REGIONAL AFFAIRS

EU

Trade v. Environmental Law

– The Fable of the Earthen Pot and the Iron Pot –

by Nicolas de Sadeleer*

Text of a speech delivered at the Haub Award ceremony (p 16) in honour of the Haub Laureate, the late Marc Pallemaerts.

The 2013 Elizabeth Haub prize was awarded to Mr Pallemaerts in recognition of his extensive and outstanding contributions to the development of environmental law at international, EU and municipal levels. Unfortunately, the recipient passed away a few months before the award ceremony took place at the University of Stockholm. I've been asked by the jury to hold the speech Marc had to give. As one of Marc's former colleagues, I regularly discussed with him in Brussels the clash between environmental law and trade law, in particular with respect to EU legal issues. Thanks to Marc's critical analyses of EU chemical and water legislation,[1] I became much more aware of the laborious task of reconciling environmental law and trade law. His sharp views on the matter have been of utmost importance in the course of my academic work.

The relationship between economic integration and environmental protection has always been fraught with controversy. It has been argued that trade liberalisation and free competition increase the wealth of trading nations so they are able to afford to implement environmental policies. On the other hand, economic growth at all costs may result in greater pressures on ecosystems. Despite the progresses that were made in the course of three decades, the results of environmental policy across Europe have at the very least been muted.

One of the main difficulties environmental law has been facing is related to the fact that the legal order of the EU is conceptualised in terms of economic integration. At the core of economic integration lies the internal market that is based on the free movement provisions promoting access to the different national markets, and on the absence of distortions of competition. It is the aim of this article to explore some of the key issues arising in this discussion.

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Clashes between Environmental Law and the Internal Market

The relationship between trade and environmental issues is somewhat different at EU level than in the World Trade Organization (WTO). The internal market and environmental policy have traditionally focused on opposite, albeit entangled, objectives: deregulation of national measures hindering free trade, in the case of the internal market, and protection of vulnerable resources through regulation, in the case of environmental policy. In other words, whereas the internal market is concerned with liberalising trade flows, environmental policy encourages the adoption of regulatory measures that are likely to impact on free trade. In addition, the internal market favours economic integration through total harmonisation (setting up a common playing field) whilst environmental law allows for differentiation.

These differences play themselves out in concrete disputes, ranging from the use of safeguard clauses in order to ban GMOs to restrictions placed on additives in fuels.[2] In these clashes, the internal market has an advantage based on its seniority. Freedoms in trading in services and goods are ingrained in the EU's DNA. By way of illustration, the principle of free movement of goods flowing from Articles 34 and 35 of the Treaty on the Functioning of the European Union (TFEU) has been proclaimed by the Court of Justice as a fundamental principle of EU law. It follows that the environmental and health exceptions to this fundamental principle must be interpreted restrictively. What is more, traders can invoke the economic rights enshrined in the EU Treaties before their domestic courts whereas the victims of pollution are deprived of a right to environmental protection stemming from the EU Treaties. The relationship is thus asymmetrical. In addition, internal market law empowers the European Commission to control the Member States wishing to adopt specific or more stringent environmental standards (prior notification and authorisation procedures under TFEU Article 114). By contrast, national authorities are known to be reluctant to implement genuine EU environmental instruments. It is necessary to face hard facts: as recognised by the Commission, the main weakness of EU rules is their lack of efficacy, with directives appearing as paper tigers due to (i) the hesitancy, criminal activities or even bad faith, on the part of certain national authorities; and (ii) the difficulties encountered by the

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European Commission in pursuing infringements before the Court of Justice.

In sum, the relationship between internal market law backed by a powerful business constituency, and environmental policy supported by a diffuse public is somewhat asymmetrical.

The Rise of Product Standards and the Risk of Hindering Free Trade

Though environmental issues encompass a broad range of measures – regulation in areas including fisheries, marine pollution, climate change, cross-compliance in agriculture, listed installations, and wildlife conservation[3] – the tensions between these regulations and trading interests are likely to become more severe where the public authorities, whether at international or municipal level, are laying down product standards and waste management requirements.

