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ARTICLE

The Importance of Setting a Target: The EU Ambition of a High Level of Protection

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Abstract
The European Union (EU) aims to ensure a high level of environmental protection. This is a key message of primary EU law. This article explores the purpose and meaning of this explicit ambition. It deciphers its influence on case law and on judicial review of legislative and administrative discretion. It argues that the requirement goes beyond window dressing and that its added value lies both in supporting the legitimacy of bold decisions and in preventing a manifest dismissal of the requisites of environmental protection.

Although primarily focused on EU law and on its technicalities, the article may offer helpful insights to other transnational or federal systems. It may help to build a better understanding of some of the challenges facing any environmental law regime confronted with the sensitive issue of 'ambition'.

Keywords: High level of protection, Ambition, Environment, Health, European Union law, Integration

1. INTRODUCTION

The European Union (EU) aims to ensure a 'high level of environmental protection'. This is a key message of primary EU law, including the Treaty on European Union (TEU) and the Treaty on the Functioning of the EU (TFEU).[1] By explicitly stating its ambition, the EU sets itself apart from other environmental policy frameworks. Many of these frameworks express their aspirations with reference to principles (prevention, precaution, polluter-pays), rights (the right to a healthy environment) or positive obligations (such as a duty to prevent pollution), but few explicitly set out the appropriate standard of protection at the high end of a range of possibilities.

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I am grateful to *TEL*'s anonymous reviewers for their perceptive comments. For more developments and materials on the issue, see also D. Misonne, *Droit européen de l'environnement et de la santé, L'ambition d'un niveau élevé de protection* (Anthemis, 2011).

[1] Lisbon (Portugal), 13 Dec. 2007, in force 1 Dec. 2009, available at: http://europa.eu/lisbon_treaty/full_text.

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Strangely enough, however, the requirement to ensure a high level of protection (HLP) in relation to the environment fails to attract much attention. Those experienced with the difficulties of negotiating legislative proposals might be amused by such an apparently over-simplistic requirement. It might also be dismissed as too intrusive on the decision maker's margin of discretion in balancing conflicting interests. As a result, the reference to a 'high level of environmental protection' is often treated as a mere recommendation to the legislature;[2] a policy principle that would hardly be enforceable.[3] Worse, it might be seen as a cynical embellishment used to legitimize difficult compromises.[4] Yet, a closer look at EU case law reveals that there might be more to the HLP requirement than meets the eye. The aim of this article is to stimulate debate about a more constructive approach to the requirement and its potential to contribute to the pursuit of environmental protection.

The article explores the *raison d'être* and the possible meaning of the HLP ambition. Although it focuses on EU law and on its technicalities, the article offers helpful insights to other transnational or federal systems. It may contribute to a better understanding of some of the challenges facing any environmental law regime that has to confront the sensitive issue of 'ambition'.

The article deciphers the influence of the HLP requirement on case law and on judicial review of legislative and administrative discretion. It argues that the requirement goes beyond window dressing and that its added value, as revealed in the case law of the European Court of Justice (ECJ), lies both in supporting the legitimacy of bold decisions and in preventing a manifest disregard of the requisites of environmental protection.

Recent EU developments affirm the relevance of a discussion on the legal foundation and strengths of the HLP provision in the Lisbon Treaty.[5] In the field of climate change and air protection, the ambition of the new Commission package proposals has recently come under scrutiny.[6] In the areas of pesticides regulation and biodiversity, provisional Commission regulations that place restrictions on substances that pose risks to bees are being challenged in court.[7] The analysis is also timely in a neoliberal context where the weakening of EU environmental protection provisions

[2] Opinion of Advocate General (AG) Léger in Case C-284/95, *Safety Hi-Tech* [1998] ECR I-4301, para. 67.

[3] C.D. Ehlermann, 'The Internal Market Following the Single European Act' (1987) 24(3) *Common Market Law Review*, pp. 361–409, at 389.

[4] L. Krämer, *EC Environmental Law*, 5th edn (Thomson/Sweet & Maxwell, 2003), p. 12.

[5] N. 1 above.

[6] Such as during the 2014 negotiations over the Policy Framework for Climate and Energy in the period from 2020 to 2030: see Commission Communication, COM(2014)15, 22 Jan. 2014. The press coverage reported that targets were weaker than had been called for by many green campaigners as well as industrial sectors, but stronger than the alternatives that some Member States and Commissioners were championing up to the final stages of the negotiations: see *The Guardian*, 22 Jan. 2014, available at: http://www.theguardian.com/environment/2014/jan/22/eu-carbon-emissions-climate-deal-2030.

[7] Such as pending Case T-429/13, *Bayer CropScience* v. *Commission*, not yet reported, challenging Commission Implementing Regulation (EU) No. 485/2013 as regards the Conditions of Approval of the Active Substances Clothianidin, Thiamethoxam and Imidacloprid, and Prohibiting the Use and Sale of Seeds Treated with Plant Protection Products Containing those Active Substances [2013] OJ L 139/12.

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and policies raises concerns over the regression of the current '*acquis*'.[8] Calls for simplification, less 'red tape' but also less regulation already affect decision-making processes and do not help to allay these concerns.[9] In addition, future bilateral trade deals might result in lower standards of environmental protection. In a context of economic crisis, where difficult trade-offs between different interests must be struck,[10] it is important to understand the potential of tools that favour the maintenance of an ambition in protecting health and the environment, including that repeated reference to a 'high level of protection'.

The article proceeds as follows. Section 2 explains how the HLP requirement appeared in the Treaties and tracks its impact on an increasing number of provisions, from its first mention in 1986 until now. Section 3 examines the influence of the HLP requirement on ECJ case law on environmental and health-related issues, as well as on consumer protection issues. The analysis proceeds in two steps. The first step explores cases in which the HLP requirement is used as a 'sword' to argue for the annulment of a legal measure. The second step analyzes the potential of the HLP requirement when used as a 'shield' against a wide range of possible claims that might jeopardize the validity a European act or limit its effectiveness. Section 4 discusses the added value of the HLP requirement. It explains that its specificity lies in its function as a 'target' or 'objective' of a policy or a legislative measure and insists on the relevance and potential of this underestimated dimension. Section 5 clarifies the conditions under which a breach of the HLP requirement could constitute the basis for judicial review. It concludes by exploring avenues to harness the 'sword-like' potential of the HLP requirement and insisting on the importance, but also the fragility, of the notion of a high level of protection.

2. THE ROOTS OF THE HLP AMBITION

The insertion of the reference to a 'high level of protection' into European law reflects concerns over the possible detrimental effects of European integration. It represents a defensive reaction to the changes that were happening in 1986, while negotiating the so-called Single European Act Treaty (SEA),[11] 30 years after the adoption of the foundational Treaty of Rome (EC) in 1957.[12] The default voting quorum for the adoption of EU legislation aimed at the establishment and functioning of the internal

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8 M. Prieur & G. Sozzo (eds), *La non régression en droit de l'environnement* (Bruylant, 2012).

9 Among which is the 'REFIT – Fit for Growth' process: see European Commission, 'Commission Takes Ambitious Next Steps to Make EU Law Lighter', available at: http://europa.eu/rapid/press-release_IP-13-891_en.htm. See also European Commission, High Level Group on Administrative Burdens, 'Cutting Red Tape in Europe – Legacy and Outlook' (Stoiber Report), 24 July 2014, with dissenting opinion, available at: http://ec.europa.eu/smart-regulation/refit/admin_burden/high_level_group_en.htm.

10 D. Vogel, *The Politics of Precaution: Regulating Health, Safety and Environmental Risks in Europe and the United States* (Princeton University Press, 2013).

11 Luxembourg (Luxembourg), 17 Feb. 1986, and the Hague (the Netherlands), 28 Feb. 1986, in force 1 July 1987, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:11986U/TXT&from=EN.

12 Treaty Establishing the European Economic Community, Rome (Italy), 25 Mar. 1957, in force 1 Jan. 1958, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11957E/TXT.

