

Introduction

Minimum Harmonisation in European Environmental Law

I.1 Introductory Remarks

Each European car driver knows by now that his or her automobile emits more carbon dioxide than that indicated under the factory specifications. Producers and importers of passenger and commercial vehicles in Europe based these specifications on regulations promulgated by the European Union (EU).¹ Besides the cases of manifest fraud, which covered the main pages of EU journals in 2016/2016,² even those specifics that have been established following the rules represent only a percentage of the actual emissions produced by a vehicle. It would therefore not be unreasonable for a Member State to decide to pass national legislation going beyond the standards set by the EU legislation on this matter. However, would this be possible? Can a Member State pass stricter environmental standards than those established in Brussels in this specific case?

Similarly, greenhouse gas emissions reductions are based on EU law under the Emission Trading Scheme Directive (ETS Directive).³ There is

¹ Regulation (EC) No 443/2009 of the European Parliament and of the Council of 23 April 2009 setting emission performance standards for new passenger cars as part of the Community's integrated approach to reduce CO₂ emissions from light-duty vehicles, [2009] OJ L 140/1; and Regulation (EU) No 510/2011 of the European Parliament and of the Council of 11 May 2011 setting emission performance standards for new light commercial vehicles as part of the EU's integrated approach to reduce CO₂ emissions from light-duty vehicles, [2011] OJ L 145/1.

² E.g. Russell Hotten Volkswagen: The scandal explained, BBC News 10 December 2015; and Guilbert Gates How Volkswagen's 'Defeat Devices' Worked, *The New York Times*, updated March 16, 2017.

³ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, [2003] OJ L 275/32.

general agreement that these EU standards are not sufficiently effective.⁴ It would therefore not be unreasonable for a country such as the Netherlands, which is making slow progress in reducing its greenhouse gas emissions, to decide that operators of industrial installations covered by the ETS Directive shall surrender more emissions allowances for each ton of carbon dioxide emitted by those installations than required by the ETS Directive. The Netherlands could also decide to subject such operators to emission limit values, in parallel to the obligations stemming from the ETS Directive. However, industrial installations are covered by a multitude of EU environmental directives. This creates difficulties for Member States in understanding whether, what and how to pass stricter standards in this field. How then can the European Union, in accordance with its duty to cooperate sincerely with the Member States under Article 4(3) of the Treaty on European Union (TEU), provide guidance about such questions?

Moving on to the field of waste management, EU and national regulation in this field have criss-crossed one another for over forty years. Persons living in the EU have all experienced waste return systems, such as those for plastic bottles. Are such waste return systems an EU requirement or a national one? How to tell? The concept of ‘Extended Producer Responsibility’ underpinning return systems seems to derive from Scandinavian countries and/or Germany.⁵ Yet it can now be found in many EU waste directives as well. It is now a concept existing in each of the Member States. How have national and EU law influenced one another in this field? Do national standards going beyond those of the EU in this field influence the development of waste law in Europe?

What about economic development? Higher national environmental standards inevitably come at a cost. Stricter car emissions tests or standards, if introduced by a car producing country, such as Sweden, means extra costs for car producers from that country. For example, Volvo will have to make extra investments to comply with such standards, leading to extra costs for its vehicles. This could lead to a weakening of the competitiveness of Volvo on the internal market, other than the Swedish one, in which Volvo competes with car producers not subject to the

⁴ For critical remarks on this system see, e.g. Woerdman (2015), pp. 64–74 with further references; Peeters (2016), chapter 2; and Bogojevic (2016), pp. 670–687.

⁵ Krämer (2011), p. 345 states that it derives from Scandinavian countries. Ezroj (2009), pp. 201–204 says that the first Extended Producer Responsibility programme in Europe was the German Packaging Ordinance introduced in 1991.

stricter Swedish standards. This could even lead to the setting up of a double production line, one for Sweden and one for the other markets. On the other hand, we should not forget what occurred once the big American car manufacturers were confronted with the economic crisis in 2008. FIAT, an Italian car manufacturer purchased around 30% of Chrysler, an American manufacturer, for zero dollar/euro.⁶ Instead, FIAT paid Chrysler with green technology developed in order to comply with the EU emissions standards in this field. Could this apply also in the imaginary example of Volvo? What is the relationship between national environmental standards going beyond EU regulation and economic development? Are such standards good or bad for economy?

