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Environmental Governance and the Legal Bases Conundrum

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I. Introduction

Although it was not mentioned in the 1957 Treaty of Rome, environmental concerns have, through the various treaty reforms, gradually been able to establish themselves as one of the greatest values enshrined in the treaties. Attention should be drawn to the fact that Article 3(3) of the Treaty of the European Union (TEU) and Articles 11, 114(3), 191 to 193 of the Treaty on the Functioning of the European Union (TFEU) are dedicated to environmental issues. Driven by the fear of a disintegration of the internal market, concerns over portraying a less mercantile image of the EU, as well as the intention to safeguard ecosystems and species under threat, a European environmental policy has thus gradually emerged. Starting from a range of action programmes, EU secondary environmental law has progressively grown from a sparse set of directives to a vast body of regulatory measures aiming both to regulate the main forms of pollution as well as to protect the main ecosystems along with some of their composite elements. Today it is possible to count more than 300 EU regulatory measures, that is around eight per cent of EU law.[1] Several EU agencies, twenty-seven Member States, three EFTA States, hundreds of Regions and Länder, and thousands of municipalities now implement EU secondary environmental law through a complex web of regulations that affect virtually every aspect of our life. Thanks to EU environmental law, much has been achieved over these last thirty years: the ban on lead in petroleum products, phasing out ozone depleting substances, reduction of nitrogen oxide emissions from road transport, improvement of waste water treatment, improvement of some aspects of air quality, increase in the number of protected species and habitats thanks to the Natura 2000 network, etc.[2] These significant progresses demonstrate the key role played by EU environmental policy and law.

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[1] L Krämer, 'Thirty Years of EC Environmental Law : Perspectives and Prospectives' (2002) 2 *Yearbook European Environmental Law* 160.

[2] European Environmental Agency, *The European Environment. State and Outlook* (Copenhagen, 2005), 19.

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What is more, few sectors of EU law still elude the growing reach of environmental concerns. Accordingly, whilst before the entry into force of the Lisbon Treaty the majority of rules which aim to protect the environment fell under the aegis of the first pillar (formerly the Treaty of European Community), the two other pillars have not remained untouched by this cross-cutting issue. The frameworks put in place for military operations, which fall under the Common Foreign and Security Policy (formerly the second pillar; currently Title V EU), have impacts on the environment.[3] Similarly, the need to combat environmental crime effectively has resulted in the policy for Police and Judicial Cooperation in Criminal Matters (formerly the third pillar; currently Articles 82 to 89 TFEU) itself opening up this issue.[4] What is more, due to their cross-cutting nature,[5] environmental questions are much broader and do interact constantly with different EU policies, the legal bases of which have proliferated as a result of the successive revisions to the founding treaties. By virtue of the integration clause enshrined in Article 11 TFEU,[6] measures taken in order to protect the environment have progressively merged in with an array of other policies. This latter clause not only highlights the importance of the environmental policy for the EU's broader development, but also the priority to

[3] According to the 2007 Annual report of the Council to the European Parliament on the main aspects and basic choices of the CFSP, 'energy security, climate change and the scarcity of resources will continue to grow in importance within the CFSP context'. See European Communities, Council document on the main aspects and basic choices of the Common Foreign and Security Policy (CFSP) presented to the European Parliament in application of para G (para 43) of the Interinstitutional Agreement of 17 May 2006 (2007) 13.

[4] See in particular Case C-176/03, *Commission v Council* [2005] ECR I-7879; and Case C-440/05, *Commission v Council* [2007] ECR I-9097.

[5] If there is any catch-all concept, then this is the environment. Immune to all efforts at legal classification, this chameleon-like concept may be limited under a narrow reading to nimby factors, whilst read more broadly it may be coterminous with the biosphere. Furthermore, it continuously overlaps with other concepts, such as ecology, nature, biodiversity, public health, workers' protection, land-planning, living surroundings, or sustainable development, which nevertheless have not succeeded in taking its place. What is more, the concept of environment now covers questions that were ignored until a short time ago, such as global warming, GMOs, nanotechnologies, or electromagnetic radiation.

[6] Article 11 TFEU requires that: '[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'. Similarly, by virtue of Art 37 EUCHR '[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'. Also known as the principle of integration, this clause is called upon to play a key role, not only due to the fact that it makes it possible to avoid interferences and contradictions between competing policies, but also because it may enhance sustainable development in favouring the implementation of more global, more coherent and more effective policies. See M Wessmaier, 'The Integration of Environmental Protection as General Rule for Interpretating Law' (2001) CMLRev 159–77; N D'Hondt, *Integration of Environmental Protection into other European EU Policies. Legal Theory and Practice* (Groeningen: Europa Law Publishing, 2003); D Grimmeaud, 'The Integration of Environmental Concerns into EC Policies: A Genuine Policy Development?' (2000) EELR 207–18; W Lafferty and E Hovden, 'Environmental Policy Integration: Towards an Analytical Framework' (2003) 3 *Environmental Politics* 1–22.

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be ascribed to it within the EU's other policies. Accordingly, other EU policies are likely to improve the state of the environment.

It must not be lost sight of that each piece of EU legislation must be founded on one or more legal bases set out in the TEU and TFEU. The Byzantine structure of treaty law with its diversification of legal bases likely to provide for specific competences to address environmental challenges remains the subject of an ongoing debate. Indeed, the choice of a legal base for the adoption of an environmental measure is far from being self-evident. As emphasized below, the identification of the act's centre of gravity may prove particularly difficult.

On one hand, the competence to protect the environment is not limited in advance by reference to a particular subject-matter defined *ratione materiae* but rather by a flurry of broad objectives encapsulated in Article 191(1) TFEU.[7] Given the general nature of these objectives and the impreciseness of the concept environment, it is difficult to lay down the exact limits of the areas covered by that policy.[8] As a result, genuine environmental measures adopted by virtue of Article 192 TFEU are likely to encroach upon other EU policies.

On the other hand, not all of the provisions which are closely, or remotely, related with the environment are likely to be adopted by virtue of the provisions laid down in Title XX TFEU, a title that is entirely devoted to environmental protection.[9] Indeed, the proliferation of legal bases in the environmental field has not been blocked by Article 192 TFEU, a provision regulating the

[7] EU environmental competence is defined in terms of objectives to be achieved, rather than areas of activities to be regulated. Pursuant to Art 191(1) TFEU, the EU environmental policy pursues four objectives which have proved to be particularly far-reaching, among which the protection of human health. As a matter of fact, health-related problems today are no longer confined to the discreet surroundings of medical surgeries or hospitals; they also manifest themselves in the control of foodstuffs, health crises, air and water pollution, and waste management. However, the fact that environmental policy takes account of health protection raises the problem of its delineation with regard to other EU policies, given that health, alongside the environment, is a cross-cutting concern permeating in virtue of Art 168(1) TFEU and Art 35 EUCHR all other EU policies. Moreover, there are significant differences between the environmental and the health policies. First, it may be noted that on an institutional level the framers of the EC Treaty and later on the TFEU did not put environmental policy on an equal footing with health policy. In fact, the means of action differ substantially on an institutional level. On one hand, pursuant to Art 4(2)(e)–(k) TFEU, both competences as regard health aspects of the environmental policy and the 'common safety concerns in public health matters' are shared. On the other, the genuine 'protection and improvement of human health' is deemed to be a complementary competence by virtue of Art 6(a) TFEU. Moreover, this imbalance is accentuated where there is a need to create exceptions to rules harmonising the internal market, as new measures may be taken pursuant to Art 114(5) TFEU in order to curb an environmental risk, but not a strictly health-related concern. See N de Sadeleer, 'Procedures for Derogations from the Principle of Approximation of Laws under Article 95 EC' (2003) 40(4) *CMLR* 889–915.

[8] See, by analogy, the protean nature of the economic and social cohesion. See Opinion of AG Poiares Maduro in Case C-166/07, *Parliament v Council* [2009] ECR I-7135, para 81.

[9] Entirely devoted to the environment, Title XX of the TFEU, which includes Arts 191–193, does not limit itself to confirming the EU's competence in environmental matters: it sets out goals, states principles, establishes criteria, defines international intervention. With respect to Art 191 TFEU, the ECJ judged in the *Peralta* case that that provision 'confines itself to defining the general objectives of the Community in environmental matters. The responsibility for deciding upon the action to be

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decision-making of environmental measures.[10] It is settled case-law that this genuine environmental legal base does not alter the competences which the EU holds under the terms of other provisions contained in either the TEU, or the TFEU.

Needless to say, the choice of legal base of pieces of legislation aiming at protecting the environment represents a critical juncture in relations between institutions, as well as the relations between the Member States and the EU.

First, in defining the scope of the EU's intervention, the legal base enables the EU to exercise its legislative competence in a given field.[11] Moreover, the base chosen determines not only which institution has competence to take the action but also the procedure to follow and the objective pursued.[12] Furthermore, it also determines the types of acts that can be adopted.

Just as the powers of the Commission, the Parliament, and the Council are capable of varying considerably depending on the procedure used, they can also end up expressing contradicting preferences as regards the choice to be made between the different legal bases provided for.[13] Indeed, the choice between a base which requires unanimity within the Council and a base which only requires a qualified majority is fundamental,[14] as too is the choice between a base implying an ordinary legislative procedure and a special legislative

taken is entrusted to the Council by Article 130s (Article 192 TFEU).' Case C-379/92, *Peralta* [1994] ECR I-3453, para 58.