In spite of the fact that industrial and energy production still remains an important source of pollution in the EU, the rise in consumption of products and services by European consumers has increased pressure on the environment. Throughout their life cycle, all products cause environmental degradation in some way. Depending on their composition, their production method, and how they are transported, used, consumed, re-used, recycled or discarded, any product can become a source of pollution. The environmental impacts of products have thus been progressively regulated at a national level, although many of these standards (addressing chemicals, pesticides, biocides, *etc*.) are derived from EU secondary law. For instance, EU regulations set out the sulphur or lead content of petrol, the list of chemical substances which may not be sold, as well as imposing restrictions relating to the composition of packaging, the phosphate content of detergents, and the maximum noise level for some types of appliance. Where the EU institutions might be unable to develop a genuine product policy, however, the Member States will have to do the job with the aim of boosting energy efficiency, renewables, recycling, re-use of discarded products, *etc*. Accordingly, by virtue of their cross-cutting nature, these national environmental standards constantly interact with the internal market.

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

Should such domestic rules be swept aside by the fundamental principles of free movement of goods and services? Given that the Treaty provisions on free movement have to be construed broadly, are the Courts called upon to interpret narrowly those environmental measures caught by the TFEU provisions on free movement of goods and services? Does internal market law hang like a Damoclean sword over every genuine national environmental measure?

In light of the sheer complexity of the EU integration process, the answers to these questions are rather nuanced. As a matter of law, there are two ways to ascertain the compatibility of environmental measures taken by Member States with fundamental economic freedoms enshrined in the EU Treaties: negative and positive harmonisation. However, before commenting upon these two categories of harmonisation, attention should be drawn to the improvements brought by the Treaty of Lisbon, which in 2009 amended the former EU Treaties.

Treaty of Lisbon, the Path toward Reconciliation

Given that the EU started off as a markedly economic project, it expressly adopted an environmental protection policy only in 1987. Today, thanks to changes to the original treaties, a broad range of objectives and obligations – integration clauses, policy principles, fundamental rights, sustainable development and protection – are enshrined in the Treaty on the EU (TEU), the TFEU and the Charter of Fundamental Rights. As such, they occupy a high place in the hierarchy of EU norms. For instance, although TFEU Article 191 instructs the Union to aim at a high level of environmental protection and lists the main principles of EU environmental law (such as the precautionary principle and the polluter-pays principle), it is not the only source of such an objective. The other instruments' provisions empower EU institutions to adopt harmonised rules with a view to protecting the environment. What is more, environmental policy is not locked into clinical isolation: under TFEU Article 11, environmental protection requirements are to be integrated into the definition and implementation of the Union's policies and activities. Moreover, sustainable development is enshrined in TEU Article 3(3) as one of the key objectives of the EU legal order. From the perspective of sustainable development, the concept of the environment has, in addition to its hard core, an economic dimension as well as a social dimension.

Negative Harmonisation

In granting greater importance to environmental values, the Court of Justice could be influential in reconciling trade and environmental interests. In the absence of harmonisation through directives or regulations (*e.g*., risks stemming from nanotechnologies are not regulated at EU level), or if harmonisation by EU measures is not deemed to be complete (*e.g*., trade in wildlife), the TFEU provisions on free movement of goods and of services are directly applicable (negative harmonisation). These provisions prohibit Member States from restricting free movement of goods (TFEU Articles 28, 30, 34, 35 and 110) or services (TFEU Article 56). Accordingly, domestic environmental measures must ensure that the economic freedoms are not breached. The scope of these rules tends to differ according to the legal category to which they belong: to each barrier

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to the free movement of goods and services, there is a corresponding prohibition governed by specific rules.[4]

However, the TFEU and case law allow Member States to maintain or adopt domestic restrictive measures that differ from those of other Member States insofar as they are deemed to be justified and proportional. With respect to the free movement of goods, for instance, TFEU Article 36 expressly allows national measures aiming at the protection of plants and animals.

That said, attempts by EU as well as national courts to reconcile the conflicts between these fundamental freedoms and environmental protection have not always been characterised by coherence. The overall impression generated by the heterogeneity of cases adjudicated so far, ranging from green certificates, public procurements, renewables, recycling, pesticides, to the conservation of biodiversity, is one of confusion. Case law has thrown up more questions than it resolves on issues such as the validity of eco-taxes, measures having an extra-territorial dimension, measures restricting the use of products, and the scope of mandatory requirements.[5]

The iron pot and the earthen po

Nonetheless, lawyers have been noticing a change of emphasis within the case law of the Court of Justice of the EU. For convenience, we have chosen but a few examples related to measures enacted by the Danish and the Swedish authorities.

