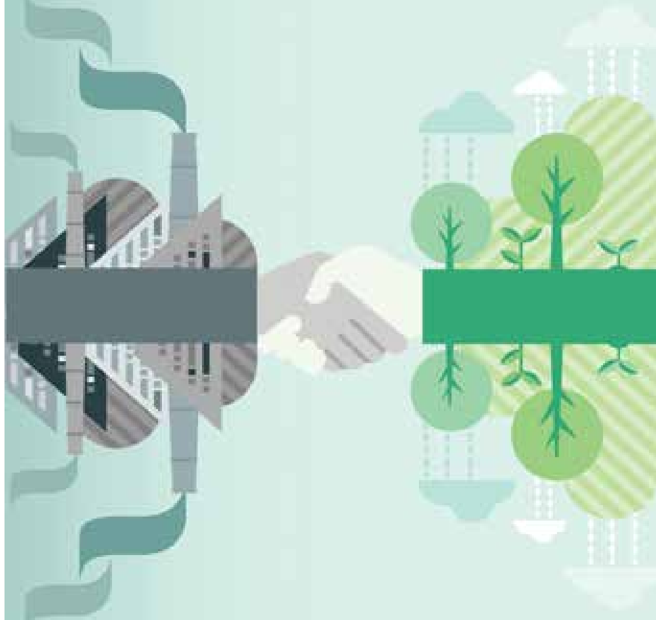

Analysis

Reconciling the Irreconcilable Trade:
Trade v Environment in the EU

By Nicolas de Sadeleer

Despite the progress made over the course of three decades, the results of environmental policy across Europe have at the very least been muted. One of the main difficulties environmental law has been facing is related to the fact that the legal order of the EU is conceptualised in terms of economic integration. Indeed, domestic environmental standards are likely to hinder within the internal market the free movement of goods and services. Below, Nicolas de Sadeleer suggests that as far as environmental product standards are concerned, harmonisation by the EU lawmakers appears to be preferable than a changeable adjudicatory approach where the courts have to review the justification and the proportionality of an array of domestic measures.

The relationship between economic integration and environmental protection has always been fraught with controversy. It has been argued that trade liberalisation and free competition increase the wealth of trading nations so they are able to afford to implement environmental policies. On the other hand, economic growth at all costs may result in greater pressures on ecosystems. In the EU, there has been an endeavour to reconcile trade and environmental concerns in order to achieve sustainable development. What is more, this issue is gathering momentum given that environmental issues are likely to become one of the stumbling blocks in the negotiation of the Transantlantic Trade and Investment Partnership (TTIP) Agreement that is likely to entail the harmonisation or the mutual recognition of a broad range of product standards.

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The clashes between environmental law and the internal market

The relationship between trade and environmental issues are somewhat different at EU level than in the WTO. At the core of EU integration lies the internal market that is based on the free movement provisions promoting access to the different national markets and on the absence of distortion of competition. The internal market and environmental policy has traditionally focused on apposite, albeit entangled, objectives: deregulation of national measures hindering free trade, in the case of the internal market, and protection of vulnerable resources through regulation, in the case of environmental policy. In other words, whereas the internal market is concerned with liberalising trade flows, environmental policy encourages the adoption of regulatory measures that are likely to impact on free trade. In addition, the internal market favours economic integration through total harmonisation (setting up a common playing field) whilst environmental law allows for differentiation. These differences play themselves out in concrete disputes ranging from the use of safeguard clauses in order to ban GMOs to restrictions placed on additives in fuels. In these clashes, the internal market has an advantage based on its seniority. It follows that traders can invoke the economic rights enshrined in the EU Treaties before their domestic courts whereas the victims of pollution are deprived of a right to environmental protection stemming from the EU Treaties. In addition, internal market law empowers the European Commission to control the Member States wishing to adopt specific or more stringent environmental standards (prior to notification and authorisation procedures). By contrast, national authorities are known to be reluctant to implement genuine environmental EU instruments. To conclude, the relationship between the internal market law backed by a powerful business constituency and the environmental policy supported by a diffuse public is somewhat asymmetrical.

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The rise of product standards and the risk of discrimination

Though environmental issues encompass a broad range of measures ranging from regulation of fisheries, marine pollution, climate change, cross-compliance in agriculture, listed installations, or wildlife conservancy, the tensions with trading interests are likely to become more severe where the national authorities are laying down product standards and waste management requirements. Indeed, by virtue of their cross-cutting nature, environmental standards constantly interact with the internal market. In spite of the fact that industrial and energy production still remains an important source of pollution in the EU, the rise in consumption of products and services by European consumers has increased pressure on the environment. Throughout their life cycle, all products cause environmental degradation in some way: depending on their composition, their production method, and how they are transported, used, consumed, re-used, recycled, or discarded, products can become a source of pollution. The environmental impacts of products have thus been progressively regulated at a national level, although most of these standards are derived from EU law. For instance, regulations set out the sulphur or lead content of petrol, and provide a list of chemical substances which may not be sold, as well as imposing restrictions relating to the composition of packaging, the phosphate content of detergents, and the maximum noise level for some types of appliance.

Given the different product regulatory approaches being developed across the EU, there has been fear of the emergence of new barriers to free trade. For some, a neo-protectionist policy underlies national and regional measures regulating products and services for the protection of the environment. Indeed, better protection of the environment through limiting the placing on the market or the use of hazardous products and substances could constitute a plausible motive for reinforcing the competitiveness of national undertakings. Additionally, such a strategy can become all the more insidious with the use of measures that make no distinction between domestic and imported goods.