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market had just changed from unanimity to qualified majority. This opened the prospect of speeding up the approximation of Member State laws and aligning formerly divergent national rules with harmonized EU-wide standards. The provision here at stake is the former Article 100A EC, on the approximation of laws, and not the then newly inserted environmental chapter of the Treaty. Some Member States, such as Germany and Denmark,[13] feared that the passage to a new rule of majority voting for the adoption of harmonized legislation towards the completion of the internal market, which set aside their former right of veto, would lower the general ambition of EU legislation on quality issues. They had particular concerns over the adoption of common standards relating to health, safety, environmental and consumer protection, which were treated very differently by the various Member States. This fear was fuelled by the fact that, during the negotiation process, the European Commission had not hesitated to suggest standards of protection that were less strict than pre-existing national rules.[14] In order to prevent the possibility that the new harmonized legislation would race to the bottom, the Member States obtained a guarantee[15] in the form of a Treaty amendment.[16] The amendment stated that, in its proposals aimed at favouring the completion of the internal market and concerning health, safety, environmental and consumer protection, the Commission will take as a base 'a high level of protection'.[17] This provision did not fully reassure the Member States. They furthermore obtained the insertion of a safeguard clause allowing Member States to apply, after the adoption of a harmonized European measure and under the control of the European Commission, their own national provisions on grounds of major needs such as human health or environmental protection. This soon created a detrimental side effect: instead of focusing attention on the level of ambition of the Commission proposals, disgruntled states needed only to activate the safeguard provision in order to try to maintain their own standards.[18]

Legal scholarship reacted cautiously to the entry of the high level of protection concept in the Treaty. It considered that the passage to qualified majority should not be delayed by the sudden creation of a new hurdle. The acceptable level of ambition should be one that does not create political difficulties for the Member States, in particular in the newly acceded southern states where environmental policies were

[13] C. Gulmann, 'The Single European Act: Some Remarks from a Danish Perspective' (1987) 24(1) *Common Market Law Review*, pp. 31–40; W. Kahl, *Umweltprinzip und Gemeinschaftrecht: Eine Untersuchung zur Rechtsidee des 'bestmöglichen Umweltschutzes' im EWG-Vertrag*, vol. 17 (Ausburger Reschtsstudien, Müller, 1993); H.G. Sevenster, *Milieubeleid en Gemeenschapsrecht* (Kluwer, 1992), at pp. 20–2; V. Constantinesco et al., *Traité instituant la CEE: Commentaire article par article* (Economica, 1992), at p. 567.

[14] Regarding the lead content of fuels see, e.g., F. Caballero, *Essai sur la notion juridique de nuisance* (Librairie Générale de Droit et de Jurisprudence, 1981), at pp. 147–9.

[15] They made other, much more demanding proposals, such as a selective veto where the proposed legislation should imperatively be formally accepted by the Member State that has the highest standard of protection. These proposals were rejected.

[16] N. 11 above.

[17] New Art. 100A EC, as inserted by Art. 18 SEA.

[18] See D. Vandermeersch, 'The Single European Act and the Environmental Policy of the European Economic Community' (1987) 12(6) *European Law Review*, pp. 407–29, at 417; J.H. Weiler, 'The Transformation of Europe' (1990–91) 100 *Yale Law Journal*, pp. 2403–83, at 2460.

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relatively under-developed.[19] Leading authors also denounced the possible cloaking effect of the concept, in particular when used to legitimize every draft proposal linked to the completion of the internal market. In this respect, one author claimed that the institutions 'use the formula of a high level in its reversed order: whatever is proposed or adopted is considered to be a high level of environmental protection'.[20]

Similarly, it was a change of the voting quorum from unanimity to qualified majority during the 1992 Maastricht reforms that triggered the insertion of the reference to a 'high level of protection' in the Treaty chapter dedicated to environmental policy.[21] It is worth noting that during its first years of existence (from 1986 onwards), the chapter dedicated to the environmental action of the Community did not mention a particular ambition. The very generous safeguard clause allowing Member States to maintain or introduce more stringent protective measures compatible with the Treaty was deemed to be sufficient.[22] Not all Member States were eager to promote stringent measures in a field in which they were not themselves very active. Again, the HLP requirement was inserted only when Member States lost their right of veto.[23] The context of the early 1990s, influenced by the 1992 Rio Earth Summit,[24] was apparently more favourable to a strengthening of the environmental dimension of the European treaties. It was under the guise of target, and no longer as a mere departure point, that the 'high level of protection' requirement was inserted in the chapter on environmental policy. It read as follows: 'Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community'.[25] In addition, a similar ambition was mentioned in the Treaty chapters on public health and consumer protection[26] and, with regard to health and employment, in the very first Articles of the Treaty detailing the competencies of the (then) European Community (EC).[27]

Since then, the concept has entered into further provisions of the Treaties and its scope and wording have been reinforced. In 1997, with the changes brought about by the Treaty of Amsterdam (ToA),[28] a link was made between the high level of

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[19] P. Pescatore, 'Some Critical Remarks on the Single European Act' (1987) 24 *Common Market Law Review*, pp. 9–18, at 18; H.J. Glaesner, 'L'Acte Unique Européen' (1986) 238 *Revue du Marché Commun*, pp. 307–21, at 312.

[20] Krämer, n. 4 above, at p. 12. See also L. Krämer, 'Das 'Hohe Schutzniveau' für die Umwelt in EG-Vertrag' (1997) 6 *Zeitschrift für Umweltrecht*, pp. 303–8.

[21] Art. 130R, §2 EC, as amended by the Treaty on European Union, Maastricht (the Netherlands), 7 Feb. 1992, in force 1 Nov. 1993, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri =CELEX:11992M/TXT.

[22] Art. 130T EC, as introduced by the SEA.

[23] Except for a series of exceptions, such as tax measures.

[24] United Nations Conference on Environment and Development (UNCED), Rio de Janeiro (Brazil), 3–14 June 1992.

[25] Art. 130R EC.

[26] Arts 129 & 129A EC.

[27] Art. 2 EC ('a high level of employment') and Art. 3 EC ('a contribution to the attainment of a high level of health protection').

[28] Amsterdam (the Netherlands), 2 Oct. 1997, in force 1 May 1999, available at: http://eur-lex.europa.eu/ legal-content/EN/ALL/?uri=CELEX:11997D/DCL.

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protection which the Commission must take as a basis for its proposals in the Treaty provision dealing with the approximation of laws[29] and the requirement that the Commission take into account in particular any new development based on scientific facts. This turned the HLP requirement into a dynamic process.[30] The requirement extends beyond the European Commission, since the Council of Ministers (representing Member States) and the European Parliament (EP) would also 'seek to achieve this objective'.[31] The 'high level of protection' notion percolated also into various articles of the new Charter of Fundamental Rights of the European Union,[32] adopted in Nice in 2000. Although, at that time, the Charter existed outside the remit of the EU Treaty, it enshrined an important list of rights and principles, including important provisions on health, environmental and consumer protection.[33]

The gradual expansion was not as smooth as it might appear. The draft Constitutional Treaty presented by the Praesidium in 2003 threatened to reduce the prominence of some of the provisions containing the HLP requirement, but they were soon reintroduced by way of amendment. Moreover, the Constitutional Treaty ultimately failed. The most recent modifications brought about by the 2007 Lisbon Treaty, which entered into force in December 2009, confirmed the strong presence of the requirement in many provisions, including in one of the very first articles detailing the main aims of the EU. A high level of protection and improvement in the quality of the environment is explicitly stated in a context of sustainable development,[34] and in various parts that detail the rules governing the functioning of the EU, such as in the articles dealing with the approximation of laws,[35] with environmental protection,[36] with public health[37] and with consumer protection.[38] The Charter also

29 Art. 100A EC, as amended by the ToA.

30 S. Weatherill, 'Union Legislation Relating to the Free Movement of Goods', in P. Oliver (ed.), *Oliver on Free Movement of Goods in the European Union* (Hart, 2010), p. 441, at 13.27.

31 Art. 100A EC.

32 Charter of Fundamental Rights of the European Union (Charter), 26 Oct. 2012, [2012] OJ C 326/02, available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

33 The Charter now holds the same legal value as the Lisbon Treaty. See Charter, ibid., Arts 35 (health), 37 (environment) and 38 (consumer).

34 Art. 3(3) TEU: 'The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance'.

35 Art. 114(3) TFEU: 'The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective'.

36 Art. 191(2.1) TFEU: 'Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay'.

37 Art. 168(1) TFEU: 'A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities'.

38 Art. 169(1) TFEU: 'In order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests'.

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explicitly refers to the HLP in relation to human health,[39] the environment[40] and consumer protection.[41]

3. IMPACT ON CASE LAW

Although the EU Treaties consecrate the notion of HLP, they offer little detail about its true meaning or its potential effects. Answers must be found in ECJ case law.[42] It is ultimately before the Court that the strengths of these various treaty provisions as part of the so-called 'primary law' of the EU – which refers to the rules upon which all Member States agree and which govern the functioning of the EU institutions and the adoption of their acts – are tested. A close look at EU case law reveals that referring to this ambition is not devoid of consequences. The sceptical attitude of commentators with regard to the significance of the HLP requirement, when it was first inserted in the internal market provisions of the Treaty of Rome via the SEA, apparently did not impress the Court.[43] On the contrary, the ECJ has welcomed the HLP requirement both as a possible ground for judicial review and as a convenient rhetorical boost in its interpretations.