[10] Pursuant to Art 192(1) TFEU, measures of secondary law must have to be adopted in accordance with the ordinary legislative procedure. However, pursuant to the second paragraph of that provision the special legislative procedure, or in other words the requirement for unanimity within the Council following consultation with the European Parliament, is maintained for a certain number of sectors regarded as sensitive. The exercise of these powers must comply with certain principles, take account of certain criteria, and seek to attain certain objectives.

[11] Article 5(1) TEU provides that '[t]he limits of Union competence are governed by the principle of conferral'. Accordingly, competence is conferred on the EU by a swathe of Treaty provisions in order to achieve objectives particular to those provisions, read in the light of the general objectives of the EU. As a result, the legal base occupies centre stage inasmuch as it identifies the competence under which EU institutions act.

[12] K St C Bradley, 'The European Court and the Legal Basis of Community Legislation' (1998) *EurLR* 379; N Emiliou 'Opening Pandora's Box: the Legal Basis of Community Measures Before the Court of Justice' (1994) *EurLR* 488; B Peter, 'La base juridique des actes en droit CEE ' (1994) 378 *RMC* 324; L Defalque et al, *Libre circulation des personnes et des capitaux. Rapprochement des législations. Commentaire J Mégret (*Brussels: IEE, 2007), 225–40; D Chalmers and A Tomkins, *EU Public Law* (Cambridge: Cambridge University Press, 2007), 140; D Chalmers, G Davies, and G Monti, *European Union Law* (Cambridge: Cambridge University Press, 2010), 95; C Kohler and J-C Engel, 'Le choix approprié de la base juridique pour la legislation communautaire: enjeux constitutionnels et principes directeurs' (2007) *Europe* 4–10; J Jans and H Vedder, *European Environmental Law*, 4th edn (Groeningen: Europa Law Publishing 2011), 59–94.

[13] R Barents, 'The Internal Market Unlimited: Some observations on the legal basis of EU legislation' (1993) 30 *CMLRev* 85; H Cullen and H Charlesworth, 'Diplomacy by Other Means: the Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States' (1999) 36 *CMLRev* 1243.

[14] If qualified majority voting prevails, recalcitrant Member States opposing the adoption of the proposed measure could be sidelined.

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procedure.[15] Admittedly, an incorrect choice of legal base does not therefore constitute a purely formal defect. Though the Treaty of Lisbon has generalized to some extent the former co-decision procedure, situations in which the ordinary legislative procedure does not apply remain sufficiently numerous in order to result in institutional conflicts. Unsurprisingly, given that the choice of the legal base shapes the decision-making process and influences its political outcomes, the institutions are seeking to choose the legal base that provides the procedure most advantageous to them. [16] The fact that such a choice is deemed to be of constitutional importance is likely to guarantee the institutional equilibrium.

Second, though the inter-institutional power struggles have abated to some extent with the generalization of the general legislative procedure, the antagonism between Member States and the EU is still alive.[17] In effect, when regulating activities impairing the environment, the EU is not acting in a policy vacuum. Indeed, as regards the vertical division of competence, the choice affects significantly the room for manoeuvre left to the Member States. By way of illustration, using Article 207 TFEU as the legal base for a regulation regulating the trade in hazardous substances implies that the act is a matter of exclusive competence.[18] Conversely, using Article 192(1) TFEU to adopt such an act implies that the act is a matter of shared competence.[19] What is more, in accordance with Article 193 TFEU, where the legal base is Article 192 Member States cannot be prevented 'from maintaining or introducing more stringent protective measures' inasmuch these measures are compatible with the Treaties.[20]

This article unfolds in seven sections. Before embarking upon analysing the conflicts between the environmental policy and other EU policies, it is necessary to recall in section 2 the principles which govern the choice of legal bases and the review by the Court of its exercise. Sections 3 to 7 cover conflicts between the environmental policy and the internal market, the Common Commercial Policy (CCP), the Common Agricultural Policy (CAP), criminal law, and

[15] With respect to the environmental policy, some acts have to be taken by the Council unanimously (Art 192(2) TFEU) whereas others by a qualified majority (Art 192(1) TFEU). Accordingly, as regards the environmental policy, the role of the European Parliament varies considerably: it can be placed on equal footing with the Council as it can be merely consulted by the Council.

[16] D Chalmers, G Davies, and G Monti, above, 95.

[17] P Wenneras, 'Towards an Ever Greener Union? Competence in the Field of the Environment and beyond' (2008) 45 *CMLRev* 69.

[18] Article 3(1) e) TFEU.

[19] Article 4(2) e) TFEU.

[20] Pursuant to Art 193 TFEU, 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 Art 192 TFEU. 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), 705–17; P Pagh, 'The Battle on Environmental Policy Competences. Challenging the Stricter Approach: Stricter Might Lead to Weaker Protection' in R Macrory (ed.), *Reflections on 30 Years of EU Environmental Law* (Groeningen: Europa Law Publishing, 2006), 10.

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nuclear law. Underpinning this analysis of the case-law is the view that environmental issues are progressively addressed within a broad range of EU policies. This evolution is testament to the influence of the key objective of sustainable development which is currently enshrined in Article 3(3) and (5) TEU, Article 21(2)(d)–(f) TEU, Article 11 TFEU, and Article 37 of the Charter of Fundamental Rights of the EU.[21] Since it is made up of three heads (social, environmental, and economic), sustainable development represents a delicate balancing of the competing social, economic, and environmental interests. As a result, sustainable development requires commercial law, competition law, consumer law, environmental law, and worker protection law to interact. Similarly, the dialogue between law and science, economic development and the preservation of natural resources, the regulation of access to resources and our consumer society must find the green shoots of a solution under the aegis of this kind of rule that is dedicated *par excellence* to the reconciliation of competing interests.

II. Principles Governing the Review by the Court of Justice of the Choice of Legal Bases

When confronted with a draft act, the instinctive reaction of lawyers from the institutions, bodies, and organisms of the EU is to search for the legal base which could serve as a foundation for it. Similarly, judges and Advocates General share the same instinct when examining applications and preliminary references concerning such acts. It is hence through the practice of substantive law that one achieves an awareness of the importance of this issue. The question is especially important since disputes concerning the legal bases of environmental acts are far from limited in number.

The choice of the legal base is not a purely formal question, but rather one of substance, being a matter of 'constitutional significance'[22] that is regularly ruled on by the Court of Justice. It is settled case-law that 'the choice of the legal base for a measure may not depend simply on an institution's conviction as to the object pursued'.[23] Instead, the determination of the legal base is amenable to judicial review, which includes in particular the aim and the content of the measure.[24]

[21] The fact that sustainable development is encapsulated in three different provisions situated at the apex of the EU legal order does not mean that its legal status is not dogged by controversies. For instance, given that sustainable development has been coined both as an objective (Art 3(3) TEU) and a principle (Art 37 CFREU), there was obviously no clear concept of what sustainable development meant from a legal point of view when these various provisions were drafted.

[22] Opinion 2/00 [2001] ECR I-9713, para 5.

[23] Case C-300/89, *Commission v Council* (*Titanium dioxide*) [1991] ECR I-2867, para 10.

[24] See, inter alia, Case C-300/89 '*Titanium Dioxide*', para 10; Case C-269/97 *Commission v Council* [2000] ECRI-2257, para 43; Case C-211/01, *Commission v Council* [2003] ECR I-3651, para 38; and Case C-338/01, *Commission v Council* [2004] ECR I-4829, para 54.

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If it is established that the act simultaneously pursues different objectives or has several components that are indissociably linked, and if one of these is identifiable as the main or predominant purpose or component whereas the other is merely incidental, it will have to be founded on a single legal base, namely that required by the main or predominant purpose or component—the centre of gravity of the act—rather than its effects.[25] Accordingly, the act concerned should in principle be adopted on one sole legal base, namely that required by the main or predominant purpose or component. It is therefore necessary to define precisely the scope of each legal base which is likely to found the proposed measure and to distinguish the core objectives and components from the ancillary ones. By way of example, the mere fact that the act contributes simultaneously to the internal market and the environmental policy is insufficient to taking it outwith the core of one of these EU policies.

However, it may be the case that the twin objectives and the two constituent parts of the act are 'inseparably' or inextricably linked without one being secondary and indirect in relation to the other. In such a case, it is impossible to apply the predominant aim and content test. Exceptionally, the Court of Justice accepts that such a measure must be founded on the corresponding legal bases and the applicable legislative procedures respected.[26] In other words, this will call for the recourse to a dual or a multiple legal base, provided that the corresponding procedures are compatible.

The fact that EU action may have a different legal base hardly poses any difficulties where the procedures are identical. By way of illustration, the novel food regulation is founded on three legal bases: Articles 43, 114, and 168(4) TFEU.[27] By the same token, in order to adopt an act promoting the use of renewable energy with the aim of combating climate change—objectives laid down under Articles 191(1) and Articles 194(1)—the legislature ought to have recourse to both Articles 192(1) and 194(2) TFEU.

