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The principle of a high level of environmental protection in EU law:
policy principle or general principle of law?

Introduction

Whilst environmental protection is not a recent concern, it has taken on over recent years a renewed intensity, characterised by the urgent need to find universal solutions to global warming, the erosion of biodiversity as well as the depletion of natural resources. The interest pursued undoubtedly springs from the fact that the situation has become in many respects alarming and risks worsening if no ambitious action is undertaken.

Indeed, despite the progresses that were made, the results of this policy have at the very least been muted.[1] EU environmental and national policies are still facing a daunting agenda of unfinished business [2] as well as a swathe of new challenges. By way of illustration, air pollution still reduces

[1] EEA, *Europe's Environment. The Dobris Assessment* (Copenhagen, 1995) 599–611; EEA, *The European Environment. State and Outlook* (Copenhagen, 2005) 18, 20 and 30; EEA, *Europe's Environment. The Fourth Assessment* (Copenhagen, 2007) 22; European Commission, *Environment Policy Review 2008*, COM(2009) 304;; EEA, *Progress towards the European 2010 biodiversity target* (Copenhagen, 2009) 17–21 EEA, *The European Environment 2010. State and Outlook* (Copenhagen, 2010) 15.

[2] Within a single sector, the trends can be mixed: some pollutants might be declining whilst others are increasing. The stabilization of the total amount of mineral nitrogen fertilizer consumption is a good case in point in that respect. See the report of the Commission on implementation of Council Directive 91/676/EEC concerning the protection of waters against pollu-

significantly life expectancy, [3] major rivers are still heavily polluted, the 2010 biodiversity conservation targets have not been met[4], and the amount of waste increases. [5] As regard new challenges, the most pressing one is climate change whose impacts are becoming ever more frequent. Indeed, the overarching target to limit climate change to temperature increases below 2 °C globally during this century[6] is unlikely to be met, in part because of greenhouse gas emissions from other parts of the world.[7] A closer look at greenhouse gas emissions within EU reveals mixed trends: whereas emissions from large point sources have been reduced, at the same time emissions from some mobile and/or diffuse sources, especially those transport-related, have increased substantially. [8] To make matters worse, every step forward (such as reductions in industrial pollution) appears to be cancelled out by the appearance of new phenomena (mass consumption, more diffuse source of pollution proving more difficult to control) or unforeseen risks (biotechnology, nanotechnology, endocrine disruptors).

The deteriorating situation thus requires environmental lawyers to assess the efficiency of their discipline. The main challenge lying ahead is that environmental law stands astride policy commitments as well as a swathe of legal requirements. To make matters worse, environmental law and policy do not always co-exist harmoniously. Political scientists have forgotten that the most important aspect of environmental policy is the fact that it is set out in legal form – by way of illustration, ecotaxes are not merely economic instruments but also fiscal regulations –, while lawyers for their part have not yet grasped that the law is embedded in politics. Environmental law is still in its infancy on the account that there has never been hardly a clear vision among politicians regarding the level of protection to achieve.

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tion caused by nitrates from agricultural sources based on Member State reports for the period 2004–2007, COM(2010) 4 final.

[3] EEA, *The Fourth Assessment* (Copenhagen, 2007) 73.

[4] The Commission as well as the EEA have repeatedly been acknowledging that the EU was unable not achieve its global target of significantly reducing biodiversity loss by 2010. E.g. European Commission, A mid-term assessment of implementing the EC Biodiversity Action Plan, COM(2008) 864 final; Ibid., Communication on options for an EU vision and target for biodiversity beyond 2010, COM(2010) 4 final; EEA, *Progress towards the European 2010 biodiversity target (*EEA, Report, Copenhagen, 2009); Ibid., *The European Environment 2010,* above, 49–50.

[5] EEA, The *European Environment 2010,* above, 71–75.

[6] Communication from the Commission, *20 20 by 2020, Europe's climate change opportunity*, COM(2008) 30 final.

[7] EEA, The *European Environment 2010,* above, 27.

[8] EEA, The *European Environment 2010, above,* 34.

To a large extent environmental law has been shaped by EU law. In this connection, account must be made of Article 191(2) of the Treaty of the Functioning of the European Union (TFEU) which is worded as follows:

> '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 …'.

In addition, the same obligation is also enshrined in Article 3(3) of the Treaty of the European Union (TEU)[9] and Article 37 of the European Union Charter of Human Rights (EUCHR).[10]

Whilst for a long time, environmental law tried hard to stand out from the crowd, after the Lisbon Treaty there has been a genuine decompartmentalisation of the high level of protection that took root in 1987 when the Single European Act was adopted. Accordingly, other Treaty provisions enshrine similar obligations with respect to other political goals.[11] These provisions are rather exceptional. Indeed, the Treaties are the only international agreements to proclaim such an obligation. It comes as no surprise that practising lawyers are asking themselves increasingly what kind of role this obligation has to play in the legal practice.