Consider, for the sake of illustration, the judgment of the Court of Justice of the EU in the *Bluhme* case.[6] Regarding the prohibition laid down by the Danish nature conservancy authorities regarding the importation of bees onto the island of Laesø, the Court considered that "measures to preserve an indigenous animal population with distinct characteristics contribute to the maintenance of biodiversity by ensuring the survival of the population". The judgment has thrown into relief the importance of biodiversity, given that the Court considered that "the establishment . . . of a protection area within which the keeping of bees other than Laesø brown bees is prohibited" owing to the recessive character of the latter's genes, constitutes an appropriate measure in relation to the aim of biodiversity conservation. It held, in addition, that the population of bees at risk need not face an immediate danger of extinction in order for the exception to be justified.

Another case in point is the *Swedish Watercraft* case.[7] This came to the Court in the course of criminal proceedings brought by the Swedish Prosecutor's Office against two jet-skiers for failure to comply with a prohibition on use of personal watercraft. The challenged measure was a general prohibition, mitigated by a regime of exceptions, on using watercraft in Sweden, apart from on specially designated waterways. The possibilities for use of the watercraft were extremely marginal at the time the questions were referred to the Court. Addressing the justification of regulations on the use of watercraft in Sweden, the Court reached the conclusion that the measure under review was justified by the objective of environmental protection as well as the protection of health and life of humans, animals and plants. The parties argued that the Swedish authorities could have chosen a less severe regime which would in principle permit the use of such craft, provided that they were not used in areas considered to be sensitive, such as a limited number of nature sanctuaries and bathing areas. The Court held that this alternative was not as effective as the prohibition ultimately put in place. In other words, restricting the use of watercraft to a limited number of designated waters is appropriate, when done for the purpose of protecting the environment.[8]

More recently, in both *Alands Vindkraft* and *Essent Belgium*,[9] the Court was called on to assess regional support schemes providing for the issuance of tradable green certificates in the region concerned for facilities producing electricity from renewable energy sources. Could this be compatible with the free movement of goods? At the outset, these schemes were running counter to the internal market, given that they were precluding the competent authorities to take account of guarantees of origin originating from other Member States of the EU and from States which are parties to the Agreement on the European Economic Area (the EEA Agreement). The Court took the view that territorial limitation requirements, which limited the country's ability to issue foreign green certificates for the electricity produced abroad, were necessary in order to attain the objective promoting the use of renewable energy sources. In particular, the Court highlighted the difficulty of determining the nature and origin of electricity once it has been allowed into the transmission or distribution system. Accordingly, the national schemes were deemed to be compatible with the internal market rules.

These developments in the case law have come about due to the fact that the EU Treaties, as discussed above, have struck a better balance under TEU Article 3(3) between the internal market and sustainable development; two objectives that have been placed on an equal footing. Given that the EU's goals are no longer solely economic, but also environmental, the proper functioning of the internal market must be accommodated with non-market values. The recognition of the environmental objective as an essential value has thus not been neutral.

Positive Harmonisation

Second, instead of being at odds with one another, the two policies can also support each other through the adoption of harmonised EU standards integrating the

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environmental dimension. Accordingly, regulation of products and services impairing the environment is often governed by directives or regulations adopted by the EU institutions, within the framework provided for in the TFEU (positive harmonisation). For instance, harmonisation of national rules on the marketing of many products – such as dangerous substances, fertilisers, insecticides, biocides, GMOs, cars, trucks, aircraft, watercraft, or electric and electronic equipment – on the basis of the internal market competences creates a precise legal framework limiting Member States' ability to lay down their own product standards. The free discretion of national authorities will be limited as harmonisation deepens.