This book aims to answer these questions. It establishes what more stringent protective measures are, and what other kinds of national measure can be considered to go beyond EU requirements (Chapter 1). It also establishes what the relationship is between such national standards and the development of a high level of environmental protection in the European Union (Chapter 2). Legal certainty is an issue little discussed in this field, yet of pivotal importance. This book establishes a framework aimed at improving Member States' understanding of whether is possible to go beyond EU standards, what kind of measures are possible in specific cases, and how to predict whether such measures will withstand judicial review before the Court of Justice of the European Union (Court of Justice) (Chapter 3). Finally, despite its legalistic approach, this book looks also at the relationship between environmental protection and economic development. It shows that, despite growing evidence that stricter environmental standards can be beneficial to economic development, national regulatory impact assessments do not take sufficiently into account such potential benefits (Chapter 4).

After reading this book, the reader will have a better and more comprehensive understanding of the intricate set of rules that exist in Europe, at the EU and national level, in order to protect the environment. The reader will understand what the relationship is between (minimum) harmonisation of environmental standards and national measures going beyond such standards, commonly called 'gold-plating'. Accordingly, before addressing the four topics outlined above, this

⁶ See joint statement by Fiat S.p.A., Chrysler LLC and Cerberus Capital Management L.P. made on 20 January 2009, in 'Fiat to take equity stake in Chrysler as alliance is announced', web article italiaspeed.com/2009 available at: www.italiaspeed.com/2009/cars/industry/01/chrysler/2001_statement.html (Accessed June 2017).

introduction continues thus, describing the concept of ‘harmonisation’ and the manner in which the Treaties envisage it as regards environmental protection.

I.2 (Minimum) Harmonisation in European Environmental Law

If we consider environmental protection in Europe today,⁷ we see a complex system of rules adopted by the Member States of the European Union and the European Union itself. Lawyers would say that environmental protection is a shared competence between the Union and its Member States.⁸ In practice, this means that in addition to environmental measures of an exclusive national nature, there are many national environmental measures that are taken to implement Union environmental law. According to Article 3 of the Treaty on European Union (TEU),⁹ the Union is tasked to 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*. This task is undertaken by the Union by means of, inter alia, legislative acts – mostly directives – establishing a high level of environmental protection. This process of environmental standards setting at EU level is known as ‘harmonisation’.

In the European Union, the concept of ‘harmonisation’ is intrinsically linked to the establishment of the internal market, i.e. an area without internal frontiers in which goods, persons, services and capital can circulate freely and in which competition is undistorted.¹⁰ The European Economic Community (EEC) was indeed created to achieve the establishment of such a market. The Treaty of Rome of 1957 focused on two regulatory techniques to achieve this goal. The 1985 Commission White Paper on *Completing the Internal Market*¹¹ highlighted how, besides Treaty prohibitions on import and export barriers among the Member States (i.e. pursuing deregulation), the Commission envisaged the adoption of common EU rules, which might replace diverging national standards

⁷ In this study, references to Europe should be seen as references to the European territories of the Member States of the European Union.

⁸ Article 4 TFEU.

⁹ For the latest consolidated version see [2016] OJ C 202/13.

¹⁰ Article 26 TFEU in conjunction with Protocol No. 27 on the Internal Market and Competition.

¹¹ COM (85) 310, para. 64.

(i.e. pursuing re-regulation).¹² Harmonisation indeed reduces or even eliminates differences among national standards by establishing a new standard. The creation of such a new standard requires making choices as to the type and quality of the regulatory regime it intends to create.¹³ To paraphrase Weatherill, harmonisation is a means to improve the functioning of the internal market, but where what is harmonised is diverse measures of (say) environmental policy taken at national level, the consequence of harmonisation is an EU choice about environmental policy.¹⁴