However, where there are differences between the procedures, the decision-making process is becoming much more complex. In effect, the compatibility of the procedures may raise difficulties, both with regard to the rules governing the majority within the Council and with regard to the participation of the European Parliament, which for certain procedures is merely consulted whilst for others is actively involved as a co-legislator. Therefore, no dual legal base is

[25] See, *inter alia*, Case C-155/91, *Commission v Council* [1993] ECR I-939, paras 19 and 21, Case C-36/98, *Spain v Council* [2001] ECR I-779, para 59; Case C-211/01, *Commission v Council*, cited above, para 39; and Case C-281/01, *Commission v Council* [2002] ECR I-12049, para 57; Case C-338/01, *Commission v Council*, para 55; and Case C-91/05, *Commission v Council*, para 73.

[26] Case C-300/89, *'Titanium dioxide'*, para 13; Case C-336/00, *Huber* [2002] ECR I-7699, para 31; Case C-281/01, *Commission v Council* [2002] ECR I-12049, para 35, Case C-211/01, *Commission v Council*, para 40; Case C-211/01, *Commission v Council* [2003] ECR I-8913, para 40, Case C-91/05, *Commission v Council*, para 75; and Opinion 2/00 [2001] ECR I-9713, para 23.

[27] Regulation No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, OJ L 268/1.

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possible where the procedures laid down for each legal base are incompatible with one another.[28] This relatively strict view entails the risk that in some cases it would be not possible to give priority to the ordinary legislative procedure.[29] As a result, recourse to the special legislative procedure is likely to encroach upon Parliament's rights whereas the use of other legal bases may involve greater participation by the Parliament inasmuch as they provide for the adoption of a measure by the ordinary legislative procedure.[30] In particular, this would undermine 'the fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly'.[31] In addition, the use of two different legal bases is also liable to affect the Member States' right to enact more stringent measures.[32]

The case-law has recently undergone a certain change in emphasis. Aware of such difficulties, the Court of Justice has held that an act could be based on the dual legal base inasmuch this is not impossible from the point of view of legislative technique.[33] However, that situation is deemed to be exceptional.[34] It follows that it is only where the procedures are incompatible from the point of view of legislative technique that a dual legal base is impossible and a choice has to be made between them.

That being said, the difficulties raised by recourse to a dual legal base may also encourage the institutions to split the act up into two distinct acts, one based on the legal base that is more favourable for the European Parliament and the other on a base which is less favourable for it or one that leads to minimal harmonization and the other to maximal harmonization. However, this dissociation may compromise the consistency of EU action.[35]

[28] Case C-300/89, *Titanium dioxide*, above, paras 17 to 21; Joined Cases C-164/97 and C-165/97, *Parliament v Council* [1999] ECR I-1139, para 14; Case C-338/01, *Commission v Council*, para 57; Case C-94/03, *Commission v Council* [2006] ECR I-1, para 52; Case C-178/03, *Commission v Parliament and Council* [2006] ECR I-107, para 57; and Case C-155/07, *Parliament v Council* [2008] ECR I-8103, para 37.

[29] Case C-155/07, *Parliament v Council* [2008] ECR I-8103.

[30] Case C-178/03, *Commission v European Parliament and Council* [2006] ECR I-12049; Case C-155/07, *Parliament v Council* [2008] ECR I-8103, para 37.

[31] Case C-300/89, *Titanium dioxide*, para 20; and Case C-65/93, *Parliament v Council* [1995] ECR I-643, para 21.

[32] P Wenneras, above, 70.

[33] Case C-155/07, *Parliament v Council* [2008] ECR I-8103, para 79. Regarding the combination between the ordinary legislative procedure referred to in Art 159(4) EC (Art 175 TFEU) and the requirement that the Council should act unanimously in accordance with Art 308 EC (Art 352 TFEU), see Case C-166/07, *Parliament v Council* [2009] ECR I-7135, para 69, noted by T Corteau (2011) 48(4) *CMLRev* 1271–96. According to Cremona, the Court takes the view that safeguarding the Parliament's rights by using the ordinary legislative procedure does not undermine the Council's right to be the sole law-maker. See M Cremona, 'Balancing Union and Member State interests: Opinion 1/2008, Choice of Legal Base and the Common Commercial Policy under the treaty of Lisbon' (2010) 35 *ELRev* 686.

[34] Case C-411/06, *Commission v Parliament* [2009] ECR I-07585, para 49.

[35] See opinion AG Kokott in Case C-155/07, *Parliament v Council* [2008] ECR I-8103, para 89.

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III. Environment and Internal Market

The rise of environmental policy was undeniably born out of the concern to avoid distortions of competition between undertakings. To give the national authorities free rein to enact unilateral product and operating standards would entail the risk of a race to the bottom between States keen to attract polluting installations to the place where the cost of pollution is lowest. This would result in a generalized reduction of protection levels. Against this backdrop, a significant number of product-oriented directives were adopted on the base of the old Article 100a EC (Article 114 TFEU) within the perspective of the completion of the internal market.

However, some pieces of legislation may pursue inextricably and equally associated environmental and internal market objectives. This is in particular the case of operating standards. Though the impact of such measures on the functioning of the internal market may be attenuated in contrast to product-related standards, it is nonetheless still there.[36] In effect, national environmental operating standards are likely to put domestic industries at a competitive disadvantage. The variation of these standards can influence decisions by companies regarding to plants location.[37] This is well illustrated by the case of the Titanium Dioxide Directive, a piece of legislation that was setting out rules prohibiting or requiring the reduction of waste discharges into soils and waters. The Court held that this directive had to be adopted under old Article 100a EC (Article 114 TFEU) on the grounds, among others, that the third paragraph of this provision required internal market legislation to seek a high level of environmental protection.[38] The Court's reasoning was underpinned by other conclusive arguments. The harmonization of operating standards in a given industrial sector entailed elimination of the distortions of competition

[36] A Weales et al, *Environmental Governance in Europe* (Oxford: Oxford University Press, 2000), 35.

[37] For instance, there is a strong concern among undertakings subject to the EU greenhouse gas emission scheme about the costs incurred by the auctioning of allowances. See Art 13(1) of Directive 2003/87/EC of 13 October 2003 of the European Parliament and of the Council establishing a scheme for greenhouse gas emission allowance trading within the Community, OJ L 275/32. So far, the impact of environmental concerns on the location of polluting industries has been rather limited in scale since environmental costs generally represent a small proportion of the overall production costs.

[38] Case C-300/89, *Commission v Council* (*Titanium dioxide*) [1991] ECR I-2867. See N de Sadeleer, 'Le droit communautaire de l'environnement, un droit sous-tendu par les seuls motifs économiques?' (1991) 4 *Amén-Envt* 217; K St C Bradley, 'L'arrêt dioxyde de titane, un jugement de Salomon' (1992) 5–6 *CDE* 609; J. Robinson, 'The Legal Basis of EC Environmental Law' (1992) 4(1) *JEL* 109; P Pilitu, 'Commentaire sous l'affaire C-300/89' (1991) *Foro it.* 369; T Schroër , 'Mehr Demokratie statt umweltpolitischer Subsidiarität? (1991) 4 *EuR* 356; U Everling, 'Abgrenzung der Rechtsanleichung zur Verwicklung des Binnenmarktes nach Art. 100 A EWVG durch der Gerichtshof' (1991) *EuR* 179; C Barnard, 'Where politicians fear to tread?' (1992) *EurLR* 127; A Sawandono, 'Beginsel van democratie versus milieu' (1992) NJB 63; L Krämer, 'Article 100 A or 130 S as a Legal Basis for Community Measures: Case C-300/89 – Titanium dioxide', *European Environmental Law Casebook* (London: Sweet & Maxwell, 1993), 21.

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likely to be generated by excessively stringent or unduly lenient environmental standards. In addition, the internal market procedure was markedly more democratic than that laid down in Article 130s. The *Titanium Dioxide* judgment seemed to be inexorably pushing the whole sphere of environmental policy, as well as other policies such as health and consumer protection, into the purview of the internal market and strengthening total harmonization.

However, the lessons of the *Titanium Dioxide* judgment could apply only in cases where environmental protection was inextricably linked to completion of the internal market. In all other cases, the operative criterion had to remain the centre of gravity. In subsequent litigation on the legal bases of the Waste Framework Directive[39] and of the regulation on transfrontier waste shipments,[40] the Court took the apposite view. In spite of the fact that these acts were securing the internal market objectives of free movement of waste, they were rightly based on Article 130s EC (Article 192 TFEU). Accordingly, the mere fact that these pieces of legislation were likely to affect the internal market[41] was insufficient to justify the legal base being constituted by Article 100a EC. It is worthy of note that in sharp contrast to the *Titanium Dioxide* case, there was no question in these two subsequent cases of indissociably linked objectives and contents but of prevailing environmental objective and content. This case-law has been approved on the grounds that extending the rationale of the *Titanium Dioxide* judgment to other environmental measures would have rendered the Treaty provisions on environmental protection nugatory. The consequences of invalidating these acts would have been particularly irksome for those Member States who wished to maintain or develop a more ambitious environmental policy.