It is easy to identify two categories of possible uses of the HLP requirement. This article refers to these as 'the sword' and 'the shield'.

The first category includes cases in which the HLP requirement is used as a direct ground to petition the annulment of a legal measure, or to contest the legitimacy of the measure. Although cases are few in number, their outcomes are varied. Importantly, the Court generally considers the argument admissible for judicial review, but it rarely finds that it has sufficient merit. These cases are important as they clarify what constitutes a high level of protection. They reveal the importance of the criteria of 'considerable improvement at the EU level' and of 'adopting more stringent measures than the international obligations'. They also make the search for 'the highest possible level of protection' less daunting. They shed light on the conditions under which changes in the level of protection, compared with the pre-existing level of ambition in a Member State or the content of a pre-existing European act, might be acceptable. Finally, the 'sword' cases reveal the potential of the HLP requirement as a criterion to assess the legitimacy and reach of administrative acts.

The second category of cases reveals the potential and limits of the HLP requirement as a means to insulate European acts from legal challenge.

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[39] Art. 35 Charter: 'Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities'.

[40] Art. 37 Charter: 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

[41] Art. 38 Charter: 'Union policies shall ensure a high level of consumer protection'.

[42] The ECJ has its seat in Luxembourg (Luxembourg) and ensures that the law is observed in the interpretation and application of the Treaties. All cases are available at: http://curia.europa.eu.

[43] The potential of the requirement was affirmed at an early stage by AG Cosmas, in his opinion in Case C-318/98, *Fornasar* [2000] ECR I-4788, para. 32.

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3.1. *The HLP Requirement as a Sword*

A considerable improvement at the EU level

In an action brought before the Court in 1997 for annulment of a Directive on deposit-guarantee schemes involving consumer protection issues,[44] the German government claimed that, because the result of implementing this Directive was a reduction in the level of consumer protection in Germany, it should be annulled on the ground of, inter alia, incompatibility with the Community's objective of attaining a high level of consumer protection. The grounds were very explicit and directly contradicted the ambition of the EU Directive.[45] The ECJ acknowledged that there must be a high level of consumer protection concomitantly with the other freedoms that are protected in the legislation, and accepted that the discussion concerning the level of protection is relevant.[46] Yet, the ECJ decided that 'no provision of the Treaty obliges the Community legislature to adopt the highest level of protection which can be found in a particular Member State'. For the Court, although the application of the Directive might result in a reduction in the level of protection in certain states, this does not compromise the general result which the Directive seeks to achieve, namely, a *considerable improvement* in the protection of depositors within the Community.[47] The Court tackled the paradox of a lowering of the level of protection for German citizens while observing the HLP requirement in the Treaty by reviewing the problem from a broader perspective: it argued that there must be a *considerable improvement* in the protection of depositors *within the Community*.

One might question whether this perspective, adopted at a time when the (then) European Economic Community (EEC) consisted of only 15 Member States, would still hold sway in today's larger EU. With 28 Member States, does the adoption of new EU legislation not necessarily promote a considerable improvement somewhere? The message of the Court should therefore be updated in order to take into account the increased size of the EU.

High, but not necessarily the highest

In 1998, the twin judgments in *Safety Hi-Tech* and *Bettati*, which had a direct link with environmental issues, conveyed a further lesson in relation to the HLP requirement.[48] In these cases, the requirement is used in a very singular and quite pernicious way – namely, as a potential means to unravel any environmental

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[44] Case C-233/94, *Germany* v. *Parliament and Council* [1997] ECR I-2405.

[45] These grounds were based on articles that do not constitute the proper legal basis of the contested act. Former Arts 3(s) and 129A EC on consumer protection are mentioned, while the legal basis on which the legislation was adopted was actually the former Art. 57(2) EC on the taking up and pursuit of activities of self-employed persons.

[46] Departing from the position of AG Léger, who considered that the objective of a high level of consumer protection laid down by Arts 3(s) and 129A EC was not the main objective pursued by the Directive 'which cannot, therefore, be made subject to it': *Germany* v. *Parliament and Council*, n. 44 above, paras 39 and 108.

[47] Ibid., para. 48.

[48] *Safety Hi-Tech*, n. 2 above; Case C-341/95, *Bettati* [1998] ECR I-4355.

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legislation that might not correspond with the highest ambition. Even though the judgments may represent a typical example of 'a wrong case at the wrong time',[49] they caused much controversy. What was at stake here was not the pre-existing level of environmental protection in a Member State, but commercial interests: a firm could not be paid by its contractor for the fire-fighting products that should have been supplied as these products had suddenly become unusable as a result of a new European Regulation. The distributor contested the validity of the regulatory prohibition of hydrochlorofluorocarbons (HCFCs) in the light of the objective of the environmental chapter of the Treaty.[50] He argued that by authorizing the use of halons, which represented a much greater threat to the ozone layer, 'the Regulation failed to ensure a high level of environmental protection as required by Article 130r(2) of the Treaty'.[51] The Court disagreed with this interpretation and concluded that the Regulation ensured a high level of protection because it adopted a more stringent measure than that deriving from the international obligations under the Vienna Convention for the Protection of the Ozone Layer[52] and its Montreal Protocol on Substances that Deplete the Ozone Layer.[53] The Court also seized the opportunity to further defuse this quite disingenuous use of the HLP requirement and made clear that:

> [w]hilst it is undisputed that Article 130r(2) of the Treaty requires Community policy in environmental matters to aim for a high level of protection, such a level of protection, to be compatible with that provision, does not necessarily have to be the highest that is technically possible. As stated in paragraph 43 of this judgment, Article 130T of the Treaty authorises the Member States to maintain or introduce more stringent protective measures.[54]

The flexibility arising from the first sentence of the paragraph was praised in prevailing scholarship.[55] The second part, however, was quickly forgotten, in spite of its importance as the justification for the very flexibility recognized in the first part. If the level of protection need not necessarily be the highest that is technically possible, it is because, as a result of the specific provisions of the environmental chapter on which the measure was based, Member States may always introduce more stringent protective measures.[56] The broad possibility of correction towards a higher level of

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[49] Because it was the only decision to apply this concept in the environmental field at the time, it had a great impact. On the possibility of having 'wrong cases at the wrong time' see K. Lenaerts & T. Corthaut, 'Towards an Internally Consistent Doctrine on Invoking Norms of EU Law', in S. Prechal & B. Van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Diverging Concepts* (Oxford University Press, 2008), pp. 495–516, at 505.

[50] Art. 130R EC.

[51] *Safety Hi-Tech*, n. 2 above, para. 47; *Bettati*, n. 48 above, para. 45.

[52] Vienna (Austria), 22 Mar. 1985, in force 22 Sept. 1988, available at: http://ozone.unep.org.

[53] Montreal (Canada), 16 Sept. 1987, in force 1 Jan. 1989, available at: http://ozone.unep.org/new_site/en/montreal_protocol.php.

[54] *Safety Hi-Tech* n. 2 above, para. 49; *Bettati* n. 48 above, para. 47.

[55] As mentioned by Léger, the scholarship is unanimous in considering that a high level of protection does not mean the highest possible level of protection: Ph. Léger, *Commentaire article par article des Traités UE et CE* (Dalloz/Bruylant/Helbing, 2000), p. 928.

[56] And not under very strict conditions, such as what is required by other provisions, among them Art. 114 TFEU, on the completion of the internal market.

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protection that characterizes the environmental chapter of the EU Treaty must be read into the objective of the policy. If the EU does not necessarily need to opt for the highest possible level of protection technically, it is because the Treaty allows Member States to go even further and raise the level of protection as they wish. Although slightly contrived, the logic makes sense. In this manner, the Court avoided creating a sword of Damocles that might have jeopardized any European environmental legislation that did not meet the most stringent standards possible.

The proposed argument did not succeed in invalidating the Regulation; nor was the resulting message that constructive. The Court's position in *Safety Hi-Tech* and *Bettati* can still easily be misinterpreted as a permission, or even an obligation, 'not to go too far', especially when choosing between various possible alternatives. When taken out of context, this potentially undermines the HLP requirement, as already demonstrated in a few cases.[57]

The HLP requirement as a limit to delegation and an indicator of essential elements of EU legislation

The HLP requirement also has an institutional dimension as it plays a part in distinguishing between the realm of the legislature and the powers of the EU executive. It plays a role in distinguishing essential from non-essential elements of a legislative act, with implications for the scope and limits of executive tools.