The making of such an EU choice is made possible by the legal bases envisaged under the Treaties. Within the context of this contribution, the most relevant ones are the current Article 114 of the Treaty on the Functioning of the European Union (TFEU)¹⁵ on the approximation of laws, Article 192 TFEU on environmental policy, and Article 194 TFEU on energy policy. Union environmental policy and law were introduced in the Treaty only with the Single European Act.¹⁶ Still, already before 1987, the EU legislator had harmonised environmental standards by relying on the then Articles 100 and/or 235 EEC. Article 100 EEC, despite focusing on the harmonisation of the internal market, was, for example, used to adopt Council Directive 73/404/EEC relating to detergents,¹⁷ which had the further objective of restricting the use of non-biodegradable detergents in order to appreciably reduce pollution of the natural environment in general, and, in particular, water pollution. Similarly, Council Directive 75/716/EEC relating to the sulphur content of certain liquid fuels was adopted on this legal basis.¹⁸ The use of this legal basis for environmental policy purposes brought Close to raise the question whether this practice constituted an abuse of the powers indicated by the 1957 Treaty.¹⁹ A question that the Court of Justice answered negatively in two

¹² Similarly, Weatherill (2017), p. 151.

¹³ *Idem*, p. 152.

¹⁴ *Idem*, p. 153 where the word ‘social’ is used instead of the word ‘environmental’.

¹⁵ For the latest consolidated version see [2016] OJ C 202/47.

¹⁶ Single European Act [1987] OJ L 169/1; For a first commentary D’Oliveira (1988), pp. 123–125; Jacobs (1988), pp. 117–122; Krämer (1987), pp. 659–688; and Vandermeersch (1987), pp. 407–429.

¹⁷ Council Directive 73/404/EEC of 22 November 1973 on the approximation of the laws of the Member States relating to detergents, [1973] OJ L 347/51.

¹⁸ Council Directive 75/716/EEC of 24 November 1975 on the approximation of the laws of the Member States relating to the sulphur content of certain liquid fuels, [1975] OJ L 307/22.

¹⁹ Close (1978), pp. 461–481.

infringement procedures against Italy based on these two directives, respectively.²⁰ No less problematic has been the use of Article 235 EEC, which allowed the EEC to adopt measures aimed at achieving EEC goals for which no specific legal basis had been provided for in the Treaty. This residual legal basis had been used to adopt, for example, Council Directive 75/439/EEC on the disposal of waste oils,²¹ the validity of which has been challenged in court, due to an alleged misuse of power.²² The Court of Justice confirmed that this legal basis can be used to pursue environmental policy. At times, these two legal bases were used conjunctively as in the case of Council Directive 75/442/EEC on waste.²³ Also as regards the use of both provisions conjunctively, the Court of Justice concluded that this was not in breach of the attribution principle.²⁴ Still, it was clear that a fully-fledged environmental policy would have greatly benefitted from the addition of an ad hoc legal basis in the Treaties.

To this end, the Single European Act of 1987 added Articles 130r, 130s, and 130t to the Treaty of Rome, with Article 130s constituting a legal basis to pursue environmental protection. Several Member States feared losing their sovereignty in this sensitive policy area. Article 130t EEC (today Article 193 TFEU) served to reassure the Member States that the level of environmental protection *remains*, at least partially, a national competence, as the Union legislator can set a minimum level of protection, subject to the limitation of having to respect the Treaties.²⁵ Indeed, traditionally, harmonisation measures based on this provision pursue minimum harmonisation.²⁶

²⁰ Case 91/79, *Commission of the European Communities v Italian Republic*, [1980] ECR 1099, ECLI:EU:C:1980:85 and Case 92/79, *Commission of the European Communities v Italian Republic*, [1980] ECR 01115.

²¹ Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils, [1975] OJ L 194/23.

²² Case 240/83 *Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU)*, [1985] ECR 531.

²³ Council Directive 75/442/EEC of 15 July 1975 on waste, [1975] OJ L 194/39.

²⁴ E.g. Case 68/81, *Commission of the European Communities v Kingdom of Belgium*, [1982] ECR 153.

²⁵ Jacqué (1986), p. 124 states that the clause in Article 193 TFEU was one of those introduced on request of the Federal Republic of Germany,²⁵ with *Länder* and *Bundesrat* actually opposing the European Single Act because they feared losing competences over environmental policy (Nicolaysen (1988), p. 115). Germany insisted also on the introduction of a clause stating that the level of protection must be set at a 'high level'. Another clause thus inserted was the principle of subsidiarity.