In the light of this case-law, it is possible to trace out the dividing line between the provisions governing respectively the internal market and the environment. On the one hand, acts which have a direct impact on the internal market, and in particular those which lay down product standards, must be adopted in accordance with Article 114 TFEU. Accordingly, the acts addressing the environmental

[39] Case C-155/91, *Commission v Council* [1993] ECR I-939. See N de Sadeleer, 'Legal Basis of EC Environmental Legislation' (1993) 2 *JEL* 291; J Bouckaert, 'Artikel 130 S EEG als juridische basis voor afvalrichtlijn' (1993) 4 *TMR* 226; D Geradin, 'The Legal Basis of the Waste Directive' (1993) 5 EurLR 418. Case C-187/93, *European Parliament v Council* [1994] ECR I-2857.

[40] Case C-187/93, *European Parliament v Council* [1994] ECR I-2857.

[41] Given that waste management is usually caught between genuine environmental concerns and free movement of goods, it has always been difficult to draw the dividing line between the measures that ought to be adopted pursuant to Art 192 TFEU and the others related to the functioning of the internal market. The Packaging Directive 94/62/EC is a good case in point. In increasing the collecting and recycling of discarded materials above the EU thresholds, the national authorities are likely to give a competitive advantage to their domestic recycling industries. Cheaper recycled products can therefore inundate other Member States' markets where recycling operations are more costly. In so doing, the imports of recycled products are likely to hamper these Member States in developing their own recycling facilities. Accordingly, this Directive was based on the internal market legal base.

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risks of chemical substances,[42] GMOs,[43] biocides,[44] motor vehicles,[45] objects or substances likely to become waste,[46] as well as acts encouraging the ecodesign of products[47] have been founded exclusively on Article 114 TFEU.[48] It may also occur that certain provisions which do not directly relate to products are adopted on the basis of this provision.[49] In a nutshell, the establishment and the functioning of the internal market may be a contributory factor in developing an EU environmental policy.

On the other side of the dividing line, a residual category embraces all acts for which an analysis of the aim and the content of the measure shows that they seek to achieve a high level of environmental protection and that they at most affect the establishment of the internal market on an ancillary base. Despite their direct or potential impact on the functioning of the internal market, these acts should be adopted on the basis of Article 192 TFEU.[50] This is the case of the directives aiming at protecting wildlife, different ecosystems, soils, marine, underground and surface water, air, and climate.[51] In addition, the acts regulating the pollution emitted by listed installations and waste management[52] have also been adopted on the basis of this provision.

[42] Regarding chemical substances, see among others Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), OJ L 396/1–851; Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, OJ L 373/ 1.

[43] With respect to GMOs, see Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms, OJ L 106/1; Regulation (EC) No 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms, OJ L 268/24.

[44] Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market, OJ L 123/1.

[45] Directive 2006/40/EC of the European Parliament and of the Council of 17 May 2006 relating to emissions from air-conditioning systems in motor vehicles, OJ L 161/12.

[46] Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste, OJ L 365/10.

[47] Directive 2005/32/EC of the European Parliament and of the Council of 6 July 2005 establishing a framework for the setting of ecodesign requirements for energy-using product, OJ L 121/ 29.

[48] The recourse to Art 114 TFEU does not preclude the possibility to adopt an act on other legal bases such as Arts 43 and 168(4) TFEU. See Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market, OJ L 309/1.

[49] Directive 2000/14/EC of the European Parliament and of the Council on the noise emission in the environment by equipment for use outdoors, OJ L 162/1.

[50] Case C-155/91, *Commission v Council*, above; and Case C-187/93, *European Parliament v Council,* above, paras 24–26.

[51] For an overview of the different acts founded on Art 192 TFEU, see N de Sadeleeer, *Commentaire Mégret. Environnement et marché intérieur* (Brussels: ULB, 2010), 247–329.

[52] However, product-related waste standards—packaging, hazardous substances in technical equipment—are based on Art 114 TFEU.

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However, in practice, it is hardly easy to sketch out the dividing line between these two types of provision.[53] Furthermore, in spite of their impact on the functioning of the internal market, several acts which regulate the placing on the market of products end up falling within the fold of environmental policy.[54]

But regardless of the appropriateness of this choice, it is the very nature of the integration process of the Member States that is at stake. By authorizing the maintenance or adoption of more binding measures with the endorsement of the Commission, Article 114 TFEU avoids the spectre of the creation of a multi-speed Europe on environmental questions. As was seen in the *Titanium Dioxide* case, this argument could be justified on economic grounds; differentiated policies could be a source for distortions to competition. Due to their implementation in a disorderly fashion, national initiatives also risk turning out to be largely ineffective, as pollution does not respect international borders. However, for acts adopted with this legal base, the considerations relating to the internal market become predominant, whilst the political objective of guaranteeing optimum protection for the environment fades into the background.

On the other hand, the recourse to Article 192 TFEU permits integration of a political nature to be pursued that consists in the attainment of basic benchmarks common to the twenty-seven Member States. Here, since environmental objectives are predominant, considerations regarding the internal market become secondary.

Nevertheless, the choice remains a delicate one. Is environmental protection best assured through the adoption of uniform legislation? Or is it necessary to guarantee this protection through minimum harmonization rules relying on Article 192 TFEU? One might answer these questions by stating that since they are reached on the basis of a consensus between twenty-seven Member States, maximum harmonization rules adopted pursuant to Article 114 TFEU do not authorize the States to seek an absolute level of protection, even though in the wake of the Treaty of Amsterdam, the Council and the Parliament must endeavour to attain a high level of protection.[55] However, through the

[53] According to L Krämer, as regards the regulation of hazardous substances, the dividing line between these two provisions is somewhat blurred. See L Krämer, above, 82.

[54] Directive 1999/94/EC of the European Parliament and of the Council of 13 December 1999 relating to the availability of consumer information on fuel economy and CO2 emissions in respect of the marketing of new passenger cars, OJ L 12/16; 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, OJ L 140/1.

[55] Pursuant to Art 3(3) EU and Art 191(2) TFEU, the tasks of the EU include the requirement to attain a 'high level of protection and improvement of the quality of the environment'. Though none of these provisions proclaim as such a 'principle' of a high level of environmental protection, EU courts as well as several commentators have been qualifying this obligation as a principle. See D Misonne, *Le niveau élevé de protection* (Brussels: Anthemis, 2010); N de Sadeleer, *Commentaire Mégret*, above, 31–6.

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mediation of minimum harmonization rules, Article 192 TFEU leaves untouched the Member States' powers to adopt a higher level of protection than that set by the EU harmonization rule, even where this mechanism may result in the emergence of European environmental law *à la carte*.[56] Indeed, air, water, soil, and emission standards are likely to differ from one Member State to another. Moreover, Member States with a low environmental profile are likely to argue for the adoption of EU harmonization standards lacking vigour, arguing that more ambitious Member States could always reckon upon more stringent standards in accordance with Article 193 TFEU.[57]

This all throws up a number of questions. Are the fears that economic cohesion may be undermined by more stringent national rules overstated? Should we conceive of environmental policy exclusively in terms of market unity? Does the fundamental nature of commitments and the importance of ecological challenges not imply, by contrast, that the Member States may move forward by adopting, if necessary, more stringent rules than the EU harmonisation rule? In the final analysis, perhaps this is simply just a false dichotomy? One might be inclined to agree with this, where one considers that the Member States currently limit themselves to transposing directives adopted on the basis of Article 192 TFEU, without however seeking to apply reinforced protection measures.[58]

That being said, new developments are taking place: the law-maker has been drawing a distinction in some directives between different provisions, some of them falling under Article 114 TFEU and others under Article 192 TFEU.[59] As far as provisions based on Article 192 TFEU are concerned, it would be possible to adopt more stringent measures in accordance with Article 193 TFEU. As far as provisions based on Article 114 TFEU are concerned, Member States are called on to comply with paragraphs 4 to 6 of that provision.[60]

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[56] Article 193 TFEU.

[57] L Krämer, *EC Environmental Law*, 6th edn (Thomson, Sweet & Maxwell, 2007), 87.

[58] JH Jans, 'Gold plating of European Environmental Measures?' (2009) 6(4) *JEEPL* 417–35.

[59] Though the aim and the content of the measure favour environmental protection, the legislature succeeds in isolating the provisions which are covered by Art 114 TFEU. See for instance Directive 2009/28/EC of the European Parliament and of the Council on the promotion of the use of energy from renewable sources which is based on Art 175(1) EC (Art 192 TFEU) and Art 95 EC (Art 114 TFEU) in relation to some provisions setting out product standards (Arts 17, 18, and 19). See also Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators, OJ L 266/1; and Regulation (EC) No 842/2006 of the European Parliament and of the Council of 17 May 2006 on certain fluorinated greenhouse gases, OJ L 161/1.

[60] Article 114 TFEU leaves Member States markedly less leeway than Art 192 TFEU, since national authorities cannot maintain or introduce more stringent measures than those encapsulated in secondary law unless expressly authorized by the Commission. See N de Sadeleer, 'Procedures for Derogations', above, 889–915; J Jans and H Vedder, *European Environmental Law*, 3rd edn (Groeningen: Europa Law Publishing, 2008), 111–21; P Wenneras, 'Fog and Acid Rain Drifting from Luxembourg over Art. 95(4)' (2003) *EELR* 169–78; M Onida, 'The Practical Application of Article 95(4) and 95(5) EC Treaty', in M Pallemaerts (ed), *EU and WTO Law: How Tight is the Legal Straitjacket for Environmental Product Regulation?* (Brussels: VUB Press, 2006), 83–117; L Defalque et al, *Commentaire J Mégret. Libre circulation des personnes et des capitaux. Rapprochement des*

IV. Environment and CCP

The question arises as to whether an EU external measure concerning other policies such as international trade is likely to fall outside these fields of competence merely because, in accordance with Article 11 TFEU, it takes account of environmental protection requirements. Or, conversely, should an environmental measure seeking to facilitate trade be adopted on the basis of the legal base relating to CCP? So far, the Court of Justice has been reluctant to draw strict demarcation lines between these competing legal bases.