Given the extent of the environmental crisis, the legal status of the obligation to seek a high level of environmental protection deserves specific attention. Accordingly, it is the aim of this chapter to explain how such an obligation has been fleshed out into more precise legal obligations and

[9] The third paragraph of Article 3 TEU runs as follows: '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.' It goes without saying that sustainable development is characterized by a strong degree of indeterminacy. Though few institutions and Member States will contend with the proposition that development should be sustainable, they might disagree on how to flesh out this proposition in individual cases. Given the significance of the social, economic and environmental value judgments involved in deciding on what is sustainable, institutions are indeed endowed with broad discretion in giving effect to this broad concept.

[10] In virtue of Article 37 of the Charter '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'. Unlike most of the other Charter provisions, Article 37 is known to one be the *parents pauvres* of the Charter on the account that it has been drafted as policy statements rather than as individual rights. That provision stands alongside the provisions of the same type in the area of consumer protection and healthcare (Article 35, second sentence and Article 38 EUCHR). See N. de Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases' *Nordic Journal of International Law* 81 (2012) 39–74.

[11] See below the various TFEU provisions commented upon in section 2.

interpreted by EU courts. In so doing, I would like to pay tribute to Gabriel Michanek and Jan Darpö for the exceptional legal work they carried out ever since Sweden has become a Member State of the EU in 1995.

1 Legal status

Pursuant to Article 3(3) TEU, 191(2) TFEU and Article 37 EUCHR, EU policies shall aim at attaining a high level of environmental protection. With respect to measures related to the establishment and the functioning of the internal market, Article 114(3) TFEU lays down a similar obligation. These obligations present a number of challenges for lawyers.

First, unlike the prevention or the precautionary principles, none of these provisions proclaim as such a 'principle' of a high level of environmental protection. That said, EU courts as well as several commentators have been qualifying this obligation as a principle.[12]

Second, since the requirement laid down by Articles 3(3) TEU and 191(2) TFEU no longer concerns protection alone but also an 'improvement of the quality of the environment', this obligation has a dynamic nature. EU institutions are therefore expected to adopt a more interventionist than conservative stance. In other words, they are not only required to avoid degradation of the environment, but must also seek to improve its quality as well as their citizens' standard of living.

Third, nothing is said as to the ways in which the EU should achieve such a high level of environmental protection. At least, Article 191(2) TFEU lists a number of other principles that could enhance the level of protection. Accordingly, both the Court of Justice and the General Court have been combining the obligation to achieve a high level of environmental protection with the principles of prevention and precaution.[13] By the same token, in *Tatar v Rumania*, the ECtHR has been stressing that the precautionary principle could be seen as a basis for the obligation to attain a high level of environmental protection.[14] What is more, other principles also oblige the EU institutions to attain a high level of protection. These include the stand-

[12] D. Misonne, *Droit européen de l'environnement et de la santé: l'ambition d'un niveau élevé de protection* (Louvain, Anthémis, 2010).
[13] Cases C-418 and 419/97 *ARCO Chemie Nederland* [2000] ECR I-4475, paras. 36 to 40; and Case C-252/05 *Thames Water Utilities* [2007] ECR I-3883, para. 27.
[14] ECtHR *Tatar v. Rumania* [2009], para. 120.

still principle[15] as well as the ALARA principle[16] which are likely to enhance the level of protection. Furthermore, the idea of a common heritage requires first a stringent implementation of the obligations laid down in the birds directive[17] and second that ecological criteria guiding the classification of Natura 2000 birds sites should not be off-set by economic considerations.[18]

Fourth, insufficient attention has been hitherto given to the level of stringency of the EU measures in the light of this principle. Regardless of whether it relates to internal market in virtue of Article 114(3) TFEU or environmental policy in virtue of Articles 3(3) TEU and 191(2) TFEU, the wording of the obligation to seek a high level of environmental protection is perplexing. For instance, a measure proposed by the Commission may appear at the same time draconian in the eyes of the Member States where environmental policy is more lenient, and yet insufficient for other Member states. There is a question as to whether the EU should strive for maxi-

[15] Article 2(4) OSPAR Convention (Council Decision of 7 October 1997, OJ [1998] L 104/1); Article 4(9), and Article 11(6) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ [2000] L 327/1. Under certain circumstances, loss of protected habitats can be authorised provided there is compensation (Article 6(4), Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora). As regard the prohibition of relaxation of health standards applicable to herds of domestic animals likely to be affected by transmissible spongiform encephalopathies, see Case T-257/07 P, order of 28 September 2008 and Case T-257/07 P II, order of 30 October 2008, paras. 86 and 89.

[16] Pursuant to Article 15 of the Convention on Nuclear Safety, approved by the Commission Decision 1999/819/Euratom of 16 November 1999 concerning the accession to the 1994 Convention on Nuclear Safety by the European Atomic Energy Community (OJ [1999] L 318/20) 'Each Contracting Party shall take the appropriate steps to ensure that in all operational states the radiation exposure to the workers and the public caused by a nuclear installation shall be kept as low as reasonably achievable and that no individual shall be exposed to radiation doses which exceed prescribed national dose limits.'