In an earlier case between the EP and Council involving pesticides, the ECJ observed that Directive 91/414/EEC concerning the Placing of Plant Protection Products on the Market[58] sought to ensure a high standard of protection of the environment, including the protection of all groundwater, and noted that this factor was decisive in its appreciation of what constitutes an essential element of the basic act, not to be modified without due respect for the appropriate legislative process.[59] Because the executive tool that set out uniform principles for the evaluation and authorization of plant protection products did not impose on Member States the need to take seriously into account the impact on all groundwater, the Court considered that it had failed to observe one of the essential elements expressly laid down by the basic Directive, which sought 'in particular to ensure a high standard of protection'.[60] The EP's assertion that the contested implementing act had altered the scope of the obligations imposed by the basic Directive, without following the indicated legislative procedure prescribed in the EC Treaty – which called for the EP

[57] The condition is proposed as a decisive element in testing the legitimacy of measures relating to human health issues which do not benefit from the possibility of reinforcement at national level that characterizes the environmental chapter of the Treaty. According to the General Court, the European institutions, although they may not take a purely hypothetical approach to risk nor base their decisions on a 'zero-risk' level, must take into account their obligation to ensure a high level of human health protection, 'which, to be compatible with that provision, does not necessarily have to be the highest that is technically possible': Case T-13/99, *Pfizer Animal Health* v. *Council* [2002] ECR II-3305, para. 152; Case T-70/99, *Alpharma* v. *Council* [2002] ECR II-3495, paras 164–5.

[58] Directive 91/414/EEC concerning the Placing of Plant Protection Products on the Market [1991] OJ L 230/1.

[59] Case C-303/94, *Parliament* v. *Council* [1996] ECR I-2943.

[60] Ibid., paras 25–31.

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to be consulted[61] – was therefore well founded.[62] The Court consequently annulled the disputed act of the Council. Clearly, in that case, the reference to the HLP requirement played a decisive role in assessing the bounds of the executive power, even if it featured only in the preamble to the Directive and not in its binding provisions. The Council, in its executive capacity, was not allowed to exclude the impact on all groundwater from the reach of the uniform principles imposed on Member States. The HLP plea functioned here in favour of a more thorough consideration of the importance of protecting the environment, even though it was in an agricultural context. It also helped to strengthen the prerogatives of the EP.

Ten years later, in relation to the same Directive on plant protection products, Sweden directly invoked a breach of 'the principle that a high level of protection of the environment and human health is to be ensured' in order to contest the validity of a Commission Decision before the General Court (GC) (formerly known as the Court of First Instance (CFI)).[63] Together with the ECJ, the GC forms part of the Court of Justice of the European Union (CJEU). It may hear actions brought by Member States against the Commission. The case dealt with the inclusion of the herbicide paraquat on a positive list that would allow the substance to enter the EU market, a possibility strongly opposed by Sweden. Sweden developed its HLP plea on the basis of two different submissions: the first concerned provisions in the Directive that fix limits regarding the acceptable operator exposure level to the substance. The second alleged a reduction in the level of protection that was guaranteed in the Directive. Sweden obtained the annulment of the Commission Decision as the GC declared that 'both branches of the set of pleas in law alleging infringement of Article 5 of Directive 91/414, breach of the principle of integration, breach of the precautionary principle and breach of the principle that a high level of protection should be ensured must be substantially accepted'.[64] However, the message regarding the HLP plea is not clear. The HLP element was more implicit than directly decisive. Sweden successfully demonstrated that models and field studies showed that the level of protection in the disputed Decision did not meet the requirements set out in the basic Directive. It showed also that, because the operator exposure level would be exceeded, the Commission had failed to comply with the basic act and the HLP requirement in its examination of paraquat.[65] Yet, the GC confirmed only that the submissions alleging operator exposure above the acceptable level must be accepted,[66] without any explicit reference to the HLP. It is a tacit endorsement at most.

With regard to the second HLP-related submission, which argued that the level of protection was lower than that afforded in the basic act, the GC showed itself willing to consider the argument but did not approve Sweden's interpretation. It explained that laying down additional requirements when including a substance in the annex to

[61] The Directive was based on Art. 43 EC.

[62] N. 60 above.

[63] Case T-229/04, *Sweden* v. *Commission* [2007] ECR II-2437, para. 54.

[64] Ibid., para. 262.

[65] Ibid., para. 133.

[66] Ibid., para. 186, referring to the precautionary principle.

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the Directive does not amount to reducing the level of protection, if only because this is allowed by the basic act itself.[67] Still, the Court did not question the relevance of the proposed linkage between the 'principle' that a high level of protection should be ensured and the absence of reduction in the level of protection.

In a 2008 case in which the EP sought the annulment of a Commission Decision on the restriction of the use of certain hazardous substances in electrical and electronic equipment,[68] the ECJ gave more credit to the possible influence of the HLP requirement on dispute settlement. In this case, which involved the chemical substance decabromodiphenyl ether (DecaBDE),[69] it was not the parties but the Court itself that wielded the 'sword'. The ECJ found in the HLP requirement the grounds to consider that the Commission had infringed the basic Directive when it allowed a general exemption for the use of DecaBDE in electrical and electronic equipment. Referring to various provisions of the EC Treaty[70] and to their explicit aim of a high level of protection, the Court in Grand Chamber confirmed that the conditions for exempting the prohibition of hazardous products in such equipment must be interpreted strictly. As a consequence, and 'without it being necessary to rule on the extent of the Commission's discretion',[71] the ECJ decided that a Commission Decision allowing a general exemption for the use of DecaBDE ran counter to the objective pursued by the legislature. The restrictive interpretative effects of HLP targets were instrumental in facilitating the annulment of the disputed provisions. The case confirms that a dimension of HLP can play a decisive role in assessing the boundaries of the executive power under EU law. In particular, it can be deployed to counter attempts to dilute the protective standards decided by the legislature.[72]

The foundation of a no-regression principle under EU law

A recent case regarding the HLP requirement in relation to health issues invites discussion of a potentially very contentious issue:[73] does the HLP requirement entail a 'no-regression' principle, compared with pre-existing EU rules? Could it be a

[67] Moreover, the laying down of special reporting duties does not indicates that the Commission has compromised the principle that a high level of protection for human health should be ensured (ibid., para. 188). It neither indicates that the Commission was hesitant as to the risks posed by that substance, nor that it decided to observe, after the event, the consequences of paraquat rather than to carry out a prior assessment (ibid., para. 189).

[68] Commission Decision 2005/717/EC Amending for the Purposes of Adapting to Technical Progress the Annex to Directive 2002/95/EC on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment [2005] OJ L 271/48.

[69] Joined Cases C-14/06 and C-295/06, *Parliament* v. *Commission* [2008] ECR I-1649, paras 75–6.

[70] Former Arts 152 EC (health) and 174(2) EC (environment).

[71] *Parliament* v. *Commission*, n. 69 above, para. 76.

[72] In other cases also relating to delegations the HLP requirement does not help in producing the annulment of Commission Decisions but, on the contrary, plays the role of a decisive shield for supporting their legality. This is not contradictory because these Decisions are intended here to comply with the aim of the basic act, which is to ensure a high level of protection: Case T-75/06, *Bayer CropScience and Others* v. *Commission* [2008] ECR II-2081, para. 83; Case T-326/07, *Cheminova and Others* v. *Commission* [2009] ECR II-2685, para. 169.

[73] Case T-257/07, *France* v. *Commission* [2011] ECR II-5827; Case C-601/11P, *France* v. *Commission*, not yet reported.

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benchmark to ensure that the level of protection promoted by environmental, health or consumer-related regulations does not go backward but only moves forward and is even constantly improved?[74]

Regulation (EC) No. 999/2001 laying down rules for the Prevention, Control and Eradication of certain Transmissible Spongiform Encephalopathies (Mad Cow Disease Regulation)[75] imposes an obligation on the European Commission to 'maintain or, if scientifically justified, increase the level of protection of human and animal health ensured in the Community'.[76] The GC has explicitly described this Regulation as 'reflecting' the HLP requirement of the TFEU.[77] This hints at a possible linkage, as already observed in the paraquat case,[78] between the HLP argument and an obligation not to reduce the level of protection that is imposed by the basic act.