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Should such domestic rules be swept aside by the fundamental principles of free movement of goods and services? Given the sheer complexity of the EU integration process, the answer to that question is rather nuanced. As a matter of law, there are two ways in which to ascertain the compatibility of environmental measures taken by Member States with fundamental economic freedoms enshrined in the EU Treaties.

Negative harmonisation

First, in the absence of harmonisation through directives or regulations, or if harmonisation by EU measures is not deemed to be complete, the provisions of the Treaty on the Functioning of the EU (TFEU) on free movement of goods and of services are directly applicable. These provisions prohibit Member States from restricting free movement (negative harmonisation). Accordingly, domestic environmental measures must ensure that the economic freedoms enshrined in Treaty law are not breached. However, the TFEU and the case law allow Member States to maintain or adopt domestic restrictive measures that differ from those of other Member States in as much as they are deemed to be justified and proportional. That being said, attempts by EU as well as national courts to reconcile the conflicts between these fundamental freedoms and environmental protection have not always been characterised by coherence. The overall impression generated by the heterogeneity of cases adjudicated so far (green certificates, public procurements, renewables, recycling, pesticides, biodiversity, etc.) is thus one of confusion. Moreover, the case law has thrown up more questions than it resolves on issues such as the validity of eco-taxes, measures having an extra-territorial dimension, measures restricting the use of products, and the scope of mandatory requirements. Nonetheless, lawyers have been noticing that a change of emphasis within the case law of the Court of Justice of the EU is underway. This development has come about due to the fact that the EU Treaties have struck a better balance between the internal market and sustainable development; two objectives that have been placed on an equal footing. Given that the EU’s goals are no longer solely economic, but also environmental, the proper functioning of the internal market must be accommodated with non-market values.

The recognition of the environmental objective as an essential value has thus not been neutral.

Positive harmonisation

Second, instead of being at odds with one another, the two policies can also support each other through the adoption of harmonised EU standards integrating the environmental dimension. Accordingly, regulation of products and services impairing the environment is often governed by directives or regulations adopted by the EU institutions, within the framework provided for in the TFEU ('positive harmonisation'). For instance, harmonisation on the basis of the internal market competences of national rules on the marketing of many products—such as dangerous substances, fertilizers, insecticides, biocides, GMOs, cars, trucks, aircraft, watercraft, or electric and electronic equipment—creates a precise legal framework limiting Member States' ability to lay down their own product standards. The free discretion of national authorities will be limited as harmonisation deepens.

The advantages entailed by harmonisation are undeniable. Firstly, for producers and distributors, it allows the setting, on the scale of the internal market, of environmental standards, which then govern the marketing of products and services as well as their free circulation within that market. Given that positive harmonisation determines more precisely the room for manoeuvre left to the Member States than a changeable adjudicatory approach, it is preferred to negative harmonisation. Secondly, harmonisation is likely to reconcile the environmental concerns with the internal market imperatives. For instance, environmental measures may benefit from the objective to harmonising 28 different legal systems with a view to guaranteeing the free movement of goods and services as well as a high level of protection; the global level of environmental protection should be reinforced as a result.

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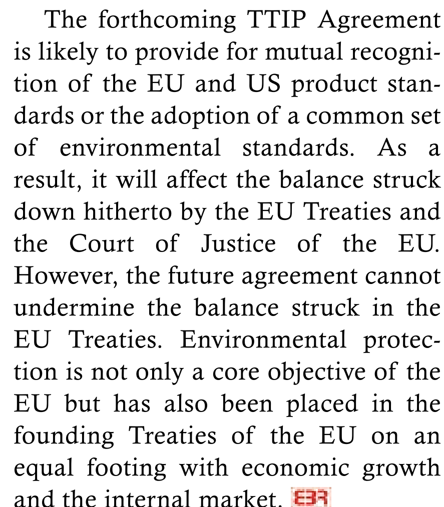
Challenges ahead

However, despite the efforts of the EU institutions, the harmonisation of standards is far from being perfect. Harmonisation measures have been piled one on top of the other without any global vision. The instruments are subject to constant adjustment not only to scientific and technical progress, but also to decisions taken on an international level. Many product categories have not been harmonised so far. Accordingly, environmental protection levels still vary significantly from one Member State to another. Yet, if legislation in the recipient State is less permissive than that of the exporting State, the former will hinder free circulation of goods and services even if it does not provide for any difference of treatment between domestic and imported products and services. In such case, the courts are called on to review the justification and the proportionality of the domestic measures at issue.



The forthcoming TTIP Agreement is likely to provide for mutual recognition of the EU and US product standards or the adoption of a common set of environmental standards. As a result, it will affect the balance struck down hitherto by the EU Treaties and the Court of Justice of the EU. However, the future agreement cannot undermine the balance struck in the EU Treaties. Environmental protection is not only a core objective of the EU but has also been placed in the founding Treaties of the EU on an equal footing with economic growth and the internal market.

About the Author

Nicolas de Sadeleer is Professor of EU law at Saint Louis University where he holds a Jean Monnet Chair on Trade and Environment. He is the author of *EU Environmental Law and the Internal Market* (Oxford, OUP, 2014), a book that challenges current thought and reassesses the rules of economic integration within an environmental framework. His website *www.tradevenvironment.eu* offers legal information on this topic.