[17] It is clear on reading Article 2 of the Birds Directive that 'ecological, scientific and cultural requirements' take precedence over 'economic and recreational requirements', the latter playing only an ancillary role (Case C-247/85 *Commission v. Belgium* [1987] ECR 3029; and Case C- 262/85 *Commission v. Italy* [1987] ECR 3073). What is more, given that birds are considered a 'common heritage', Member States are being called upon to transpose accurately the directive's obligations. See Case C-247/85 *Commission v. Belgium* [1987] ECR 3029, para. 9; Case C-38/99 *Commission v. France* [2000] ECR I-10941, para. 53; and Case C-6/04 *Commission v. UK* [2005] ECR I-9017, para. 25.

[18] Case C- 44/95 *Regina* [1996] ECR I-3805, paras. 23 to 25.

mal protection, [19] zero tolerance, or even zero risk.[20] Does it follow from these treaty provisions that the level of protection must be calculated at the highest conceivable level? Or should lawmakers make do with an intermediate level of protection? The uncertainty within the scope of this obligation does not however mean that the EU institutions enjoy absolute discretion in this regard. It is beyond question that a non-existent or low level of protection would violate this Treaty law obligation.[21]

Nonetheless, with respect to the harmonisation taking place in the environmental realm, a minimum degree of flexibility would appear to be permissible in virtue of Article 191(2) TFEU in view of the differences between regional situations. In addition, pursuant to Article 191(3) TFEU, the quest for high protection levels is tempered by the obligation to take into account the differences between situations in the various regions of the EU. Similarly, the ability of Member States to adopt enhanced protection measures pursuant to Article 193 TFEU[22] indicates that the benchmark level need not necessarily be the highest possible. This seems to be logical: certain countries suffer from droughts whilst others are victims of flooding; species endangered within the territory of one Member State are not necessarily under threat elsewhere.[23]

[19] With respect to the health and safety of workers, the employers have 'to ensure that the risk from a hazardous chemical agent to the safety and health of workers at work is eliminated or reduced to a minimum' (Article 6(1) of Council Directive 98/24/EC of 7 April 1998 on the protection of the health and safety of workers from the risks related to chemical agents at work, OJ [1998] L 131/11).

[20] In the field of food safety, the EU lawmaker has been endeavouring a zero risk approach (Case C-286/02 *Bellio Flli* [2004] ECR I-3465). With respect to consumer protection, see Cases C-305/03 and C-229/04 *Schulte* [2005] ECR I-9215.

[21] A. Epiney, 'Environmental Principles', in R. Macrory (ed.), *Principles of European Environmental Law* (Groeningen, Europa Law Publishing, 2006) 28.

[22] Pursuant to that provision, any Member State may at any time freely decide to maintain or adopt more stringent standards than those provided for under the act adopted on the basis of Article 192 TFEU. The power of the Member States to adopt more stringent measures is not however absolute. First, stricter national measures pursuant to Article 193 TFEU may only be adopted with reference to the EU harmonization rule enacted under Article 192 TFEU. Accordingly, national measures must consist in the extension of the harmonization rule by pursuing a greater level of protection. This means that the Member States may neither lower the level of protection nor change the arrangements for implementing secondary law. Another limit consists in the requirement for the more stringent protective measure to be compatible with Treaty law. See J. Jans, 'Minimum Harmonization and the Role of the Principle of Proportionality' *in* M. Führ, R. Wahl and P. von Wilmowsky (eds.), *Umweltrecht und Uwmeltwissenschaft. Festschrift für E. Rehbinder* (Erich Schmidt Verlag, 2007) 705–717.

[23] See annex II B of Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds, OJ [2009] L 20/7.

Moreover, reasoning by analogy, from the point of view of the establishment of the internal market, Article 27 TFEU, along with the provisions of Article 114(10) TFEU, confirm that it is not necessarily mandatory to obtain the highest level of protection.

This variation however brings with it the risk of weakening protection levels. Due to the absence of uniform protection, one may fear *à la carte* exceptions, and the toning down of obligations as a function of geographical area.[24]

2 High level of environmental protection and of other societal values

We shall adumbrate at this stage a number of legal issues related to the implementation of similar obligations encapsulated in the TFEU and EUCHR (see table 1). Indeed, public health and consumers protection policies reiterate this qualitative requirement.[25] Moreover, the EU is called on to promote a 'high level of employment'.[26] Conversely, the internal market policy must fully integrate these various concerns since, in virtue of Article 114(3) TFEU, the internal market Commission's proposals must pursue a high level of protection, when they concern health, safety, environmental protection and consumer protection.[27]

[24] The waste packaging directive is a good case in point in this respect. For instance, because of their specific situation, some Southern Member States may decide to postpone the attainment of recycling targets (Article 6(5) of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste, OJ L 365/10).

[25] In virtue of Article 168 (1) TFEU 'a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities' whereas pursuant to Article 169(1), 'in order to promote the interests of consumers and to ensure a high level of consumer protection', the Union shall contribute to safeguard various consumers' interests. In addition, Articles 35, 37 and 38 of the Charter require the achievement of a high level of health, environmental protection and consumer protection.