The initial rule was to destroy the whole herd of animals to avoid the threat of mad cow disease. This rule was later relaxed when total herd culling could be considered disproportionate given the availability of disease-detecting tests. France reacted fiercely as it considered the new regime to be too weak, and contested the legality of the respective Commission Decision. France uncompromisingly argued that the European Commission breached its obligation to ensure a high level of protection of human health[79] as well as the precautionary principle in relation to risk management.[80] However, this plea failed to convince the GC, not because it would be unfit for judicial review but because the Court considered that it could not find any manifest error in the assessment. On appeal, France insisted on the need for a more subtle assessment, based on the specific wording of the basic act. It argued that it was not sufficient to check whether the HLP requirement had been respected 'in general', but that the GC should have verified that the measures maintained or increased the level of protection of human health. The ECJ, acting as an appeal court from the GC, accepted that the approach should be refined given the specific wording of the basic act, but changed perspectives as to how the comparative clause must be interpreted. It considered that the clause was indeed inserted in order to prevent any lowering of the level of protection in the EU that might occur through executory

[74] See, to that effect, A. Aragao, 'Le fondement européen de la prohibition de la régression: le niveau élevé de protection de l'environnement', in M. Prieur & G. Sozzo (eds), *La non régression en droit de l'environnement* (Bruylant, 2012), pp. 347–64; N. de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford University Press, 2014), at p. 45. See also Opinion of AG Léger in *Safety Hi-Tech*, n. 2 above, para. 67, mentioning that the legislature, because of the HLP requirement in the environmental field, is called upon to ensure that the policy being pursued is constantly improved.

[75] [2001] OJ L 147/1.

[76] Ibid., Art. 24a.

[77] Case T-257/07, *France* v. *Commission,* n. 73 above, paras 64–5.

[78] *Sweden* v. *Commission*, n. 63 above.

[79] As enshrined in the former Art. 152(1) EC and Art. 24a of Regulation (EC) No. 999/2001, n. 75 above.

[80] Case T-257/07, *France* v. *Commission,* n. 73 above, para. 65. This is in relation to Art. 152(1) EC providing that a high level of human health protection is to be ensured in the definition and implementation of all Community policies and activities and that protection of public health takes precedence over economic considerations and may therefore justify adverse economic consequences, even those which are substantial, for certain traders (see, to that effect, the orders in Case C-180/96R, *United Kingdom* v. *Commission* [1996] ECR I-3903, para. 93, and Case T-158/03, *Industrias Químicas del Vallés* v. *Commission* [2005] ECR II-2425, para. 134.

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measures, but that the provision must not be interpreted as excluding any relaxation from earlier preventative measures. It considered that the comparison – in that specific case and with due regard to the specific wording of the mandate given to the Commission in the Mad Cow Disease Regulation – must not be carried out with reference to the level of protection resulting from earlier preventative measures adopted in the same field, but refers 'in general to the level of health "assured in the [EU]"'.[81] For the ECJ, it cannot be ruled out that, in the light of scientific progress, the same level of protection may be ensured by less restrictive measures. This is because the level of protection of human health is tightly correlated with the level of risk deemed acceptable for society, which depends in turn on the scientific knowledge available at a given moment.[82] The assessment of a possible 'regression', in relation to the mandate given to the Commission, is flexible and depends on how risk management has evolved, not on the content of the previous regime. This very accommodating interpretation renders review of the achievement of an equal or higher level of protection extremely flexible when risk management is involved.

No direct effect

In the area of consumer protection, the *Schulte* case concerned customers who complained about the weak level of ambition of their own national law in protecting a loan agreement. They sought to invoke the HLP requirement directly in national court proceedings. However, the ECJ disagreed that the HLP requirement as incorporated in Article 114 TFEU (formerly Article 95 EC) could have a 'direct effect on Member States' and could be relied on directly as a basis for obligations that are binding on a Member State.[83] It nonetheless endorsed the interpretative role of the argument in reviewing a national measure's compliance with EU law by affirming that 'at the most the provision could be used as an aid to interpretation of the Directive'.[84]

Assessment

The sample is too small to draw decisive conclusions but is nevertheless instructive. Firstly, the HLP argument is justiciable. When pleas relate to acts of EU institutions, the Court does not reject them as being irrelevant, or as encroaching on the discretion of the decision maker. Secondly, a clear divide exists between judicial review of the ambition of a basic legislative act and judicial review of the ambition of an executive or delegated act. The intensity of review is considerably higher in the latter than in the

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81 Case C-601/11P, *France v Commission*, n. 73 above, para. 135.

82 Ibid., para. 136. Referring to the rules governing general principles of food law, the Court also recalls that the provisional risk management measures, which are adopted in the context of scientific uncertainty, must be re-examined within a reasonable period of time in order to ensure that they are proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen by the Union (as specified in Art. 7 of Regulation (EC) No. 178/2002 Laying Down the General Principles and Requirements of Food Law, Establishing the European Food Safety Authority and Laying Down Procedures in Matters of Food Safety [2002] OJ L 31/1).

83 Case C-350/03, *Elisabeth Schulte and Wolfgang Schulte* v. *Deutsche Bausparkasse Badenia AG* [2005] ECR 1-9215, para. 61 (*Schulte*), commented on by E. Jerry (2007) 44 *Common Market Law Review*, pp. 501–18.

84 Ibid., para. 61.

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former scenario. Thirdly, the Court apparently does not wholeheartedly endorse the original objective of the first Treaty amendments with regard to the HLP requirement, which was to resist a weakening of pre-existing levels of protection. The Court refuses, however, to set aside the requirement. In that regard, the Court explains the position that 'the HLP does not necessarily mean the highest level of protection'. The Court even provides a set of possible indicators that could help in identifying compliance with the HLP requirement. Among them, the acknowledgement that the measure is more stringent than related international obligations is worth noting.[85]

3.2. *The HLP Requirement as a Shield*

There is extensive case law in which the HLP requirement has proved useful as a shield to enhance the legitimacy of EU acts and defend them against a wide array of claims.

Supporting the choice of Article 114 TFEU as the appropriate legal basis

Choosing the right legal basis (the specific treaty provision on which an EU regulation or directive is based) is an important requirement under EU law, given the principle of conferral, or attributed powers.[86] The legal basis determines the extent of the EU competence. It settles the appropriate decision-making procedure for the adoption of the measure concerned. It determines the essential requirements of each specific policy. To verify that the correct legal basis has been selected is part of the mandate of the European Court. In that regard, it is noteworthy that the Court used the HLP requirement at an early stage to confirm the legality of Article 114 TFEU on the approximation of laws (formerly Article 100A EC) over Article 191 TFEU (formerly Article 130R EC). Article 114 was arguably the more democratic treaty basis because it demanded a deeper involvement of the EP in decision making than did earlier incarnations of Article 191 TFEU. Because Article 114 TFEU refers to the need to take as a basis a high level of protection, the Court decided that it 'expressly indicated' that the objectives of environmental protection may be effectively pursued and that environmental measures were not the exclusive preserve of the Council.[87] The rationalization did not stop there as the Court further exploited the potential of the HLP requirement, this time to settle sensitive health-related issues and to avoid the competency constraints that characterize EU health policies. In health matters, the EU may only 'complement' but not 'harmonize' national legislation, except in a few limited areas such as measures regarding medicinal products, devices for medical use, veterinary and phytosanitary fields, blood and its derivatives.[88]

Notwithstanding this restriction, the ECJ has used two tools that expand the potential for harmonization. Firstly, the Court referred to the integration principle,

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[85] *Safety Hi-Tech*, n. 2 above, para. 47; *Bettati*, n. 48 above, para. 45.

[86] Art. 5(2) TEU and Art. 7 TFEU.

[87] Case C-300/89, *Commission* v. *Council* [1991] ECR I-2867, para. 24.

[88] Art. 168 TFEU.