²⁶ Over a 'practice of minimum harmonisation as a means of attaining environmental goals' see Jans & Vedder (2012), pp. 108–122.

Minimum harmonisation essentially means that Member States have to implement the minimum level of protection established by Union environmental measures, and additionally, they may maintain or introduce measures providing a higher level of environmental protection than that pursued by the Union legislator. To be clear, it does not mean that the level of protection of the environment must be the lowest possible one.²⁷ Both Article 114 and 192 TFEU aim at a high level of environmental protection. Article 37 of the Charter of Fundamental Rights confirms this approach.²⁸ Minimum harmonisation can hence be better associated to ‘optimal’ harmonisation than to ‘minimal’ harmonisation.²⁹ It is the optimal level of environmental protection given the specific circumstances of the case and the interests at stake during the negotiation process. This level need not be the highest,³⁰ nor the lowest, possible.

Moreover, it should be noted that the concept of ‘minimum harmonisation’ should not be applied to an EU measure as a whole. As indicated by Hofhuis, EU legislation can contain a mix of minimum and maximum harmonisation.³¹ Which level is pursued must therefore be established at the level of each specific provision within an EU act. To this extent, indications can be found in the text of the provision under scrutiny. Words such as ‘at least’, ‘not more than’, and ‘a minimum of’ indicate that Member States have room to pursue a higher level of protection of the environment than that required by the provision at hand. The pursuing of minimum harmonisation can also be recognised by the use of clauses explicitly stating that stricter national standards are allowed. When such clauses are formulated with regard to the whole content of an EU measure, this means that the EU measure as a whole pursues minimum harmonisation. Even when no such indication can be read in the EU measure concerned, it is still possible that minimum harmonisation is pursued. Treaty provisions such as Article 193 TFEU does indeed state that measures based on Article 192 TFEU should not prevent Member States from maintaining or introducing more stringent protective measures.

²⁷ Hofhuis (2006), pp. 10 and 11.

²⁸ For the latest consolidated version see, [2016] OJ C 202/389.

²⁹ Hofhuis (2006), p. 11.

³⁰ Case C-233/94, *Federal Republic of Germany v European Parliament and Council of the European Union*, [1997] ECR I-2405.

³¹ Hofhuis (2006), p. 11.

Chapter 1 refines the meaning of the concept ‘more stringent protective measures’ while Chapter 3 looks deeper at the manner in which the EU legislator indicates to the Member States the room to go beyond EU standards. Yet it should already be clarified here that going beyond EU standards does not mean derogating from EU law. Member States’ actions take place under the umbrella of the so-called principle of sincere cooperation.³² Sincere cooperation is a broad concept which encompasses a positive and a negative obligation. On the one hand, the Union and the Member States must cooperate to achieve the objectives set out in the Treaties. On the other hand, they must refrain from undertaking actions which could jeopardise the achievement of such objectives. In the context of minimum harmonisation, this means that Member States must respect the EU minimum first.

From a temporal perspective, harmonisation should not be seen as a static exercise. Developed in an official manner since 1972, EU environmental policy has reached today a body of law that encompasses most environmental issues. Soil is probably the least regulated environmental medium at EU level; nevertheless, this does not mean that harmonising measures will no longer be adopted by the EU legislator in this field. Further harmonisation or re-harmonisation is continuously pursued by the EU institutions.

I.3 Environmental Protection: A Member States’ Responsibility

The existence of a great variety of EU environmental standards could suggest that environmental protection is mainly an EU responsibility. This conclusion would be wrong. From the perspective of the environment, the above shows that environmental protection in Europe derives from the Member States’ implementation of the Union minimum, from the use that Member States make of the possibility of going beyond the requirements of Union law and from the use that Member States make of their power to regulate matters not regulated by Union law. This is the essence of a system based on shared competences. It should be noted that under the principle of subsidiarity, set out in Article 5(3) TEU, the Union may act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at a central level or at the regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union

³² Article 4(3) TEU.

level. In essence, as stated by Krämer, Member States have to protect the environment and certain measures have to be taken by the Union.³³ Moreover, under Article 193 TFEU, Member States may adopt measures pursuing a higher level of environmental protection than that required by Union environmental legislation based on Article 192 TFEU. The Court of Justice has established that, since Member States may adopt stricter measures, Union environmental measures do not need to be based on the highest level of environmental protection that is technically possible.³⁴ As stated in the literature, this shows that the European system of environmental protection is based on the idea that Member States will adopt stricter measures.³⁵ In short, environmental protection remains primarily a Member State responsibility.

