

EU Environmental Law and the Internal Market

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Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

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First Edition published in 2014

Impression: 1

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Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013949376

ISBN 978-0-19-967543-2

Printed in Great Britain by
CPI Group (UK) Ltd, Croydon, CR0 4YY

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General Introduction

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

Driven by fear of a disintegration of the internal market, concerns over portraying a less mercantile image of the EU, as well as the intention of safeguarding ecosystems and species under threat, a European environmental policy has thus gradually emerged. Although not mentioned in the 1957 Treaty of Rome, environmental concerns have, through various Treaty reforms, gradually been able to establish themselves as one of the primary values enshrined in the Treaties. Henceforth, environmental protection is not only a core objective of the Union but has also been placed on an equal footing with economic growth and the internal market. As far as secondary law is concerned, environmental issues also made headway. At first an obscure field in the 1970s, and having long remained the preserve of engineers and biologists, this policy and the law to which it gave rise have ended up asserting themselves both on public and private actors. Starting with a range of action programmes, EU 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 regulatory measures; that is, around 8 per cent of EU law.¹ Several EU agencies, 28 Member States, three European Free Trade Area (EFTA) States, hundreds of regions and Länder, and thousands of municipalities now implement EU secondary environmental law through a complex web of regulation that affects virtually every aspect of our lives.

Thanks to EU environmental law, much has been achieved over the last 30 years: bans on lead in petroleum products, the phasing-out of ozone-depleting substances, a reduction in nitrogen oxide emissions from road transport, improvements in wastewater treatment and water quality, a reduction in acidification, and improvements to some aspects of air quality.² This significant progress demonstrates that environmental policy and law do work. Even though recent years have seen a decline in legally binding instruments in favour of 'voluntary' agreements and the abandonment of a sectoral

¹ Given that the scope of environmental policy is dogged with controversy, the precise number cannot be precisely determined. According to the Directory of EU legislation in force, on 1 September 2010 there were 113 regulatory acts directly regulating chemicals, 365 acts addressing the wider area of pollution and nuisance, and a total of 1,321 covering the broader environmental realm. See also L. Krämer, '30 Years of EC Environmental Law: Perspectives and Prospectives' (2002) 2 *YbEEL* 160.

² European Environment Agency (EEA), *The European Environment. State and Outlook* (Copenhagen: EEA, 2005) 19.

approach in favour of a more global dimension, EU environmental law should continue to play a significant role over the course of this century.

However, despite the earlier progress that was made, the results of this policy have at the very least been muted.³ EU environmental and national policies are still facing a daunting agenda of unfinished business⁴ as well as a swathe of new challenges. By way of illustration, air pollution still reduces life expectancy significantly,⁵ major rivers are still heavily polluted, the 2010 biodiversity conservation targets have not been met,⁶ and the amount of waste is increasing.⁷ As regards new challenges, the most pressing is that of climate change, the impact of which is becoming ever more frequent. Indeed, the overarching target to limit climate change to temperature increases of less than 2°C globally during this century⁸ is unlikely to be met, in part because of greenhouse gas emissions from other parts of the world.⁹ A closer look at greenhouse gas emissions within the EU reveals mixed trends: whereas emissions from large point sources have been reduced, emissions from some mobile and diffuse sources, especially those which are transport-related, have increased substantially.¹⁰ To make matters worse, every step forward—such as reductions in industrial pollution—appears to be cancelled out by the appearance of new phenomena—mass consumption, more diffuse sources of pollution proving more difficult to control—or unforeseen risks—biotechnology, nanotechnology, endocrine disruptors, etc. The deteriorating situation thus requires lawmakers constantly to return to the drawing board for solutions.

In view of the cultural, social, and economic impact of environmental policy, the relations between Treaty law and secondary environmental law have been subject to intense debate in the academic literature for over a decade, fuelled by a swathe of specialist law journals and various associations of lawyers.¹¹

³ EEA, *Europe's Environment. The Dobbris Assessment* (Copenhagen: EEA, 1995) 599–611; EEA, *The European Environment. State and Outlook* (Copenhagen: EEA, 2005) 18, 20, and 30; EEA, *Europe's Environment. The Fourth Assessment* (Copenhagen: EEA, 2007) 22; European Commission, Environment Policy Review 2008, COM(2009) 304; EEA, *Progress Towards the European 2010 Biodiversity Target* (Copenhagen: EEA, 2009) 17–21; EEA, *The European Environment 2010. State and Outlook* (Copenhagen: EEA, 2010) 15; OECD, *Environmental Outlook to 2050* (Paris: OECD, 2012).