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as expressed in the health policy chapter,[89] according to which a high level of human health protection *is to be ensured* in the definition and implementation of all EU policies and activities. Secondly, the Court read Article 114 TFEU expansively and interpreted it to mean that the article *explicitly* requires that a high level of protection of human health 'is to be ensured'[90] or 'should be guaranteed'[91] in achieving harmonization. This is not the exact wording of the Treaty.[92] The Court arguably used this approach in order to force the use of Article 114 TFEU as the appropriate legal basis in cases where health issues, including tobacco-related illnesses, were at stake, and to favour Article 114 TFEU over a health-related specific legal base that does not cover the possibility of European harmonization as such.[93] The Court considers that because a high level of human health protection is to be ensured in the definition and implementation of all EU policies and activities, one can safely say that proposals based on Article 114 encompass that dimension just as one can accept the possibility of harmonization in health-related areas.[94]

Avoiding diluted interpretations

The ECJ favours teleological interpretation[95] and states that the provisions of a given law must be interpreted in the light of its purpose. Thus, directives must be interpreted in a way that safeguards their practical effect or '*effet utile*'. Conversely, interpretation must not jeopardize the fundamental objective of the legislation. The recognition of the importance of this objective has a consolidating effect. It offers the potential to avoid diluting interpretations and to confirm strong positions. In that regard, it is worth noting that the HLP, often linked to or expressed as the target of a policy, has the potential to reinforce teleological interpretation.

Reliance on the HLP has indeed proved to be quite effective in preventing restrictive interpretations that tend to narrow the scope of EU legislation. It helped to insert quails, partridges, pigeons[96] and gilts[97] within the scope of Directive 96/61/EC

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89 Ibid.

90 Case C-376/98, *Germany* v. *Parliament and Council* [2000] ECR I-8419, para. 88 (emphasis added).

91 Case C-491/01, *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, para. 62.

92 The exact wording of the current Art. 114 TFEU is: 'The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective'.

93 Art. 168 TFEU. Only complementing measures are provided for: *Germany* v. *Parliament and Council*, n. 90 above, para. 88.

94 See also Case C-434/02, *Arnold André* [2004] ECR I-11825, para. 32; Case C-210/03, *Swedish Match* [2004] ECR I-11893, para. 32; and Joined Cases C-154/04 and C-155/04, *Alliance for Natural Health and Others* [2005] ECR I-6451, para. 30.

95 P. Pescatore, 'Les objectifs de la Communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice: Contribution à la doctrine de l'interprétation téléologique des Traités internationaux', in *Miscellanea W.J. Ganshof van der Meersch,* vol. 2, (Bruylant, 1972), at p. 362.

96 Case C-473/07, *Association Nationale pour la Protection des Eaux et Rivières and OABA* [2009] ECR I-319, paras 25–7.

97 Case C-585/10, *Møller* [2011] ECR I-13407, paras 29 and 33.

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on Integrated Pollution Prevention and Control (IPPC).[98] It consolidated the right to bring an action to prevent pollution, including the availability of an injunction against a permit as a remedy, where necessary.[99] It also helped to ward off attempts made by Member States to narrow the scope of the Strategic Environmental Assessment Directive[100] and of the Waste Framework Directive.[101] Teleological interpretation also helped to strengthen the threshold of compliance: because a legislative act pursues a high level of protection, a Member State (and its industrial installations) must comply fully with it.[102] In the cases just mentioned, the ECJ's references to the HLP emanate directly from the wording of the secondary legislation under scrutiny. However, if the HLP requirement is not expressly mentioned in the directive or regulation at issue, the Court will introduce it by directly invoking the Treaty and affirming the requirement in relation to the legal basis or even to the fundamental objectives of the Treaty. In such cases, it is the aim governing the policy itself, as laid down in the TFEU, which helps to avoid restrictive interpretations. This process is decisive in a consistent series of cases[103] that deal with the concept of waste and, particularly, what it means to 'discard' an item. This is so even if the reference is enshrined in a 'package' of provisions that often also includes the precautionary principle. The HLP requirement is also key in assessing the manoeuvring room available to Member States regarding their power to restrict movements of waste and keep them on their territory if they consider that recovery in the destination state could harm human health and the environment.[104] It plays an important role in the Court's refusal to accept weak interpretations of the Waste

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98 Directive 96/61/EC concerning Integrated Pollution Prevention and Control [1996] OJ L 257/26.

99 Case C-416/10, *Križan and Others* v. *Slovenská Inšpekcia Zivotného Prostredia*, not yet reported, paras 108–9. Ph. Icard, 'CJUE du 15 janvier 2013 "Križan": la prédominance du droit de l'environnement européen sur une décision d'urbanisme nationale' (2013) 1 *Revue de droit de l'Union européenne*, pp. 121–42. Directive 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment [2001] OJ L 197/30 (Strategic Environmental Assessment Directive).

100 Case C-567/10, *Inter-Environnement Bruxelles et al.* v. *Région de Bruxelles-Capitale* [2012] ECR I-159, para. 30: an interpretation of the scope of the Directive, which would exclude plans and programmes the adoption of which is regulated by national legislative or regulatory provisions, 'by appreciably restricting the directive's scope, would compromise, in part, the practical effect of the directive, having regard to its objective, *which consists in providing for a high level of protection of the environment*. That interpretation would thus run counter to the directive's aim of establishing a procedure for scrutinising measures likely to have significant effects on the environment'.

101 Case C-270/03, *Commission* v. *Italy* [2005] ECR I-5233, paras 19–22. At the time, Directive 75/442/EEC on Waste [1975] OJ L 194/1, as amended by Directive 91/156/EEC of 18 Mar. 1991 on Waste [1991] OJ L 78/32.

102 Can a Member State be in breach of its obligations if it complies with most but not all of the legal provisions? The Court decided that 'as it is apparent from Article 1 of the IPPC Directive', because the EU legislature has imposed on the Member States obligations in order that a high level of protection of the environment, taken as a whole, might be achieved, 'it follows from this that it is only if the Member States carry out the obligations imposed on them by that directive fully and in accordance with that directive that the objective of protection may be achieved': see Case C-158/12, *Commission* v. *Ireland* [2013], not yet reported, para. 22.

103 Joined Cases C-418/97 and C-419/97, *ARCO Chemie Nederland and Others* [2000] ECR I-4475, para. 39; Case C-9/00, *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, para. 23; Case C-1/03, *Van de Walle and Others* [2004] ECR I-7613, para. 45.

104 Case C-277/02, *EU-Wood-Trading GmbH* v. *Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH*[2004] ECR I-11957, para. 47.

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Water Directive[105] and in its confirmation that treatment is an obligation for all urban waste water, and not only for water that is directly discharged into a sensitive area.[106] However, the trend is not fully consistent. In some cases, the HLP wording could have reinforced or even changed the interpretation in favour of a stricter environmental protection framework, but it was not mentioned.[107]

A way to bridge transition gaps

The HLP requirement plays a role in preserving the effects of an annulled measure. In *Inter-Environnement Wallonie and Terre Wallonne*, the ECJ accepted that the possibility 'cannot be ruled out' that the objective of a high level of protection of the environment being pursued by EU policy in the area of environmental protection may be better achieved by maintaining the effects of an annulled order during the short period necessary for its redrafting rather than by retroactive annulment.[108]

A convenient tie-breaker

The HLP requirement may also help to close complex debates. In a few cases, the reference to the requirement has acted as a final decisive argument, or as a presumption in helping to settle disputes in a peremptory way, without any detailed explanation as to its supposed content. In these instances the Court refers to the HLP requirement in a rather oblique manner, injecting general statements into its deliberations such as 'this is confirmed by the objective of ensuring a high level of protection' or 'this means that the measure is not capable of compromising the objective of a high level of protection'.[109] In these situations, the ECJ's deployment of the HLP requirement comes across as rather cynical and its functionality appears quite far removed from pursuing environmental goals.

105 Directive 91/271/EC concerning Urban Waste Water Treatment [1991] OJ L 135/40.

106 Case C-396/00, *Commission* v. *Italy* [2002] ECR I-3949, paras 29–32; Case C-335/07, *Commission* v. *Finland* [2009] ECR I-9459, para. 29; Case C-438/07, *Commission* v. *Sweden* [2009] ECR I-9517, para. 30.

107 Case 6/00, *Asa* [2002] ECR I-1961, paras 63–6; Case C-237/07, *Janecek* [2008] ECR I-6221, para. 46.

108 Case C-41/11, *Inter-Environnement Wallonie and Terre Wallonne*, not yet reported, para. 55.

109 As demonstrated, for instance, in cases involving the REACH Regulation (Regulation (EC) No. 1907/2008 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), [2006] OJ L 396/1). In Case C-558/07, *SPCM and Others* [2009] ECR I-5783, para. 35, the decision on the meaning of the concept of 'monomer substance' is 'confirmed by the objectives of the REACH Regulation, as defined by Recital 1 in the preamble and Article 1(1) of the Regulation, which consist in ensuring a high level of protection of human health and the environment and the free movement of substances while enhancing competitiveness and innovation'. In Case C-358/11, *Lapin* v. *Lapin* [2013], not yet reported, paras 31 & 62, the Court explains that '[t]he REACH Regulation seeks, in particular, to ensure a high level of protection of human health and the environment. In the light of that objective, it must be acknowledged that the European Union legislature, by authorising the use of wood treated with […] solutions under certain conditions, has taken the view that, although that treatment is carried out with a dangerous substance which is subject to restrictions under that regulation, that dangerous nature is not capable of compromising that high level of protection of human health and the environment in the case where such use is limited to certain applications'. As a result, the REACH Regulation is considered to be the relevant framework for determining whether treated wood may cease to be waste and contributes to demonstrating that its holder is not required to discard it.