One difficulty stems from the fact that numerous environmental multilateral agreements (EMAs) regulating the trade in certain products sometimes invoke trade mechanisms in order to sanction the States which do not respect their international obligations.[61] Put simply, these trade-related measures can prohibit or restrict imports of goods on the ground that the exporting country does not comply with the international agreement. Whilst the goal of these international agreements is clearly not to promote trade, this nevertheless does not prevent commercial aspects from constituting an anchor point for environmental policy.

By virtue of Article 3(1)(f) TFEU, the EU's powers are exclusive in the area of CCP. Insofar as CCP instruments need not necessarily promote or facilitate commercial exchanges, Article 207 TFEU does not prevent EU law-makers from placing restrictions on the importation or exportation of certain goods.[62]

Accordingly, the demarcation between the CCP and environmental policy may be marked out in the following manner. Council decisions to conclude agreements with a main environmental goal and an ancillary goal related to foreign trade must be founded on Article 192 TFEU, which is the case for the majority of agreements in this area.[63] Conversely, where EU law is intended

législations (Brussels: IEE, 2006), 233–7; MG Dohetry, 'The Application of Article 95(4)–95(6) of the EC Treaty: Is the Emperor Still Unclothed' (2008)8 *YbEEL* 48–79.

[61] The EU is party to several multilateral environmental agreements that rely upon trade-related measures designed to ensure compliance: the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Council Decision 97/640/EC [1997] OJ L 272/45); the Montreal Protocol of 16 September 1986 on Substances that Deplete the Ozone Layer (Council Decision 88/540/EC [1998] OJ L 297/8); the Kyoto Protocol of 11 December 1997 (Council Decision 2002/358/EC [1997] OJ L 130/1); the Cartagena Protocol of 29 January 2000 on Biosafety; and the Stockholm Convention on Persistent Organic Pollutants (Council Decision 2006/507/EC [2006] OJ 2006 L 209/1). It must be noted that unlike the Member States the EU is not a party to the Convention on International Trade in Endangered Species (CITES) which allows punitive trade restrictions to be imposed on non-complying parties.

[62] Footnote 28 in Opinion of AG J Kokott in Case C-178/03, *Commission v European Parliament and Council* [2006] ECR I-12049.

[63] See Opinion 2/00 [2001] ECR I-9713, para 44; Case C-459/03, *Commission v Ireland* [2006] ECR I-4635, above, para 90. As a matter of practice, see the following agreements: The Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol (Council Decision 88/540 [1988] OJ L 297/8); Rio Convention on Biological Diversity (Council Decision 93/626 [1993] OJ L 309/1); Rio Convention on Climate Change (Council Decision 94/69 [1994] OJ L 33/11); Espoo Convention on Environmental Impact Assessment in a Transboundary Context; and Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes

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'essentially to . . . promote, facilitate or govern trade',[64] it is necessary to found it on Article 207 TFEU.

Nevertheless, there is no lack of boundary disputes. As a matter of fact, the inclusion in international agreements of trade measures motivated by non-trading interests is likely to erode the scope of the CCP. In addition, in AG Kokott's view, 'the more players there are on the European side at international level, the more difficult it will be to represent effectively the interests of the Community and its Member States outwardly, in particular vis-à-vis significant trading partners'.[65] Anxious to guarantee a uniform EU position with regard to the external world, the Commission tends to conclude agreements on the back of the CCP with a view to depriving the Member States of their external prerogatives. Conversely, as guarantor of Member State sovereignty, the Council on the other hand seeks to limit the exclusive competences of the EU. Moreover, under the EC arrangements, the decision-making weight of the European Parliament has been decisive in environmental matters, whilst it was almost non-existent in CCP matters.[66] Last, the choice of the environmental legal base has a significant bearing on the Member States' room for manoeuvre to enact more stringent measures. Whereas a decision concluding an international agreement founded on Article 192 TFEU allows the Member States capacity to adopt more stringent measures by virtue of Article 193 TFEU, this is not the case where agreements are founded on Article 207 TFEU.

Less to be expected was that the Court' judgments on this matter would follow such a tortuous path, leaving commentators distinctly unsure as to the respective weight to be given to aspects relating to the CCP, and those related to environmental protection.

In *Greek Chernobyl I*, a case concerning the conditions for importing agricultural products originating in third countries following the nuclear accident at Chernobyl, the Court of Justice confirmed the applicability of the CCP legal base[67] when adopting a regulation governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power station.[68]

The Court's opinion regarding the conclusion of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity made it possible to clarify the dividing line which separates the CCP from environmental policy. In some respects, Opinion 2/00 reflects the transfer to the international stage of the internal

(Council Decision 95/308 [1995] OJ L 186/42). The decision ratifying the Montego Bay Convention on the Law of the Sea was founded on Arts 37 EC (Art 43 TFEU), Arts 113 EC (Art 207 TFEU) and 174(1) EC (Art 192(1) TFEU). Articles 145 to 147 as well as Arts 192 to 243 of this Convention deal with environmental protection.

[64] Opinion 2/00 of 6 December 2001 [2001] ECR I-9713, above, para 5.

[65] Opinion of AG Kokott in Case C-13/07, *Commission v Council*, above, para 72.

[66] See former Art 133 EC.

[67] Former Art 133 EC.

[68] Case C-62/88, *Greece v Council* (Chernobyl I) [1990] ECR I-1527.

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trade *versus* environment conflict that led to the *Titanium Dioxide* and *Waste Directives* cases commented on above.[69] Since this agreement had the goal of regulating, or even preventing, trade in GMOs, it falls within the ambit of environmental competence (shared competence).[70] In effect, this Protocol is essentially intended to avoid biotechnological risks and not, as argued by the Commission, to facilitate or to regulate commercial exchanges. The Court gave particular consideration to the treaty framework within which the Protocol was negotiated, ie the Convention on Biological Diversity. The Commission's argument concerning the practical difficulties related to the implementation of the mixed agreements was not considered to have sufficient weight in order to tip the balance in favour of the CCP legal base.[71] In effect, any practical difficulties associated with joint participation cannot affect the allocation of shared competence.

On the other hand, the opposite solution was reached regarding Council Decision 2001/469/EU of 14 May 2001 concerning the conclusion, on behalf of the EC, of an agreement between the government of the United States of America and the EC on the coordination of energy efficient labelling programs for office equipment. The Council replaced Article 133 EC (Article 207 TFEU), which had been proposed by the Commission, with Article 175(1) EC (Article 192(1) TFEU). In applying the centre of gravity test, the Court nonetheless found that the CCP objectives were predominant, due to the fact that the programme did not contain any new energy efficiency requirements.[72] Though the Court confirmed the centre of gravity test, it introduced at the same time the test of 'direct and immediate effects on trade'.[73]

In two judgments issued on 10 January 2006 on the choice of legal base of acts concerning the export and import of dangerous chemicals,[74] the Court of Justice however accepted the possibility of grounding a Council decision concluding, on behalf of the EC, the Rotterdam Convention on the Prior Informed Consent procedure for certain hazardous chemicals and pesticides, and the Parliament and Council Regulation transposing the provisions of the above international treaty, respectively on Article 133 EC and Article 175(1) EC

[69] See the discussion in section 3 above.

[70] Opinion 2/00 [2001] ECR I-9713, above; (2003) *CMLRev* 15. See K St C Bradley and M Moore, 'Case Law of the European Court of Justice' (2003) 3 *YbEEL* 527–30; Maubernard, 'L'intensité modulable des compétences externes de la CE et de ses Etats membres' (2003) 39(2) *RTDE* 230–46.

[71] As a result, an agreement was concluded with the aim of allocating the tasks between the European Commission and the Member States. Whereas the Commission was competent to negotiate trade-related matters, the Presidency was in charge for the residual matters. See C Bail, J Decaestecker, and M Jorgensen, 'European Union' in C Bail, R Falkner, and H Marquard (eds), *The Cartagena Protocol on Biosafety* (London: Royal Institute of International Affairs, 2002), 170–1.

[72] Case C-281/01, *Commission v Council* [2002] ECR I-12049, para 43.

[73] Paragraphs 40–41.

[74] Case C-94/03, *Commission v Council* [2006] ECR I-1; Case C-178/03, *Commission v European Parliament and Council* [2006] ECR I-12049, noted by D Simon (2006) *Europe* 12–13; D Langlet (2006) 18(3) *JEL* 495–504; and P Koutrakos (2007) 44 *CMLRev* 171.

