must be a high level of consumer protection … however, no provision of the Treaty obliges the Community legislature to adopt the highest level of protection which can be found in a particular Member State.' It followed that, although the Directive at issue may result in a lower level of investor protection in certain cases (in particular, compared to the protection available under Germany law), this did not call into question the overall result which it tried to achieve.