[26] Article 9 TFEU.

[27] However, in *Schulte*, the Court of Justice held that the requirement for a high level of protection contained in the old Article 95(3) EC (Article 114(3) TFEU) was not directly applicable to national authorities, irrespective of its implementation under secondary law. This obligation was therefore not directly binding on the Member States. See Case C-350/03 and C-229/04 *Schulte* [2005] ECR I-9215, para. 61, noted by E. Jerry (2007) 44 *CMLR* 501–518.

Table 1. TFEU and EUCHR provisions requiring a high level of protection

VALUES	TEU-TFEU PROVISIONS	EUCHR PROVISIONS
Environment	Article 3(3) TEU Articles 114 (3) and 191 TFEU	Article 37
Health	Articles 114(3) and 168 TFEU	Article 35
Consumers	Article 114(3) and 169 TFEU	Article 38
Worker Safety	Article 114(3) TFEU	– – –
Employment	Article 9 TFEU	– – –

Be it for workers, patients, consumers or the environment, the requirement to attain a 'high level of protection' has scarcely attracted any attention and has been the object of only a few commentaries in the academic literature. These obligations have often been classed under the category of declarations of intent. They are considered at best as policy principles devoid of any binding force, or as a guarantee of legitimacy which is automatically placed on draft regulations, directives, and decisions.

There is in the first place a strong doctrinal resistance to the idea that the courts may control compliance with the requirement for a high level of protection irrespective of the subject matter. It is argued that it is not a matter for the courts to interfere with the margin of appreciation that is naturally reserved to the EU institutions. This is claimed to undermine the very idea of the separation of powers. Strictly speaking, institutions are called on to determine the optimal level of protection not the courts. Accordingly, the obligation to improve living and working standards which is incumbent upon the Member States in the area of social protection has been interpreted as being of a general and policy nature.[28]

By way of illustration, in a case concerning the safety of working conditions, with an evident environmental element since the danger threatening the health of workers came from petrol vapours emitted by service stations, the Court of Justice held that it was not a matter for it to review the proportionality of a duty to reduce the use of a carcinogen at the place of work, without linking that requirement to the outcome of a risk assessment.[29] Admittedly, it is not for the Court of Justice to interfere with the verification of more stringent measures (more stringent thresholds, reductions in time

[28] Case C-126/86 *Gimenez-Zaera* [1987] ECR I-3697; and Case C-72/91 *Sloman-Neptune* [1993] ECR I-887.
[29] Case C-2/97, *Borsana* [1998] ECR I-8597, para. 40.

limits or extensions to the scope of application, etc.) than those which form the subject-matter of Community action. The review of the proportionality of these measures is a matter for the national courts.

That said, these obligations to attain a high level of protection are likely to become interpretative principles where a conflict between economic and antagonist societal objectives arises. The need to guarantee a high level of protection for health had already led the Court to emphasise the efficacy of a directive adopted pursuant to Article 114 TFEU in order to justify its compatibility with the general principles of Union law. For instance, in *Tobacco II*, the Court of Justice held that in situations where there is a risk of divergence resulting from differing levels of protection on national level, the common goal of achieving a high level of protection for health means that it is necessary to harmonise national regulations.[30] Similarly, only the prohibition on the marketing of tobacco for chewing will guarantee complete efficacy with regard to the pursuit of a high level of protection, going beyond economic interests.[31] In other words, an effective policy of prevention will contribute to achieving a high level of protection. This assertion made with reference to public health is of course capable of applying to the environment.

3 Secondary law

If these Treaty obligations are not to be rendered ineffective, they must be fleshed out in more precise regulatory devices. As regard the place of the obligation to seek a high level of environmental protection in secondary law four issues arise for comment here.

First, whilst they have taken care to do so rather sparingly for the polluter pays and the precautionary principles, the EU lawmaker has not hesitated to proclaim the need for a high level of protection under a number of secondary law obligations.[32] For instance, compliance with this obligation is a prerequisite for the admissibility of State aids in environmental matters: in order to raise the level of environmental protection beyond that provided for under national law, only aids which encourage such protection may benefit from

[30] Case C-380/03 *Germany v. European Parliament and Council* [2006], paras. 40–41.

[31] Case C-434/02 *Arnold André* [2004] ECR I-11825; and Case C-210/03 *Swedish Match* [2004] ECR I-11893, paras. 56 and 57.

[32] The former IPPC 2008/1/EC Directive refers at least ten times to the obligation to achieve a high level of protection. Such an obligation can require the promotion of '*high quality recycling*' pursuant to Article 11(1) of directive 2008/98/EC on waste, OJ L 312/3.

an exemption.[33] Moreover, the achievement of this principle is betrayed by a relatively heterogeneous terminology: 'significant improvement', 'adequate level of protection', 'optimal protection', and so on. Similarly, environmental law abounds with expressions that are testament to a search for optimisation or excellence: best available technologies, energy efficiency, resource efficiency, etc.