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(Articles 207 and 192 TFEU), since the 'commercial and environmental components' of the instruments were 'indissociably linked'.[75] Indeed, even though 'the protection of human health or of the environment was the most important concern in the mind of the signatories of the Convention', the trade element of the Convention was not merely ancillary by virtue 'of direct and immediate effects on trade.'[76] In so doing, the Court combined the centre of gravity test with the test of 'direct and immediate effects on trade'. Given that in contrast to the Cartagena Protocol, the Rotterdam Convention focuses almost exclusively on trade issues of chemical management, the Court could reach a different conclusion than in the previous case.[77] Accordingly, it is insufficient to rely exclusively on the environmental objectives of the agreement without paying heed to the Convention's obligations relating to import and export of chemicals. What is more, the Court dismissed AG Kokott's opinion, who argued in favour of the applicability of the environmental legal base on the grounds that recourse to a dual legal base was precluded since the procedures provided for under each of these two bases were incompatible.[78] On a procedural level, the Court found that recourse to a dual legal base was possible, first since the Council ruled by qualified majority, and secondly because 'recourse to Article 133 EC jointly with Article 175(1) EC is likewise not liable to undermine the Parliament's rights'.[79] The Court concluded that the combination of legal bases did not involve any encroachment on the rights of Parliament, which had in any event been consulted. In contrast to the *Titanium Dioxide* case,[80] the procedures were therefore not incompatible with one another. However, the Court did not address the issue of Member States' residual competence. In this connection, it must be noted that Article 207 TFEU does not encapsulate a clause similar to Article 193 TFEU, a provision allowing Member States to enact more stringent measures.

At this stage, it is difficult to set out the practical implications of the judgments of 10 January 2006. Though the Court acknowledges the possibility of combining exclusive and shared competence, it does not answer the question as to how these competences should be handled in practice. One is left with little guidance with respect to this issue.

One might well ask whether the Rotterdam Convention must still be regarded as a mixed agreement, or whether it falls under the exclusive competence of the

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[75] Case C-94/03, *Commission v Council* [2006], above, para 51; and Case C-178/03, *Commission v European Parliament and Council* [2006], above, para 44.

[76] Case C-94/03, *Commission v Council* [2006] ECR I-1, paras 43 and 42.

[77] P Langelet, above, 500.

[78] Opinion AG Kokott in Case C-178/03, *Commission v European Parliament and Council* [2006], above, para 61.

[79] In fact, although former Art 133 EC, read in conjunction with Art 300(3) EC did not formally provide for the Parliament's participation, former Art 175 EC by contrast was premised on Parliament's involvement.

[80] Case C-300/89, *Commission v Council* [1991] ECR I-2867.

EU by virtue of its ties with the CCP.[81] Like other EMAs, the Rotterdam Convention has been concluded jointly by the EU and the Member States. Accordingly, the Member States do participate in the agreement alongside the EU. Practical difficulties in the management of the shared competence cannot in themselves justify full exclusivity.[82] However, a closer analysis of the new acts implementing the Rotterdam Convention highlights that the EU enjoys to a great extent an exclusive competence. Indeed, the implementation of the international agreement leads to total harmonization of this field. In particular, the annex of the new Council Decision on the conclusion of the Rotterdam Convention[83] declares that, 'in accordance with Article 133 of the Treaty, the European Community has exclusive competence on common commercial policy, concerning, in particular, trade in goods'. Replacing Council Regulation (EC) No 304/2003, which was annulled by the Court of Justice in Case C-178/03 as it was based solely on Article 175(1) of the Treaty, Regulation (EC) No 689/2008 concerning the export and import of dangerous chemicals[84] implements the Rotterdam Convention.[85] Under that regulation the Commission is to decide on behalf of the EU whether or not to permit the import into the Community of each chemical subject to the Prior Informed Consent (PIC) procedure. Moreover, as regards the participation of the EU in the Convention, the Commission acts as the single contact point with the Secretariat and other parties to the Convention as well as with other countries.[86] Put simply, though the Commission is working in close cooperation with the Member States, it is nevertheless the common designated authority for the participation of the EU in the Convention.[87]

As a result, the conclusion of the Rotterdam Convention by the Member States does not enable them to adopt more stringent measures governing the export of chemical substances which diverge from the comprehensive harmonized EU law provisions adopted pursuant to Article 114 TFEU, except in accordance with Article 114(5) TFEU. In any case, the judgments of 10

[81] See Council Decision 2006/730/EC of 25 September 2006 on the conclusion, on behalf of the European EU, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade [2006] OJ L229/25.

[82] By virtue of Rule 44 of the rules of procedure for the Conference of the Parties to the Rotterdam Convention, a regional economic integration organization shall not exercise its right to vote if any of its Member States exercises its right to vote, and vice versa (UNEP/FAO/RC/COP.1/33).

[83] Council Decision 2006/730/EC of 25 September 2006 on the conclusion, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade, OJ L 299/23. That Decision is founded on Arts 133 and 175(1) EC (Arts 207 and 192(1) TFEU) in order to reflect the impact of provisions on both trade and environmental issues.

[84] Regulation (EC) No 689/2008 (OJ L 204/1) is founded on Arts 133 and 175(1) EC (Arts 207 and 192(1) TFEU).

[85] Article 1(1) a).

[86] 5th Recital of the Preamble.

[87] Communication of the Commission, Technical Guidance Notes for Implementation of Regulation (EC) No 689/2008, OJ C 65/1.

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January 2006 represent a change in emphasis from the cautious reading of the extent of the external competences to the EU in the area of the CCP.[88]

A further twist in this case-law is the judgment on the validity of the legal base of Regulation No 1013/2006 on the transfrontier movement of waste.[89] In the proceedings initiated by the Commission against that regulation, the applicant argued that since the shipment of waste also has a commercial dimension, and the new regulation increased this dimension, the act concerned had to be based on both Articles 175 of the EC Treaty (now Article 192 TFEU) and 133 of the EC Treaty (now Article 207 TFEU). The Commission route had not been followed by the European Parliament and the Council on the grounds that the act concerned essentially related to waste management and not the facilitation of trade in waste. Applying the principles in this area, according to which the choice of legal base is based on objective elements associated with the purpose and content of the act, and given that where the act pursues multiple goals it is necessary to take account of the principal goal, the Court of Justice rejected the Commission's annulment action. Essentially, the Court held that the contested regulation pursued an environmental objective as its principal goal. This finding was made on various grounds: out of the forty-two recitals setting out the justification for the regulation, only two referred to the internal market, the implementation of which may be furthered by the common trade policy.[90] The content of the various mechanisms for controlling transboundary movements of waste also confirms the environmental justification. The fact that waste may originate from or be destined for third countries did not imply that the regulation was trade related, as argued by the Commission. The Court found that the regulation did not treat such waste differently.[91] In this way, the regime applicable to transfers of waste with third countries was based on the same type of environmental control mechanism as that governing transfers within the Union. The Court went on to assert that an EU act falls within the exclusive competence in the field of the CCP insofar as it relates specifically to international trade in that it is essentially intended to promote, facilitate, or govern trade and has direct and immediate effects on trade in the products concerned.[92] It follows from this judgment that recourse to a dual legal base remains the exception rather than the rule.

In line with the case-law on the Rotterdam Convention, in some cases the EU measures are based jointly on Articles 207 and 192 TFEU.[93] In other cases, a

[88] D Simon (2006) *Europe* 12–13.

[89] Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190/1.

[90] Case C-411/06, *Commission v Parliament* [2009], para 52.

[91] Paragraph 60.

[92] Paragraphs 71–72.

[93] Regulation (EEC) No 3254/91 of 4 November 1991 prohibiting the use of leghold traps in the Community and the introduction into the Community of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold traps or trapping

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distinction could also be drawn between different provisions, some of them falling under Article 207 and others under Article 192 TFEU.[94] Last but not least, since the entry into force of the TFEU, the inter-institutional tensions should subside. Admittedly, the procedures for the adoption of acts falling under these two policies are the same, namely the ordinary legislative procedure, albeit minor procedural differences.[95]

V. Environment and CAP

So far, environmental protection has not been numbered amongst the concerns of the Common Agricultural Policy (CAP), the objectives of which are still today of an exclusively economic or social nature. Needless to say, the objectives of Article 39 TFEU require at the very least serious grooming. The first of them, focusing on 'productivity', certainly does not meet current needs since it completely conceals concerns relating to the protection of the environment, consumers, and public health, to mention only the most obvious. Again from an environmental point of view, this objective entirely disregards the more modern functions of agriculture, such as the nature protection function, the improvement of the countryside as well as tourism. Article 39 TFEU also disregards this multi-functional purpose of agriculture which the Union thus seeks to defend and to promote within the ambit of the WTO.[96] The integration clause would thus be nothing other than a last resort which would not make it possible to call into question the productivity focused objectives with regard to agriculture as pursued under Article 39 TFEU. This old-fashioned vision of agriculture is all the more striking since in an increasing number of legal systems agricultural law is day by day taking account of environmental and public health concerns.[97]

That being said, the Court of Justice has relaxed this apparent rigidity within the texts.[98] The broad interpretation of the objectives of the CAP within the context of the protection of public health has thus opened up the way for the adoption of measures of an environmental nature on the base only of former Article 37 EC, which has been replaced by Article 43 TFEU. The CAP has thus

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methods which do not meet international humane trapping standards, OJ L 308/1; Regulation (EC) No 689/2008 of 17 June 2008 concerning the export and import of dangerous chemicals, OJ L 204/1.