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Testing the limits

The 'shield effect' is also important in consumer protection cases, but it operates within clear limits.[110] The Court is very clear that recourse to the HLP requirement in consumer protection issues is of no avail where complete and maximum harmonization has been reached. This approach to harmonization, which leaves Member States with no opportunity to adopt stricter measures once the common standard has been fixed, characterizes the field of consumer protection, in contrast to the area of environmental protection.[111] In recent cases involving commercial practices, Member States have argued that they acted in favour of a high level of consumer protection. The Court considered this not to be an appropriate basis to justify measures that are stricter than the harmonized EU legislation, as the Treaty does not provide for any leeway in that regard.[112]

Assessment

The findings of the ECJ show that the HLP requirement may function as an interpretative tool that can consolidate the legitimacy of EU acts, without always necessarily endorsing a true attempt to reach a higher level of protection. The Court tends to call on HLP to get out of difficult situations and often relies on alternative treaty bases. There is a trend in cases that review the compatibility of national measures with EU law to use the HLP requirement to boost legal arguments that could also have been promoted on the basis of the '*effet utile*' doctrine. It is indeed already well known that a directive or a regulation must be interpreted in the light of its objective and in such a way as to ensure that it is fully effective. Still, the HLP dimension further helps to fend off attempts to dilute the stringency of some EU requirements, as it insists on the need to pursue a certain degree of ambition in the area of environmental protection. However, the case law is not fully consistent and may still evolve in various directions.

4. ADDED VALUE – THE IMPORTANCE OF SETTING A TARGET

4.1. *The Target and its Foundations*

As expressed by Advocate General Bot in 2003,[113] both the TFEU and the Charter of Fundamental Rights[114] raise the general interest in a high level of environmental protection 'to the status of an EU target'. The strength and particularity of the HLP requirement lies primarily in its status of 'target'. The HLP is the *raison d'être* of EU policy on the environment, while the principles of prevention, precaution, correction

110 See, for that specific case law, D. Misonne, 'Le niveau élevé de protection des consommateurs au cœur de l'article 114 TFUE: au-delà de la déclaration d'intention?' (2011) 2 *Droit de la consommation – Consumentenrecht,* pp. 26–50.

111 S. Weatherill, 'Consumer Policy', in P. Craig & G. de Burca, *The Evolution of EU Law*, 2nd edn (Oxford University Press, 2011), at pp. 837–67.

112 Case C-52/00, *Commission* v. *France* [2002] ECR I-3827, para. 15; Joined Cases C-261/07 and C-299/07, *VTB-VAB and Galatea* [2009] ECR I-2949, paras 52 & 63; Case C-304/08, *Plus Warenhandelsgesellschaft* [2010] ECR I-217, para. 41; and Case C-540/08, *Mediaprint Zeitungs-und Zeitschriftenverlag* [2010] ECR I-10909, paras 30–7.

113 Opinion in Case C-195/12, *Bois de Vielsam*, not yet reported, para. 82.

114 Art. 191 TFEU and even Art. 37 of the Charter.

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by priority at source and polluter-pays are its foundations.[115] The Court in Grand Chamber confirmed this distinction, which follows from the very wording of the Treaty, when it specified that the precautionary principle 'is one of the foundations of the high level of protection pursued by Community policy on the environment'.[116]

A distinction must thus be drawn between these various elements, even if they are closely related. In the area of risk management, the link between the HLP requirement and precaution is admittedly very tight. They form an unavoidable duo: distinct, but necessarily combined. This became clear in the *Artegodan* case, in which the GC relied on the health dimension of the environmental chapter in the TFEU in combination with the HLP requirement to justify elevating the precautionary principle to a general principle of EU law.[117]

However, the HLP is often mentioned without any reference to the precautionary principle. Although precaution and the HLP requirement both deal with ambition (the level of protection to be pursued), precaution under EU law always implies situations where risks and uncertainty are combined.[118] This is not intrinsic to the HLP requirement. The peculiarity of HLP lies in its bold questioning of the ambition as such, with no necessary link to issues of scientific uncertainty.

4.2. *Relevance of a Target*

The status of the HLP as a target is significant under EU law for various reasons.

As shown in the analysis of the 'shield' case law above, the target of a legislative act or of a policy is a decisive factor where case law embraces teleological interpretation: the target often guides the reasoning of the judge in order to avoid diluting interpretations that would weaken EU law.[119]

The target is also decisive in appreciating limits to delegation stemming from a basic act: the target helps to distinguish what is essential from what is not, and therefore cannot or can be lawfully delegated.[120] The target of the basic act also helps to determine the delegate's margin of discretion and curtails discretion when the basic act directly fixes a mandate that, because of the aim pursued, must be interpreted strictly.

115 See the wording of Art. 191(2) TFEU.

116 Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels* [2004] ECR I-7405, para. 44.

117 Joined Cases T-74/00, T-76/00, T-83/00 to T-85/00, T-132/00, T-137/00 and T-141/00, *Artegodan and Others* v. *Commission* [2002] ECR II-4945, para. 183. Judgment on appeal: C-39/03P, [2003] ECR I-7885.

118 'Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective': Case C-333/08, *Commission* v. *France* [2010] ECR I-0757, paras 92–3.

119 This teleological method leading to a creative jurisprudence has proponents but also detractors. See, among others, G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press, 2012); A. Albors Llorens, 'The European Court of Justice, More than a Teleological Court' (1999) 2 *Cambridge Yearbook of European Legal Studies,* pp. 373–98.

120 See *Parliament* v. *Council*, n. 59 above, paras 25–31. See also nn. 64 and 70 above.

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Additionally, the target is a pivotal element in reviewing the proportionality of EU legislation. More often than not[121] EU measures are expected to be proportionate to *the aim* of the proposed measure. Indeed, settled case law affirms that the principle of proportionality requires that EU measures do not exceed the limits of what is appropriate and necessary 'in order to attain *the objectives* legitimately pursued by the legislation in question; where there is a choice between several appropriate measures, one must resort to the least onerous one, and whatever the disadvantages are must not be disproportionate to *the aims* pursued'.[122] The objectives or aims pursued are truly deciding factors in the review of proportionality; they are the steady elements, beacons in a sea of possibility, against which the acceptability of restrictive measures is to be tested. Here, a reference to the HLP target may be sufficient to overcome the proportionality hurdle, especially when judicial review is limited to measures that are manifestly inappropriate.[123] Francis Jacobs considers it 'safe to say that if the set objective involves a high level of protection, the restraints will inevitably be also higher. So, endorsing higher levels implies a readiness to accept more restrictive measures, as that is the very nature of proportionality'.[124]

Yet, a target is rarely isolated and must often be read in combination with others. Still, concurrent targets are not necessarily conflicting but can reinforce each other.[125] The Court sometimes organizes targets hierarchically and gives precedence to the protection of health and the environment, as it did with regard to the REACH Regulation on chemical substances.[126] Even when the Court decided that it was necessary to ascertain whether, in exercising its discretion, the EU legislature attempted to achieve a degree of balance between the protection of health, the environment and the consumer on the one hand and the economic interests of traders on the other, it clarified that such a balance must be struck 'while pursuing the objective assigned to it by the Treaty to ensure a high level of protection of health and environmental protection', thus adding a special weight to the last dimension.[127]

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121 Proportionality is not a uniform test but an open-textured principle which is used in different contexts to protect different interests. It entails different degrees of scrutiny, as expressed by T. Tridimas, 'Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny', in *The Principle of Proportionality in the Laws of Europe* (Hart, 1999), pp. 65–84. On the proportionality of national measures see J. Jans, 'Proportionality Revisited' (2000) 27(3) *Legal Issues of Economic Integration*, pp. 239–65.

122 Case C-343/09, *Afton Chemical* [2010] ECR I-7027, para. 45; Case C-189/01, *Jippes and Others* [2001] ECR I-5689, para. 81; *SPCM and Others*, n. 109 above, para. 41; and Joined Cases C-379/08 and C-380/08, *ERG and Others* [2010] ECR I-02007, para. 86.