Second, the lack of precision as to the meaning of these terms can lead to significant variations in their implementation. For instance, the obligation not to endanger human health as well as the environment while managing waste, which is laid down in the waste framework Directive,[34] does not specify the actual content of the measures which must be taken by the Member States. Nevertheless, it is settled case law that this provision is binding on the Member States as to the objective to be achieved, whilst leaving them a margin of discretion in assessing the need for such measures.[35]

Third, EU secondary law is not always consistent.[36] What level of harm or impact should lead to regulatory intervention varies significantly from one regulation to another. Several chemical regulations prohibit squarely the use of chemical substances whereas under REACH, regarding carcinogenic risks, an adequate control is deemed to be sufficient. [37]

A fourth issue emerges as of particular importance. Most of the EU measures aiming at protecting the environment don't seek an absolute level of protection.[38] The following illustrations are testament to the restricted

[33] Environmental State Aids Guidelines 2008, para. 5.2.1.3, para. 171; Article 8(1) of the General Block Exemption EC Regulation No 800/2008. See N. de Sadeleer, 'State Aids and Environmental Measures', *Nordic Journal of Environmental Law* (2012).

[34] Article 4(1) of Directive 2006/12; Article 13 of Directive 2008/98 on waste, OJ L 312/3.

[35] Case C-365/97 *Commission v. Italy* [1999] ECR I-7773, para. 67; Case C-420/02 *Commission v. Greece* [2004] ECR I-11175, para. 21; and Case C-297/08 *Commission v. Italy* [2010] ECR I-1749, para. 96.

[36] N. de Sadeleer, *Commentaire Mégret. Environnement et marché intérieur* (Brussels, ULB, 2010) 331–333.

[37] As a matter of principle, hazardous chemicals whose risks can be 'adequately controlled' can be placed on the market. Article 57(2) REACH, OJ L 396/1.

[38] However, under legislative acts regarding health protection the EU's intervention is not subject to a specific threshold. See in particular, Article 7(1) of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ [2002] L 31/1. Under that paragraph, with a view to ensuring a high level of health protection, 'provisional risk management measures' may be adopted in order to prevent 'the possibility of harmful effects on health'. No threshold has been set out as regard the significance of these effects.

approach endorsed by the EU lawmaker. For instance, EU institutions or national authorities are called upon to eliminate or to prevent the occurrence of:

- '*unacceptable effect* on the environment' of residues of plant protection products,[39]
- '*serious risk* to human or animal health or to the environment' of seeds treated with plant protection products,[40]
- 'a *serious risk* to human health, animal health or the environment', it must be demonstrated in order to 'suspend or modify urgently an authorisation' on the placing on the market of genetically modified food and feed.[41] The Court of Justice understands the expressions 'likely' and 'serious risk' rather stringently 'as referring to a significant risk which clearly jeopardises human health, animal health or the environment'. Moreover, that risk must be established on the basis of new evidence based on reliable scientific data.[42]

Similarly, Member States are obliged to assess 'projects likely to have *significant* effects on the environment'. [43] It follows that risks deemed to be insignificant are not subject to harmonisation.

By the same token, the EU courts are also requiring the Commission and the Member States that the environment risk is real or significant. There are indeed various examples in the case law.

- 'A *significant deterioration* in the environment over a protracted period without any action being taken by the competent authorities' may be an indication that the Member States has exceeded the discretion conferred by a framework directive on environmental protection.[44]

[39] Article 4(2)(b)) of 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, OJ [2009] L 309/1.
[40] Article 49(2) of Regulation (EC) No 1107/2009, above.
[41] Article 34 of Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, OJ [2003] L 268/1.
[42] C-58/10 à C-68/10, *Monsanto* [2012], paras. 69 and 76.
[43] Article 2(1) of Directive 85/337/EC of the European Parliament and of the Council of 21 October 2009 on the assessment of the effects of certain public and private projects on the environment, OJ [1985] L 175/40.
[44] Case C-365/97 *Commission v. Italy*, para. 68, Case C-420/02 *Commission v. Greece* [2004], para. 22; Case C-297/08 *Commission v. Italy* [2010], para. 101; and Case C-37/09 *Commission v. Portugal* [2010], para. 38.

– National measures restricting the trade in wild mammals and birds bred in captivity can be justified inasmuch as there is a '*real risk*' to animal welfare and biodiversity.[45]
– 'the *significant environmental effects* caused by the incorrect implementation of the urban waste water directive must be substantiated by a certain amount of evidence'. [46]

Another illustrative picture of the threshold regarding the significance of the risk is the case law on eutrophication of water within the meaning of Council Directive 91/271/EEC concerning urban waste water treatment.[47] Eutrophication is characterized by, among other conditions, an 'undesirable' disturbance to the balance of organisms present in the water, which 'must be considered to be established where there are *significant adverse effects* on flora or fauna'.[48] It follows that an accelerated growth of algae is not sufficient, as such, to demonstrate such 'undesirable disturbance'. Accordingly, the Commission bears the burden of proof to demonstrate 'loss of ecosystem biodiversity, nuisances due to the proliferation of opportunistic macroalgae and severe outbreaks of toxic or harmful phytoplankton'.[49]