[94] In isolating in the act the provisions which are covered by Art 192 from the other provisions, the legislature should be able to draw a clear distinction between the measures falling within the exclusive competence and within the shared competence conferred on the Community by Art 192 TFEU. See Opinion of AG Poiares Maduro in Case C-411/06, *Commission v Parliament* [2009], para 13.

[95] Pursuant to Art 192(1) TFEU, the legislature is called on to consult the Economic and Social Committee and the Committee of the Regions which is not the case under Art 207(2) TFEU.

[96] C Blumann (dir), M Blanquet, DC Le Bihan, A Cudennec, C Maitre, Y Petit, and N Valdeyron, *Commentaire J. Mégret. Politique agricole commune et politique de la pêche* (Brussels: ULB, 2011), 34.

[97] P Jack, *Agriculture and EU Environnemental Law* (Ashgate, 2009).

[98] Case C-405/92, *UK v Council* [1998] ECR 855.

provided an anchor point which measures intended to protect the environment could latch on to. What is more, the Court of Justice ruled that various anticipative protective health measures adopted either by the Commission or by the Council on agriculture could be justified by the precautionary principle encapsulated in the title on the environment.[99] The environment has therefore become a fully-fledged element of agriculture,[100] even though the procedure contemplated under the EC Treaty paid much less attention to the democratic role played by the European Parliament than the TFEU.

This means that regulations pursuing simultaneously objectives of agricultural policy and environmental protection, such as a regulation which limited the use of driftnets and a regulation on agricultural production methods compatible with the requirements of the protection of the environment are rightly covered by the CAP.[101] On the other hand, where an act specifically forms part of environmental policy, it must be adopted on the basis of Article 192 TFEU, even if it pursues the goal of improving agricultural production. This is the case for measures to protect forests against fires and atmospheric pollution.[102] The Court dismissed the view that agricultural policy objectives had any priority over those on environmental policy.

Since the entry into force of the Treaty of Lisbon, these tensions should subside partially because the competences of the European Parliament have been enhanced as the adoption of acts falling under the CAP are subject to the ordinary legislative procedure (Article 43(2) TFEU).[103]

However, the integration clause encapsulated in Article 11 TFEU does not under any circumstances entail that it is acceptable to incorporate all environmental requirements into CAP. In this regard, it is certain that it is not possible to integrate safeguarding mechanisms[104] or the exceptions provided for in relation to environmental policy into CAP.

[99] Case C-180/96P, *UK v Commission* [1996] ECR 3903, para 93; Case C-352/98, P *Bergaderm* [2000] ECR5291, para 53. See N de Sadeleer, *Environmental Principles* (Oxford: Oxford University Press, 1992), 119–21.

[100] Case C-366/00, *Republik Österreich and Martin Huber* [2002] ECR I-7699, para 33. See also Opinion of AG Trstenjak in Case C-428/07, *Mark Horvath v Secretary of State for Environment* [2009], para 55.

[101] Case C-405/92, *Mondiet* [1993] ECR I-6133, paras 25–27; and Case C-336/00, *Huber*, above, paras 25–27.

[102] Joined Cases C-164/97 and C-165/97, *European Parliament v Council* [1999] ECR I-1139.

[103] With respect to CAP, the difficulties in drawing the dividing line between the scope of the ordinary legislative procedure and the *sui generis* procedure conferring on the Council the power 'to adopt measures on fixing prices, levies, aid and quantitative limitations' (Art 43(2)(3) TFEU) should not be underestimated. Indeed, the structure of that provision seems to suggest that para 2 should be interpreted as the main procedure whereas para 3 should be seen as an exception likely to be interpreted narrowly. See R Mögele and F Erlbacher (eds), *Single Common Market Organisation—Article-by-Article Commentary of the Legal Framework for Agricultural Markets in the EU* (CH Beck, Hart, Nomos, 2011), 39–41.

[104] Article 192(5) TFEU.

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VI. Environment and Criminal Law

Under the terms of the EC Treaty, the adoption of technical harmonization rules by the Council acting by qualified majority in co-decision with the European Parliament (first pillar) represented a significant break with the previous arrangements for unanimous voting within the Council (third pillar). Two judgments concerning the fight against pollution have clarified the extent of the Council's competences in criminal matters before these were transferred to the first pillar following the entry into force of the Treaty of Lisbon.[105] In spite of the changes introduced by the new treaty, these judgments continue to arouse interest on a theoretical level.

Since criminal matters fell exclusively under the third pillar, the EC was not competent to harmonize criminal environmental law although most of the national rules were fleshing out EC secondary law obligations. As a result, the Council adopted Framework Decision No 2003/80 on the protection of the environment through criminal law, in particular with a view to countering the designs of the European Commission which had proposed the adoption of a directive with a legal base in Article 175 EC (Article 192 TFEU). In a judgment handed down by the Grand Chamber on 13 September 2005, the Court accepted the Commission's submission, holding that it may adopt harmonization measures 'in relation to the Member States' criminal law' within the ambit of the first pillar.[106]

Following this first judgment, a second case concerning proceedings for annulment was introduced by the Commission against Framework Decision No 2005/667 of 12 July 2005 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution, a framework decision which the Court of Justice annulled two years later.[107]

In these two cases, the Court annulled the framework decisions in their entirety, 'being indivisible'.[108]

By undermining the foundations of the third pillar, the Court has asserted the indispensable nature of the policies contemplated under the first pillar when these permit the adoption of measures 'in relation to the Member States' criminal law'. Having regard to the large scale initiatives by the Member States in tandem with the Council as well as the highly contrasting positions adopted by

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[105] Article 83 TFEU.
[106] Case C-176/03, *Commission v Council* [2005] ECR I-7879, noted by D Simon (2005) *Europe* 13. See H Labayle, 'L'ouverture de la boîte de Pandore. Réflexions sur la compétence de la Communauté en matière pénale (2006) 3–4 *CDE* 379–428; D Pichoustre, 'La compétence pénale de la Communauté' (2006) 12 *JTDE* 15; Peers, 'The European Community's Criminal Competence: The plot thickens' (2008) 33 *ELRev* 399; Hedeman-Robinson, 'The EU and Environmental Crime' (2008) 20 *JEL* 279; P Weneraas, above, 49–50.
[107] Case C-440/05, *Commission v Council* [2007] ECR I-9097.
[108] Case C-176/03, *Commission v Council*, para 54; and Case C-440/05, *Commission v Council*, above, para 74.

the EC institutions regarding the extent of their prerogatives over criminal law matters, these two judgments have profoundly shaken up the European institutional realm.

In these two cases, the Court appears to have taken account of the need to reinforce the effectiveness of the protection given to the numerous harmonization rules, 'non-compliance with which may have serious environmental consequences'.[109]

In its judgment of 13 September 2005, the Court placed the emphasis on the obligation to achieve a high level of protection for this policy, the obligation to incorporate environmental considerations, the need to achieve an essential objective of the European Community, the existence of a specific EU policy in environmental matters, as well as obligations classified as 'essential', 'fundamental and transversal'.[110] It follows from the 'transversal and fundamental' nature of environmental policy that it exercises an attractive force, thus justifying incursions by Community law-makers into areas of competence reserved to the third pillar.

By the same token, in its judgment of 23 October 2007, the Court emphasized the fact that environmental protection 'must be regarded as an objective which also forms part of the common transport policy'.[111]

After having reviewed the classical criteria within its case-law concerning disputes relating to the legal base, such as the determination of the centre of gravity of the measure in question in the light of its purpose and content, the Court recalled that although 'as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence', this reservation does not however prevent 'the Community legislature [. . .] from taking measures which relate to the Member States' criminal law', subject to a number of conditions.[112]

Nevertheless, it follows from these two cases that it was not however possible to harmonize any criminal law provision whatsoever within the ambit of the first pillar. In accordance with the case-law, three conditions must be satisfied.

In the first place, 'the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities' must constitute 'an essential measure' for combating serious environmental offences.[113]

Secondly, the adoption of measures concerning criminal law must 'ensure that the rules which it lays down on environmental protection'[114] or 'in the field of maritime safety'[115] are fully effective. Thus, criminal legislation may only be an

[109] Case C-440/05, *Commission v Council*, above, para 69.
[110] Case C-176/03, *Commission v Council*, paras 41 and 42.
[111] Case C-440/05, *Commission v Council*, above, para 60.
[112] Case C-176/03, *Commission v Council*, above, para 47; Case C-440/05, *Commission v Council*, above, para 66.
[113] Case C-176/03, *Commission v Council*, para 48; Case C-440/05, *Commission v Council*, above, para 66.
[114] Case C-176/03, *Commission v Council*, above, para 48.
[115] Case C-440/05, *Commission v Council*, above, para 69.

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ancillary element of existing Community legislation, and a criminal law of the environmental or transport cannot exist autonomously.

Finally, whilst the first judgment did not rule on the question as to whether Community law may go so far as to impose a minimum threshold for sanctions, leaving to national authorities the task of setting the precise level of punishments, the Court took a clear stance on this question in its judgment of 23 October 2007: the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence'.[116]

Due to the fact that the Lisbon Treaty provides for the incorporation of the third pillar into the first, it will be necessary to see whether this case-law will have an effect on the future exercise by the Council and European Parliament of their competences in criminal matters.