⁴ Within a single sector, the trends can be mixed: some pollutants might be declining whilst others are increasing. The stabilization of the total amount of mineral nitrogen fertilizer consumption is a good case in point in that respect. See the Report of the Commission on implementation of Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources based on Member State reports for the period 2004–2007, COM(2010) 4 final.

⁵ EEA, *Europe's Environment. The Fourth Assessment* (Copenhagen: EEA, 2007) 73.

⁶ The Commission as well as the EEA have repeatedly acknowledged that the EU was unable to achieve its global target of significantly reducing biodiversity loss by 2010. Eg European Commission, A mid-term assessment of implementing the EC Biodiversity Action Plan, COM(2008) 864 final; European Commission, Communication on options for an EU vision and target for biodiversity beyond 2010, COM(2010) 4 final; EEA, *Progress Towards the European 2010 Biodiversity Target* (Copenhagen: EEA, 2009); EEA, *The European Environment 2010* (n 3), 49–50.

⁷ EEA, *The European Environment 2010* (n 3), 71–5.

⁸ Communication from the Commission, 20 20 by 2020, Europe's climate change opportunity, COM(2008) 30 final.

⁹ EEA, *The European Environment 2010* (n 3), 27.

¹⁰ EEA, *The European Environment 2010* (n 3), 34.

¹¹ Eg the *International Yearbook of Environmental Law*, the *Yearbook of European Environmental Law*, the *Yearbook of International Environmental Law*, the *European Environmental Law Journal*...

However, despite the attention devoted to them,¹² these rules still come across as a regulatory jungle. Both their mutual intertwining as well as their technical or scientific nature give even the most rash of lawyers reason to pause. One of the main difficulties environmental law has been facing in the EU is related to the fact that the legal order of the EU was originally conceptualized in terms of economic integration, and had no regard for the precarious state of natural resources and *res communes*, for which we are accountable to future generations.

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 distortion of competition. The relationship between that form of economic integration and environmental protection has always been fraught with controversy. It has been argued that trade liberalization 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. Moreover, 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 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 liberalizing 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 harmonization whilst environmental law allows for differentiation. To make matters more complicated, the relationship between the internal market and the environment has always been asymmetrical.

Given that environmental issues encompass a broad range of measures ranging from green energy, regulation of fisheries, cross-compliance in agriculture, product policy, waste management, or wildlife conservancy, the tensions with trading interests are likely to vary considerably depending on the regulation at issue. That said, the tensions between the two policies have been smoothed out through a mix of complementary means. On the one hand, an innovative interpretation of Treaty provisions enshrining economic freedoms has offered some leeway to national environmental agencies ('negative harmonization'). On the other hand, the two policies can also support

¹² P. Davies, *EU Environmental Law* (Farnham: Ashgate, 2006); N. de Sadeleer and C.-H. Born, *Droit international et communautaire de la biodiversité* (Paris: Dalloz, 2004); N. de Sadeleer, *Commentaire Mégret. Environnement et marché intérieur* (Brussels: ULB, 2010); A. García Ureta, *Derecho Europeo de la Biodiversidad* (Madrid: Gomez-Acebo & Pombo, 2010); C. Hilson, *Regulating Pollution: A UK and EC Perspective* (Oxford: Hart, 2000); J. H. Jans and H. Vedder, *European Environmental Law*, 4th edn (Groeningen: Europa Law, 2012); L. Krämer, *EC Environmental Law*, 6th edn (London: Sweet & Maxwell, 2007); M. Lee, *EU Environmental Law. Challenges, Change and Decision Making* (Oxford: Hart Publishing, 2005); E. Louka, *Conflicting Integration. The Environmental Law of the EU* (Antwerp: Intersentia, 2004); P. Pagh, *EU MiljøRet* (Copenhagen: C. Ejler, 1996); V. Plaza Martín, *Derecho ambiental de la Unión europea* (Valencia: Tirant Lo Blanch, 2006); A. M. Moreno Molina, *Derecho comunitario del medio ambiente* (Madrid/Barcelona: Marcial Pons, 2006); J. Scott, *European EU Environmental Law* (London: Longman, 2001); J. Scott (ed.), *Environmental Protection. European Law and Governance* (Oxford: OUP, 2009); P. Thieffry, *Droit de l'environnement de l'UE* (Brussels: Bruylant, 2011). With respect to EU case law, see W. Douma (ed.), *European Environmental Case Law* (The Hague: Asser Instituut, 2002); L. Krämer, *Casebook on EU Environmental Law* (Oxford: Hart Publishing, 2002).

each other through the adoption of harmonized EU standards integrating the environmental dimension ('positive harmonization'). Needless to say, lawmakers and courts are always likely to face the need to reconcile the irreconcilable.