Last, it ought to be remembered that Article 8 ECtHR is engaged in as much that the alleged nuisances were 'sufficiently serious' to affect adversely the applicant's enjoyment of amenities of their homes and the quality of their family life. [50] Although the requirement of the seriousness of the harm has to be established by the claimant, little has been stated with regard to its extent. The ECtHR generally assumes that Article 8(1) has been violated where the exposure or environmental quality thresholds have been exceeded. It cannot be denied that where the concentrations of toxic pollutants have exceeded the regulatory thresholds, the pollution becomes potentially dangerous to the health and well-being of the applicant. Similarly, the repetition over a period of several years of noise pollution in excess of the thresholds authorised during night hours will infringe the rights protected

[45] Case C-219/07 *Andibel* [2008], para. 36; Case C-100/08 *Commission v. Belgium* [2009], para. 100.
[46] Case C-390/07 *Commission v. UK* [2009] ECR I-214, para. 46; and Case C-508/03 *Commission* v *UK* [2006] ECR I-3969, para. 78.
[47] OJ [1991] L 135, 40.
[48] Case C-280/02 *Commission* v *France* [2004] ECR I-8573, paras. 22 and 23; and Case C-390/07 *Commission* v *UK* [2009] ECR I-214, para. 36.
[49] C-390/07 *Commission* v *UK* [2009], paras. 36 and 38.
[50] CtEHR *Mileva v. Bulgaria* [2010], para. 91. See N. de Sadeleer, 'Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases', *above*, 39–74.

under Article 8.[51] That said, the mere fact that the source of pollution is unlawful is not sufficient to ground the assertion that the applicants' rights under Article 8 have been interfered with.[52] In fact, the issue of proper enforcement of domestic environmental or land planning law has not been approached as 'a separate and conclusive test but rather as one of many aspects which should be taken into account in assessing whether the State has struck a faire balance'.[53]

4 Case law

4.1 Reviewing the legality of EU acts

Since it is binding on the EU institutions, the legality of the obligation to achieve a high level of protection may be subject to review. The Court of Justice has held that when adopting the prohibition on the use and marketing of HCFC, 'the Community legislature did not infringe the requirement of a high level of protection laid down in Article 130r(2) EC since no manifest error of assessment had been committed when determining the level of protection'.[54] In his opinion on this case, AG Léger considered that the obligation to aim at a high level of protection 'must … be interpreted as a recommendation addressed to the Community legislature, under which the latter is called upon to ensure that the policy already being pursued is constantly improved'.[55]

On the other hand, AG Cosmas asserted in 1999 his idea that the level of protection in environmental matters is binding on the legislator when it acts on the basis of the old Article 130r EC (Article 192 TFEU) since a Community rule that does not meet "that qualitative criterion" could be annulled.[56]

That being said, account must be taken of new case law developments regarding the placing on the market of chemical substances. In the *Paraquat* case, the General Court took the view that the fact that the Commission included an active substance, paraquat, in a "positive" list concerning the placing on the market of plant protection products where it had not been established that it did not have harmful effects on health, violated this principle.[57] Similarly, in the *DecaDBE* case, the Court of Justice held that the

[51] Case *Moreno Gómez v. Spain*, 16 November 2004.
[52] Case *Mileva v. Bulgaria,* 25 November 2010, para. 91.
[53] F. McManus, note under *Gómez v. Spain* (2006) 8 *Env L Rev* 227.
[54] Case C-341/95 *Safety Hi-Tech S.R.L.* [1998] ECR I-4355, para. 53.
[55] Opinion AG Léger in Case C-341/95 *Safety Hi-Tech S.R.L.* [1998] ECR I-4355, para. 67.
[56] Opinion AG Cosmas in Case C-318/98 *Fornasar* [2000] ECR I-4788, para. 32.
[57] Case T-229/04 *Sweden v. Commission* [2007] ECR II-2437, paras. 161 and 224.

prohibition on the use of certain hazardous substances in electrical and electronic equipment implies, in accordance with the requirement for a high level of protection, that the Commission may 'grant exemptions only in accordance with carefully defined conditions' and that the conditions for exemption be interpreted strictly.[58] In this case, the fact that the directive had been enacted on the basis of Article 95 EC (Article 114 TFEU) did not have the effect of exempting the Commission from the requirement to respect the obligation for a high level of protection under Articles 152 and 174 EC (Articles 168 and 191(1) TFEU).

However, regarding the validity of the entry into force of protection regimes, the Court of Justice does not require an immediate optimal level of protection. Given that the implementation of EU protective measures may be carried out gradually, the most stringent option does not prevail straightaway. For instance, the prohibition of a substance which depletes the ozone layer does not necessarily entail the outlawing of other gases, even if the general application of the measure would have permitted a higher level of protection.[59] Similarly, the subjection of certain polluting plants to the EU Greenhouse Gas Emission Trading Scheme does not imply the immediate extension of this regime to all installations emitting such gases.[60] To conclude with, the Court appears to be satisfied with an intermediate level of protection, in particular at the initial stage of the implementation of a new regulatory approach.