VII. Environment and Nuclear Law

Neither the objectives nor the obligations laid down in the 1957 EURATOM Treaty refer to the protection of the environment. This absence of reference does not preclude the adoption of an authorization scheme aiming at protecting health.[117] In the aftermath of the nuclear accident in Tchernobyl, the Council adopted by a qualified majority on the basis of Article 113 EEC (Article 207 TFEU) a regulation on the conditions governing imports of agricultural products originating in third countries. Contending with that choice, the Hellenic Republic claimed that, by basing the contested regulation on Article 113 EEC, the Council infringed the EEC and EAEC Treaties on the grounds that the regulation was concerned exclusively with the protection of the health of the general public. Accordingly, the regulation should have been based on Article 31 of the EAEC Treaty or on Articles 130r and 130s EEC (Article 192 TFEU). Both the aim and content of the impugned regulation pointed to the rule's primary purpose being to regulate trade between the Community and non-member countries, thus more properly falling within the scope of the CCP.[118] To name another example, in *Chernobyl II*, the European Parliament contended that Regulation No 3954/87 laying down maximum permitted levels of radioactive contamination of foodstuffs and feedingstuffs following a nuclear accident was not legitimately based on Article 31 of the European Atomic Energy Community Treaty (EAEG). In view of the prohibition on marketing contaminated goods, the European Parliament argued that this piece of legislation was an internal market measure which should therefore have been based on Article 100a EC (Article 114 TFEU). However, the Court of Justice held that, according to its objective and its

[116] Case C-440/05, *Commission v Council*, above, para 70.
[117] Case C-29/99, *Commission v Council* [2002] ECR I-11221, paras 75 and 79.
[118] Case 62/88, *Greece v Council* [2002] ECR I-1549, para 16.

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content, the regulation had 'only the incidental effect of harmonizing the conditions for the free movement of goods'.[119] The significance of this judgment lies in the fact that not every harmonization of national product standards should fall within the scope of ambit of Article 114 TFEU.

VIII. Conclusion

By virtue of their cross-cutting nature environmental questions do interact constantly with the internal market (Articles 114 to 118 TFEU), transport (Title VI TFEU), CCP (5th part, Title II TFEU), public health policy (Title XIV TFEU), consumer protection (Title XV TFEU), trans-European networks (Title XVI TFEU), industries (Title XVII TFEU), economic and social cohesion (Title XVIII TFEU) as well as development (5th part, Title III, chapter 1 TFEU). Other policy areas thus do not remain untouched by the treaty obligations to foster sustainable development and to integrate environmental requirements. Accordingly, the application of the centre of gravity test founded on identifying the main and incidental aims and content of the measure is becoming more challenging. Therefore, alongside the harmonization of legislation with a view to facilitating the establishment of the internal market, there is a constant interaction between environmental policy and most policies mentioned in the TFEU. In order to achieve sustainable development in accordance with Article 3(3) TUE, these various EU policies must adopt an environmental dimension.

As discussed above, the question of whether a measure aiming at protecting the environment should be based on Article 192 TFEU is anything but an academic exercise. The choice of the proper legal base has significant repercussions on the institutional equilibrium and on the leeway enjoyed by Member States in implementing EMAs as well as secondary law. In effect, the legal base chosen can be of importance both to setting the content of the EU measure and its implementation in the national law of the Member States. Though a single base is still preferable to multiple bases, it comes as no surprise that the Court of Justice's resistance to dual or multiple legal bases is fading away. Indeed, there is no shortage of acts founded on different legal bases.

Although the *raison d'être* of a flurry of product-oriented and trade-oriented measures clearly is one of improving the state of the environment, they simultaneously pursue environmental and trade objectives which are inseparably linked without one being ancillary to the other.

Whether the proliferation of legal bases is likely to improve the environment remains to be seen. As a matter of fact, there is no shortage of grey areas where the environmental competence ends whereas others begin to unfold.

[119] Case C-70/88, *Parliament v Council* [1991] ECR I- 4561; p 159, noted by N de Sadeleer (1992) 3 *Amén.-Env.* 104.

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Accordingly, other institutional actors—DGs of the Commission, parliamentary committees, Councils—than the traditional environmental protagonists[120] would be eager to be involved in the decision process. In spite of the improvements from the Lisbon Treaty, the conflicting views on identifying the centre of gravity of measures linked to the aim of environmental protection are likely to continue. Needless to say, Case C-411/06 on the legal base of the regulation on the transfrontier movement of waste precludes all hope of a much-awaited peace agreement on this matter. Perhaps the front-line victim of such drawn-out conflict is the credibility of the EU environmental governance.

The table below sets out the main policies which act as the cornerstones for environmental protection, their legal bases as well as the applicable procedures.

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[120] Though the EU institutions do not have any special features of note with regard to the environment, it must be noted that different institutions have had to come up to speed. The European Council has been increasingly active in addressing climate change issues. The Environment Council meets in principle once every three months. It includes the ministers or secretaries of state with responsibility for environmental protection. The European Parliament boasts a Committee on Environment, Public Health and Food Safety (ENVI). Last but not least, since it is responsible for submitting legal acts to the Council and to the Parliament or for controlling the proper application of environmental law, the Commission occupies a central position within the institutional framework. Since 1978, the Commission has set up a directorate general with responsibility for this portfolio and a commissioner has been granted specific responsibility for these questions. Since 2009, due to the specific features of the Climate Action brief, another commissioner has been placed in charge of a specific policy concerning the fight against global warming. Acting under the authority of these two commissioners, two directorates-general are fulfilling an essential administrative role.

Legal bases of pieces of legislation contributing to the protection of the environment

Policies	Scope of the measures	Legal bases	Procedures	Illustrations
CAP	Production and trading in agricultural products	Article 43 TFEU Article 37 EC	OLP or SLP	Chapter 1, Title II of Regulation (EC) No 1782/2003 establishing common rules for direct support schemes under the common agricultural policy
Transport	Maritime and air transport	Article 100 TFEU Article 80 EC	OLP (Article 294 TFEU; Article 251 EC)	Directive 2002/30/EC on the establishment of rules and procedures with regard to the introduction of noise-related operating restrictions at Community airports Regulation 417/2002/CE on the accelerated phasing-in of double hull or equivalent design requirements for single hull oil tankers
Approximation of provisions on indirect taxation	Harmonization of indirect taxes	Article 113 TFEU Article 93 EC	SLP	Proposed Directive on CO2 taxation
Internal Market	Establishment and functioning of the internal market	Article 114 TFEU Article 95 EC	OLP (Article 294 TFEU; Article 251 CE)	Product standards regarding chemical substances, biocides, GMOs, etc.
CCP		Article 207(4) TFEU Article 133 (4) EC	OLP (294 TFEU; 251 EC)	Regulation (EC) No 2173/2005/EC establishing a licence scheme for the import of timber into the European Community.
Health	Veterinary and phytosanitary measures	Article 168(4) b) TFEU Article 152(4) b) EC	OLP (Article 294 TFEU; Article 251 EC)	Regulation (EC) No 1774/2002/EC laying down health rules concerning animal by-products not intended for human consumption
Environment	General measures	Article 192 (1) TFEU Article 175(1) EC	OLP (Article 294 TFEU; Article 251 EC)	Quality standards, Emission standards, operating standards, listed installations authorization schemes

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Policies	Scope of the measures	Legal bases	Procedures	Illustrations
Environment	Harmonization touching upon Member States' residual powers	Article 192 (2) TFEU Article 175(2) EC	SLP	Provisions primarily of a fiscal nature, town and country planning, quantitative management of water resources, land use
Environment	General policy programmes	Article 192 (3) TFEU Article 175(3) EC	OLP (Article 294 TFEU; Article 251 EC)	Sixth Action programme
Environment and CCP		Articles 192(1) and 207(4) TFEU Articles 175(1) EC et 133(4) EC	OLP (Article 294 TFEU; Article 251 EC)	Regulation (EC) No 842/2006/EC on certain fluorinated greenhouse gases and Regulation 689/2008/CE concerning the export and import of dangerous chemicals
Environment and development cooperation		Articles 192(1) and 209 TFEU Art. 175 et 179 EC	OLP (Article 294 TFEU; Article 251 EC)	Regulation (EC) No 2494/2000/CE on measures to promote the conservation and sustainable management of tropical and other forests in developing countries
Environment and incidentally internal market		Article 192 (1) as well as for a number of provisions Article 114(1) TFEU Article 175(1) EC et and Article 95 (1)EC	OLP (Article 294 TFEU; Article 251 EC)	Directive 2009/28/EC on the promotion of the use of energy from renewable sources
Internal market and CCP		Article 114 TFEU Article 95 EC Article 207(4) TFEU	OLP (Article 294 TFEU; Article 251 EC)	Council Decisions on the conclusion of the agreements prohibiting the use of leghold traps

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Policies	Scope of the measures	Legal bases	Procedures	Illustrations
Agriculture, Internal market and health		Articles 43(2), 114 et 168 (4) b) TFEU Articles 37(2), 95 and 154(4) b) EC	OLP (Article 294 TFEU; Article 251 EC)	Regulation (EC) No 1107/2009/EC concerning the placing of plant protection products on the market
Agriculture, CCP and environment		Articles 43(2), 207(4) and 192(1) TFEU Articles 43, 133 and 175 EC	Council	Decision 98/392/EC concerning the conclusion by the EU of UNCLOS

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