The confrontation between ecological imperatives and economic integration justifies a detailed examination of the compatibility of environmental protection regimes with the internal market. Informed by the desire to clarify and systematize, this book will attempt to set out in a concise manner the environmental protection rules contained in the Treaties and in key secondary legislation and the ways in which they interact with the internal market and competition law. Accordingly, the book will place particular emphasis on the compatibility of EU and national environmental protection measures with the provisions of the TFEU on the free movement of goods and services, the freedom of establishment, as well as freedom of competition. In particular, it sheds light on the ways in which EU Courts are trying to reconcile internal market obligations with environmental concerns.

The discussion will be structured as follows.

With the entry into force of the Treaty of Lisbon on 1 December 2009, environmental issues are not only cutting across traditional boundaries of 'official' disciplines, but are also entangled with other non-tradable interests, such as consumers and health concerns, which have been gathering momentum in EU Treaty law. Part I of the book will thus consider the place occupied by a broad range of objectives and obligations—sustainable development, high-level protection, integration clauses, policy principles, and fundamental rights—that are enshrined in the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the Charter of Fundamental Rights, and the European Convention on Human Rights (ECHR). It is suggested in Chapters 1 and 2 that this flurry of Treaty obligations contributes to an equilibrium between the economic core of EU integration and environmental concerns. In addition, environmental policy must be considered in its own rights. In order to define the objectives, principles, and decision-making procedures characteristic of EU environmental policy, the TFEU includes a title specifically dedicated to environmental policy. Chapter 3 is dedicated to the Treaty provisions that empower EU institutions to adopt harmonized rules with a view to protecting the environment. As will be seen, these measures can be related either to internal market policy (Art. 114 TFEU) or to the environmental policy (Art. 192 TFEU). Chapter 4 will set out in a concise manner the main environmental protection measures in key secondary legislation.

Part II will place particular emphasis on the compatibility of environmental protection measures with a number of key TFEU provisions on the free movement of goods and services, as well as freedom of establishment. The focus of this part is on the case law regarding consistency of environmental measures with Articles 28–30, 34–36, 49, 56, and 110 TFEU. Account must also be taken of the fact that several Treaty provisions require the EU institutions to take into account environmental requirements while establishing the internal market. Consequently, Part II will also consider the place occupied by environmental issues within the internal market. It will focus, in particular, on the scope of Articles 26 and 113–114 TFEU.

Part III will provide an in-depth analysis of the compatibility of environmental protection agreements with the TFEU provisions on the freedom of competition and State aids under Articles 101–108 TFEU.

Some clarification of a methodological nature is in order. A broad understanding has been adopted of the concepts of the environment and the internal market. From the perspective of sustainable development, the concept of the environment has, in addition to its core elements, an economic dimension as well as a social dimension. Our perspective is therefore broader than that adopted by most commentators who have discussed this issue.

Furthermore, with a view to bringing a fresh and original perspective to the study of environmental law, the book attempts to tackle the issue from a new angle: that of the spillover effect of environmental issues on a number of general obligations of EU Treaty law. Indeed, the original feature of environmental policy lies in the fact that by asserting its cross-cutting nature, it overturns the boundaries separating the different legal disciplines. Thanks to this spillover effect, the environmental concepts and principles quickly become disseminated throughout EU law. Conversely, environmental Treaty obligations are likely to gain support from concepts or principles proper to other policies such as health and consumers.

Finally, although this book has been designed in a practitioner-friendly way, it is also intended to be accessible for students. To keep the book manageable, not all the controversies related to the various Treaty provisions on the internal market and competition have been explored in depth; instead, it is assumed that readers are already acquainted with EU economic law. Furthermore, theoretical developments are illustrated throughout, along with the relevant case law. The manner in which the case law is exposed should help to put the legal concepts—measures having equivalent effect, discriminatory taxations, State aids, abuse of dominant position, etc—in a more practical context. For the sake of clarity, ample use is made of tables. All relevant sources and authorities are quoted fully, with special emphasis placed on case law in order to enable readers easily to seek further information. In so doing, it is hoped to give both practitioners and students the theoretical background they need to help them answer their own questions: do Treaty law and secondary law permit the national authorities to maintain such-and-such a regime of authorizations, to adopt a positive list of hazardous substances, to prohibit the placing on the market or the use of a hazardous product, to limit the importation of animals or plants, to levy environmental taxes that do not amount to State aids, or to conclude an agreement with private undertakings that does not impede competition?

Further developments regarding these issues may be followed on the author's website at <<http://www.tradeenvironment.eu>>.