Provided that the EU institutions are committed to achieve a high level of environmental protection, the advantages entailed by internal harmonisation are undeniable. Firstly, for producers and distributors, it allows the setting, on the scale of the internal market, of environmental standards which then govern the marketing of products and services as well as their free circulation within that market. Given that positive harmonisation determines the room left to the Member States for manoeuvre more precisely than a changeable adjudicatory approach, it is preferred to negative harmonisation. Secondly, as far as environmental product standards are concerned, harmonisation by EU law makers appears to be preferable to a changeable adjudicatory approach where the courts have to review the justification and the proportionality of an array of domestic measures. Thirdly, harmonisation is likely to reconcile the environmental concerns with the internal market imperatives. For instance, environmental measures may benefit from the harmonisation of 28 different legal systems with a view to guaranteeing the free movement of goods and services as well as a high level of protection; the global level of environmental protection should be reinforced as a result. Fourthly, paragraph 3 of TFEU Article 114 obliges EU institutions, in the course of establishing the internal market, to pursue a higher level of protection "concerning health, safety, environmental protection and consumer protection". While the level of protection guaranteed under EU law does not necessarily have to be the highest possible, this does not mean that it is non-existent, weak, feeble or even intermediate. In addition, this obligation is subject to judicial review.

However, despite the efforts of the EU institutions, the harmonisation of standards is far from perfect. Harmonisation measures have been piled one on top of the other without any global vision. The instruments are subject to constant adjustment not only to scientific and technical progress, but also to decisions taken on an international level. Many product categories have not yet been harmonised. The structuring of EU legislation is inspired less by the model of the symmetrical arrangement of French-style gardens familiar to the 17th century landscape gardener André Le Nôtre, and rather more by the composition of a typical English park. This heterogeneity can end up leaving national authorities, businesses, and civil society utterly nonplussed.

As a result, environmental protection levels still vary significantly from one Member State to another. Yet, if the recipient State is less permissive than the exporting State, the former will hinder free circulation of goods and services even if it does not provide for any difference of treatment between domestic and imported products and services. In such cases, the courts are called on to review the justification and the proportionality of the domestic measures at issue.

Challenges Ahead: Rolling Back Environmental Legislation and Cutting Red Tape

One has to be aware that the EU is less likely in any near future to commit itself to fostering ambitious environmental policies. In effect, it is when the legal principles underlying this branch of law are enunciated by the Courts when ruling on hard cases, and when the values are most clearly proclaimed in both the TEU and TFEU, that the EU legislative output in environmental protection matters falters.

Since the early 1990s, there has been a marked reduction of proposed environmental legislation. The reduction in quantity of legislation went in parallel with a reduction of the binding character of new EU secondary law obligations. There has been, moreover, a marked tendency not to set out common environmental standards, such as emission values – no willingness to fix limit values for discharges of hazardous substances into waters.

Lately, it appears that environmental law is being sacrificed to recent political developments – *e.g.*, Better Regulation, Smart Regulation, REFIT,[10] *etc*. – under which, according to the logic of deregulation, the law was called upon to climb down from its pedestal in order to engage with market requirements. The creed is to get rid of "burdensome regulation and red tape".[11] Environmental and health regulations are seen as regulatory burdens jeopardising "the competitiveness and innovativeness of European industries".

As a result, environmental law no longer takes the form of a system of unilateral constraints which imposes on society a definition of the common good or the general interest. It is felt that it should be merely soft law. Public law constraints are simply one of many instruments, the role of which is in any event called into question.

To make matters worse, with the new Junker Commission, deregulating appears to be more fashionable in Brussels than ever. The President of the European Environmental Bureau recently stressed that this is the "biggest reorientation away from environmental priorities in decades", noting that "[t]he audacity of the attack on environment through the set-up of the new Commission has been breathtaking".[12] With a striking rise in temperatures, this picture is somewhat bleak to say the least.

This far-reaching (smart) policy calls into question the traditional functions of the State, and trumps the constitutional duties laid down under EU treaty law. Needless to say, the filtering process envisioned by the new European Commission is not only flawed from a legal perspective where it leads to a genuine deregulatory trend, it is also a serious economic mistake. Tougher harmonised regulations on products, renewables, nature conservation, and energy efficiency are not only good for the environment

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but also for the competitiveness of the Member States' economies. By way of illustration, air pollutants are responsible in the EU for more than 400,000 premature deaths[13] and up to €940 billion in health costs per year. Accordingly, tougher regulations on air pollution would not only save lives, but also boost the economy. By the same token, several authorities complain that the Natura 2000 network hinders economic development – a statement that has not been supported by any serious economic studies. These criticisms are leaving aside the economic benefits – ecotourism, rural development, ecosystem services, *etc*. – of such nature conservation policy. In order to be viable, tomorrow's economy should definitively be green. To take the opposite view would bring us into mayhem.