The obligation to seek a high level of protection is also an interpretative principle as regard the validity of EU legislation. By way of illustration, the harmonization of criminal penalties within the context of the first pillar was justified by AG Ruiz-Jarabo Colomer with reference to the obligation to achieve a high level of protection and to improve the quality of the environment, such as provided for under the former Article 2 EC (Article 3(3) TEU).[61]

[58] Cases C-14 and 295/06 *Parliament and Denmark v. Commission (« décaBDE »)* [2008] ECR I-1649, paras. 74 and 75.
[59] Case C-341/95 *Safety Hi-Tech S.R.L.* [1998] ECR I-4355, para. 47.
[60] Case C-127/07 *Arcelor Atlantique et Lorraine* [2008] nyr, para. 32.
[61] Opinion AG Ruiz-Jarabo Colomer in Case C-176/03 *Commission v. Council* [2005] ECR I-7879, para. 72.

4.2 An interpretative principle of the environmental obligations placed on Member States

The scale necessary in order to be successful in establishing an effective policy on the environment, taken together with the ongoing concern to eliminate the barriers to the free movement of goods and services, evidently call for the adoption of harmonised rules on EU level. Harmonised rules have the advantage of putting all of the Member States on an equal footing and requiring them to contribute equally to the financial costs resulting from the regulatory obligations. However, since the harmonisation process is filled with exceptions, Member States are likely to be encouraged to follow the lowest common denominator. As has been seen for the fight against global warming, the possibility offered to the Member States to determine themselves the number of allowances to allocate to each of the industrial sectors concerned has led the national authorities to be very generous to their own industries.[62] As a result, derogatory regimes are likely to encourage some Member States to depart from the obligation to seek a high level of environmental protection.

Be that as it may, it is clear from case law that the obligation to achieve a high level of protection inevitably impinges on the margin of appreciation of the authorities called upon to implement EU environmental law. According to the Court of justice's case law, this is an interpretative principle.

This may be illustrated by the case law on the concept of waste. The term 'to discard' an object or substance liable to become waste and, accordingly, the field of application of the EU regulation on waste, must be interpreted not only in the light of the objectives of the framework directive on waste, but also in the light of the obligation to achieve a high level of protection.[63] This means that the concept of waste cannot be interpreted restrictively. What is more, regarding the implementation of nature conservation directives, the precautionary principle is one of the foundations of the high level of environmental protection.[64] By the same token, the concept of biocide cannot be interpreted restrictively. Given that Directive 98/8 governing the placing of biocidal products on the market takes 'as a condition a high level of protection for humans, animals and the environment', such a level of protection could be seriously jeopardised if classification as biocidal products were to

[62] A. Brohé, N. Eyre and N. Howarth, *Carbon Markets* (London, Earthscan, 2009) 120–122; J. de Sepibus, 'Scarcity and Allocation of Allowances in the EU Emissions Trading Scheme-A Legal Analysis' 32 (2007) *NCCR Trade Working Paper*, 36.
[63] Cases C-418 and 419/97 *ARCO Chemie Nederland* [2000] ECR I-4475, paras. 36 to 40; Case C-252/05 *Thames Water Utilities* [2007] ECR I-3883, para. 27.
[64] Case C-127/02 *Waddenzee* [2004] ECR I-7405, para. 44.

be interpreted too narrowly. Accordingly, the Directive's scope of application encompasses not only 'those products containing one or more active substances and having a direct chemical or biological effect on the target harmful organisms', but also 'products which … contain one or more active substances but exert only an indirect chemical or biological effect on those organisms'.[65]

In a similar vein, national regulations applicable to domestic waste waters discharged through sceptic tanks which were imposed as an alternative to EU waste regulations were required to guarantee a level of protection equivalent to that resulting from the application of EU waste law. [66]

Furthermore, the determination of the relevant control procedure is also likely to be influenced by the principle. Regulation No 1013/2006 on shipments of waste which establishes procedures and control regimes for the shipment of waste, depending inter alia on the origin, destination and route of the shipment, and on the type of waste shipped is a good case in point. A German court asked the Court of Justice whether Regulation No 1013/2006 is to be interpreted as meaning that the export to Lebanon of catalyst waste is prohibited. The case arose from the fact that catalysts fall within two different categories, one of which means that export of the waste concerned is prohibited, whereas the other means that a special control procedure is to be implemented by the country of destination. AG Bot took the view that where there is uncertainty regarding the treatment of waste being exported outside the EU, 'it is necessary to choose the narrowest approach, making it possible to limit shipments of waste: namely, the prohibition of exports. That is also the best approach for attaining the objective of protecting human health and the environment, which Regulation No 1013/2006 is designed to achieve.'[67] The Court of Justice endorsed that line of reasoning.[68]

Inter-Environnement Wallonie raises similar issues, but in the context of an entirely different set of facts. The effects of a regional programme concerning the protection of waters against pollution caused by nitrates adopted in accordance with Nitrates Directive 91/676, can be exceptionally maintained by a national court in spite of its annulment for reasons linked to the violation of another environmental directive. In effect, the programme at issue had not been subject of a strategic impact assessment

[65] Case C-420/10 *Söll* [2012], para. 27.
[66] Case C-252/05 *Thames Water Utilities* [2007] ECR I-3883.
[67] Opinion AG Bot in Case C-405/10 *Garenfeld* [2011] nyr, para. 69.
[68] Ibid., para. 47.

pursuant to Directive 2001/42. To justify the maintenance of the protective effects of the programme, the Court of justice stressed that annulling the illegal order could result 'in a lower level of protection of waters against pollution caused by nitrates from agricultural sources, given that this would run specifically counter to the fundamental objective of that directive, which is to prevent such pollution'.