The use that Member States make of the possibility to go further than required by Union law, and the use that Member States make of their power to regulate matters not regulated by Union law, is traditionally approached from two different points of view. On the one hand, it is looked at from an environmental perspective. From this perspective, lawmakers, enforcement and judicial bodies, non-governmental organisations (NGOs) and academics consider whether national law establishes a higher level of environmental protection than that required by Union law. This practice is, in most of the cases, referred to as the Member States' power to establish *more stringent protective measures* or *more stringent measures*.³⁶ On the other hand, Member State actions are approached from an economic perspective. From this perspective, lawmakers, industry and – always most often – academics consider whether national law places burdens upon industry and citizens that are not required by Union law. This practice is often referred to as *gold-plating*.³⁷

I.4 Focus and Structure of the Book

In the literature, Pagh strongly criticises what he called “*the stricter*” *mantra*.³⁸ The idea that a minimal level of environmental protection at

³³ Krämer (2011), p. 440.

³⁴ Case C-284/95, *Safety Hi-Tech Srl*, [1998] ECR I-4301, para. 49.

³⁵ Jans, Squintani et al. (2009) p. 418.

³⁶ This concept is used also outside environmental law. See on this concept further in Chapter 1, Section 1.2.

³⁷ This concept is used also outside environmental law. See on this concept further in Chapter 1, Section 1.3.

³⁸ Pagh (2006), pp. 5–15.

Union level will be integrated with stricter national standards at the national level is misleading, most notably because it seems that Member States do not maintain or introduce national standards to provide a higher level of environmental protection.³⁹ In a previous publication with Anker, Purdy and De Graaf, I wrote that ‘it may be argued that a ‘no gold-plating’ principle makes little sense as a dominating transposition principle in environmental legislation.’⁴⁰ Further, it has been argued that the decision not to adopt national environmental legislation going beyond the relevant EU measure *frustrates* the concept of Article 5 TEU and of Article 193 Treaty for the Functioning of the European Union.⁴¹ As my co-authors and I stated in a previous publication, ‘the absence of gold-plating can reverse the whole system of environmental protection under [the Treaties]’.⁴² At the same time, it has long been recognised in the literature that there has been a lack of data and clarity on the legal meaning of more stringent protective measures and gold-plating, on the presence or absence of such measures and the reasons behind their presence or absence.⁴³ In my Ph.D. thesis I demonstrated that gold-plating is more widespread than previously thought.⁴⁴ It occurs in all environmental fields and in each Member State it is possible to identify cases of gold-plating, even in those countries which have developed policies to constrain it. Still, it confirms that there is a growing tendency not to go beyond EU standards. This growing practice can have repercussions for the functioning of the system of environmental protection as envisaged under the Treaties.

To understand better these possible repercussions, this book goes a step further. It builds upon the empirical data gathered during and after my Ph.D. thesis in order to establish a more general theory on the relationship between national and EU environmental standards. It does so by focusing on four areas of interest. First, it looks at the meaning of the concepts ‘*more stringent protective measures* or *more stringent measures*’,

³⁹ For example, Krämer (2011), p. 440 and Jans, Squintani et al. (2009), p. 435.

⁴⁰ Anker et al. (2015), p. 43.

⁴¹ Krämer (2011), p. 440.

⁴² Jans, Squintani et al. (2009), p. 435.

⁴³ To be precise, a few preliminary studies on gold-plating have been performed in the United Kingdom and in the Netherlands; see Chapter 1, Section 1.3. However, such studies did not specifically focus on environmental protection and only looked at the law as it stood at the time at which the studies were performed. Therefore, they do not provide a clear picture of the ‘stricter mantra’ phenomenon in environmental law.

⁴⁴ Squintani (2013), chapter 9.