What is more, the trade and environment issue is already gathering momentum on both sides of the Atlantic, given that environmental issues are likely to become one of the stumbling blocks in the negotiation of the Transantlantic Trade and Investment Partnership (TTIP) Agreement,[14] which is likely to entail the harmonisation or the mutual recognition of a broad range of product standards. As a result, this forthcoming trade agreement might affect the balance hitherto struck by the EU Treaties and the Court of Justice. However, the future agreement cannot undermine the balance struck in the EU Treaties. Environmental protection is not only a core objective of the EU but has also been placed in the founding Treaties of the EU on an equal footing with economic growth and the internal market.

Conclusions

The EU internal market is by its very nature not particularly susceptible to strong State regulation, which generally calls for the implementation of policies with the goal of protecting vulnerable environmental media such as aquatic ecosystems undergoing radical changes due to eutrophication, or species threatened with extinction. Although the Lisbon Treaty called for a more nuanced approach, Treaty law remains strongly wedded to a hierarchy of values favouring economic integration. In addition, whether the EU institutions are able to reconcile trade and environmental interests in secondary legislation remains to be seen.

To conclude, we should keep in mind Jean de Lafontaine's fable on the iron pot and the earthen pot. Though they have to venture in the world tight together, "*clopint clopant comme ils peuvent*", at the end of the journey, the iron pot shatters the clay pot. In the light of recent political developments, it is fair to ask ourselves: would trade interests – the iron pot – hit environmental law – the earthen pot – so hard that the latter would be "dashed to bits", "before we can complain"?

Marc Pallemaerts would surely have reminded us of the warning that Lafontaine gave us:

Take care that you associate
With equals only, lest your fate
Between these pots should find its mate.

Notes

1 Pallemaerts, M. 2002. *Toxics and Transnational Law*. Oxford: Hart Publishing.
2 For a comprehensive overview of the EU case law on environment and trade disputes, see http://www.tradeenvironment.eu/documents-case-law/.
3 De Sadeleer, N. 2014. *EU Environmental Law and the Internal Market*, at 175–224. Oxford: Oxford University Press.
4 As to the extent to which environmental measures are caught by these economic freedoms, see *ibid*., at 229–469.
5 *Ibid*., at 314–320.
6 Case C-67/97 *Criminal proceedings against Ditlev Bluhme* ("Laesø bees") (1998) ECR I-8033, para. 33.
7 Case C-142/05 *Mickelsson and Roos* ("Swedish Watercraft") (2009) ECR I-4273.
8 *Ibid*., para. 34.
9 Case C-573/12, *Alands Vindkraft* (2014); Joined cases C-204/12 to C-208/12 (2014), *Essent Belgium NV v. Vlaamse Reguleringsinstantie voor de Elektriciteits - en Gasmarkt*.
10 Communication from the Commission on the Regulatory Fitness and Performance Programme, COM(2014)368 final.
11 European Commission. 2006. *Better Regulation – simply explained*. Luxembourg: Office for Official Publications of the European Communities.
12 Wates, J. 2014. "Regulatory Rollback Rampage". *Metamorphosis* 73: 1–2.
13 EEA. 2007. *Europe's Environment: The Fourth Assessment*, at 73. Copenhagen: EEA.
14 Directives of 17 June 2013 for the negotiation on the Transatlantic Trade and Investment Partnership between the European Union and the United States of America, ST 11103/13 RESTREINT UE/EU RESTRICTED.

UNECE / Aarhus Convention

Parties Adopt Maastricht Declaration

by Elsa Tsioumani*

The fifth session of the Meeting of the Parties (MoP-5) to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)[1] and a series of associated meetings were recently held in Maastricht, the Netherlands. MoP-5 convened 30 June–1 July 2014; the second session of the meeting of the Parties to the Protocol on Pollutant Release and Transfer Registers (PRTRs) was held 3–4 July; and the two sessions' joint High-level Segment was held on 2 July.[2] At the High-level Segment, Parties adopted the Maastricht Declaration on transparency as a driving force for environmental democracy. The 45th meeting of the Convention's Compliance Committee (which is the source of the compliance recommendations considered by MoP-5), took place 29 June–2 July 2014.[3]

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