However, this requirement to achieve a high level of environmental protection cannot be relied on by the Member States in order to circumvent the obligations resulting from the implementation of environmental directives. Support for this proposition may be found in the following case. Following the initiation of an infringement action by the Commission due to the failure to implement the former IPPC Directive correctly, in particular with regard to the failure to require administrative authorisation for existing listed installations that now fell within the reach of that directive, Spain had argued that this directive only had the goal of achieving a high level of environmental protection and not a maximum level. Since 88.53 % of installations existing in Spain would have received authorisation in accordance with this Directive upon expiry of the time-limit set in the Commission's reasoned opinion, the Spanish authorities argued that a high level of environmental protection had been achieved. The Court of Justice rejected this argument on the grounds that the directive required 'complete and total implementation' by the Member States.[69]

The obligation to achieve a high level of environmental protection impinges also on the manner in which the lawmaker complies with the principle of proportionality. In this respect, *Afton* is a good case in point. The Court was asked to rule on whether an EU limit for the presence of a metallic additive likely to cause air pollution in fuel complied with the principle of proportionality. The Court stressed that 'the European Union legislature could justifiably take the view that the appropriate manner of reconciling the high level of health and environmental protection and the economic interests of producers of the substance' was to limit its content 'on a declining scale while providing for the possibility …. of revising those limits on the basis of the results of assessment'. [70]

One further point may be worth making here. In contrast to the areas of health, consumer protection and employment protection, environmental protection is distinctly less tied to concerns over the realisation of the internal market. Admittedly, with respect to water, soil, air, and ecosystem pro-

[69] Case C-48/10 *Commission v. Spain* [2010] nyr, para. 26.
[70] Case C-343/09 *Afton* [2010], para. 64.

tection, a high level of environmental protection may be achieved outside the internal market, independently of the need to eliminate technical barriers to the free movement of goods. Where the harmonisation is on principle minimal in nature, nothing prevents the Member States which so wish from reinforcing the EU level of protection.[71]

That being said, the obligation to seek a high level of environmental protection can also be invoked by Member authorities in enacting measures that are likely to hinder the free movement of goods. It hardly needs to be said that the free movement of waste may be affected by waste management measures which may differ substantially from one State to another. In its *EU-Wood* judgment, the Court of justice considered a German export measure in the light of the obligation to achieve a high level of protection pursuant to former Article 2 EC (Article 3(3) TEU). The Court accepted that the most stringent German criteria may prevail within the context of controls over the cross-border movement of waste. In order to appreciate the risks which the waste recovery operation in another country entails, the German competent authority of dispatch was entitled, in accordance with a teleological interpretation of the regulation in keeping with the promotion of a high level of protection, to rely on the standards applicable to the recovery of waste within its national territory, even where the standards were stricter than those in force in the State of destination, Italy.[72] The Court thereby accepted an extra-territorial application of the most stringent standards.

5 Conclusion

At the outset, given its degree of indeterminacy, the interpretation of the obligation to seek a high level of environmental protection is particularly arduous. It is not only vague but also ambiguous. First and foremost, the provisions commented upon above do not specify the means to be used in order to achieve this high level of protection. It all depends on the good will of the legislature that is called upon to flesh out this highly general obligation into specific rules through appropriate harmonisation measures. What is more, the will of the Member States to concretise the obligations contained in secondary law through more precise arrangements is also vital. Second, it must be noted that the scope of the obligation is diluted by a mass of other similar clauses.

[71] Article 193 TFEU.
[72] Case C-277/02 *EU-Wood-Trading* [2004] ECR I-11957, para. 47.

Nonetheless, the vague and ambiguous nature of these provisions does not mean that they are short of legal effect. It goes without saying that the recognition of the obligation to seek a high level of environmental protection encapsulated in the TEU, TFEU, and EUCHT is not neutral.

First, since it is binding on the EU institutions, the legality of the obligation to achieve a high level of protection may be subject to review. The *Paraquat* and the *décaBDE* cases take on particular significance in this context.

Second, the scope of the obligations under secondary law and of national provisions transposing this secondary law must be interpreted with reference to this obligation. A careful analysis of case law has made it possible to clarify the interpretative function played by the obligation to seek a high level of environmental protection.

Last but not least, I have also attempted to demonstrate that the recognition of similar obligations in Treaty law with respect to health and consumer policies reinforce their interdependence with the environmental policy. By forming a more homogeneous block, these three policies relativize the hard core of the EU's economic integration.