123 *Afton Chemical*, ibid., para. 46.

124 F. Jacobs, 'The Role of the European Court of Justice in the Protection of the Environment' (2006) 18(2) *Journal of Environmental Law*, pp. 195–205, at p. 195.

125 *SPCM and Others*, n. 109 above, paras 44–5.

126 Ibid., paras 44–5: 'The objectives of the REACH Regulation, set out in Article1 thereof, are to "ensure a high level of protection of human health and the environment [...] as well as the free circulation of substances on the internal market while enhancing competitiveness and innovation". However, regard being had to Recital 16 in the preamble to the REACH Regulation, it must be stated that the Community legislature established, as the main purpose of the obligation to register laid down in Article 6(3) thereof, the first of those three objectives, namely to ensure a high level of protection of human health and the environment'.

127 *Afton Chemical*, n. 122 above, para. 56.

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It is also settled case law that although some freedoms and rights form part of the general tenets of EU law – such as the freedom to pursue a trade or a business and the right to own property – they do not amount to unfettered prerogatives but must be seen in the light of their social functions. Consequently, they may be restricted, provided that these restrictions correspond in fact with the objectives of general interest pursued by the EU.[128] In that regard also the target that is being pursued by the restrictive measure plays a crucial role. It often happens that the ECJ, when confronted with conflicting rights or freedoms of equal value, considers that the interests involved must be weighed with regard to all the circumstances of the case in order to determine whether a fair balance was struck.[129] One cannot find such an explicit review of a 'fair balance' where the ECJ observes, on the contrary, that the '*the importance of the objective pursued* by the disputed regulation may justify adverse consequences, even substantial adverse consequences, for certain traders'. In notorious cases such as *Fedesa* (hormones) and *Arcelor* (emissions trading),[130] the Court has indeed affirmed that the importance of the public interest objectives pursued, including health and environmental protection, is such that it justifies even substantial negative economic consequences for certain operators. This remains applicable even if it has also been made clear that the EU legislature's exercise of its discretion must not produce results that are 'manifestly less appropriate than those that would be produced by other measures that were also suitable for those objectives'.[131]

The fact that a disputed regulation entails serious economic consequences therefore does not suffice to conclude that it is disproportionate or unbalanced for the purpose of judicial review. This is far from the comforting idea of a principle of 'equilibrium' in assessing the legality of EU acts. The GC recently linked this quite radical pronouncement to the HLP *target*, at least in relation to the public health dimension of the TFEU.[132]

4.3. *Special Effects of Integration*

The potential of the HLP requirement as a way to expand the reach of EU law by enabling recourse to treaty bases warrants further reflection on the possible impact of the so-called 'integration clauses' of EU primary law and on the logic developed in the settled case law. The strength of an integration clause, also referred to as a 'mainstreaming' or 'horizontal' clause,[133] depends on its weight (what it refers to)

128 Case 44/79, *Hauer* [1979] ECR 3727, para. 23; Case 265/87, *Schräder* [1989] ECR 2237, para. 15; Case C-293/97, *Standley and Others* [1999] ECR I-2603, para. 54; Joined Cases C-402/05P and C-415/05*P, Kadi and Al Barakaat International Foundation* v. *Council and Commission* [2008] ECR I-6351, para. 355; *ERG and Others*, n. 122 above, para. 80.

129 Case C-112/00, *Schmidberger* [2003] ECR I-5659, para. 81.

130 See, to that effect, Case C-331/88, *Fedesa and Others* [1990] ECR I-4023, paras 15–17; *United Kingdom* v. *Commission*, n. 80 above, para. 93; Case C-183/95, *Affish* [1997] ECR I-4315, para. 42; *Industrias Químicas del Vallés* v. *Commission*, n. 80 above, para. 134; *Pfizer Animal Health* v. *Council*, n. 57 above, paras 456–7; Case C-86/03, *Greece* v. *Commission* [2005] ECR I-10979, para. 96; Case C-127/07, *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, para. 57.

131 *Arcelor*, ibid, para. 57.

132 Case T-31/07, *Du Pont de Nemours* [2013], not yet reported, paras 131–2.

133 Weatherill, n. 30 above, p. 440 at 13.26. With regard to the environmental integration clause see, inter alia, T. Schumacher, 'The Environmental Integration Clause in Article 6 after EU Treaty: Prioritising

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and formulation (how it is phrased). When the integration clause states that a high level of human health protection shall be *ensured* in the definition and implementation of all EU policies and activities,[134] it is a strong requirement. The alchemy of linking Article 114 TFEU on market harmonization[135] with the requirement to integrate health and environmental considerations in all EU policies has unlocked the door to harmonization in health-related issues, as discussed in the case law analysis above. Moreover, harmonization occurs under the condition that a high level of protection is guaranteed. This necessarily turns the HLP requirement into an 'obligation' rather than a mere recommendation. It is because of the integration clause, which brings with it the HLP requirement, that the EU may circumvent the limitations of Article 168 TFEU.[136] The Court's reasoning, referring to Article 114 TFEU to promote maximum harmonization in health issues, will be acceptable in the long term only if the HLP concern is genuine. In that regard, the test will not be whether the legislator has adopted the highest level of protection possible but rather if it has not committed an obvious error of appreciation. A complete harmonization on the basis of the lowest common denominator would not be legitimate, nor would the generalization of a very low level of health protection.

5. CONCLUSION

It was easily foreseeable, but it is now confirmed: the 'sword' path is much trickier than the 'shield' path. The concrete level of ambition deemed acceptable for society in a specific EU act, in areas such as the environment or health protection, results from a complex political choice which lies with the competent authority and not with the Court.[137] Judicial review of the substance is therefore often confined to examining whether the exercise by the authority of its powers is vitiated by an evident error of assessment, whether through an abuse of power or by exceeding the limits of discretion. From this vantage point, establishing that an institution did not commit an evident error or exceed its powers is easier than doing the opposite. The HLP requirement will therefore more easily be deployed to affirm EU authority than to dismantle it. The 'sword' path is not conclusively barred, but it must be used selectively. The ECJ case law shows that two avenues are at least worth considering.

The first avenue concerns the conformity testing of the relation between a basic act and its delegation or executory measures. When a mandate has been given, the delegate's margin of discretion is necessarily limited: delegated acts must remain in conformity with the essential elements of a basic act, including its aims. In this regard,

Environmental Protection' (2001) 3 *Environmental Law Review*, pp. 29–43; N. Dhondt, *Integration of Environmental Protection into other EC Policies* (Europa Law, 2003).

134 Art. 168 TFEU.

135 Art. 114 TFEU.

136 Art. 168(5) TFEU. Integration clauses also characterize the fields of environment and consumer protection, but in a different context: harmonization is a straightforward option there, even if it must fit within the context of the completion of the internal market when operating in the field of consumer protection. Possibilities are larger in the area of environmental protection, where various intensities of possible harmonizations are accepted.

137 *Greece* v. *Commission*, n. 130 above, para. 88.

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the HLP dimension has already proved to be useful in the annulment of Commission decisions.[138]

The second avenue relates to the harmonization of measures based on the harmonization clause of Article 114 TFEU.[139] Here, the HLP requirement may be interpreted as a specific duty that limits the discretion of the decision maker. While acknowledging that a degree of political compromise is inevitable, Weatherill and Oliver assert that 'a manifest neglect to address the protective quality of the harmonized rule or a manifest error of appraisal regarding the applicable conditions would provide a basis for annulment of an adopted act'.[140] Generalizing the lowest level of protection, or adopting a standard that would result in a real reduction in protection at EU level may well be an indicator of such a manifest neglect or error of appraisal. Admittedly, this would impact only on the most obvious situations.

Paradoxically, challenging the legality of the level of protection of an EU act adopted on the basis of the environmental chapter of the TFEU[141] is a dead end. This is because of the possibility of correction towards a higher level of protection afforded in Article 193 TFEU. That specific chapter creates a 'system' for achieving the target of the policy by combining, on the one hand, the minimal protection which the harmonized rule has crystallized and, on the other hand, the opportunity left to Member States to reinforce that protection. In this area, indeed, there is always, legally speaking, the possibility open to Member States to reinforce the standard of protection[142] even if this is not an easy political choice.[143] However, the ECJ would entertain arguments that challenge the adequacy of the basic level of protection afforded by the EU legal act. Evidence that the level of protection is lower than that provided by internationally agreed common obligations might convince the Court.[144] The HLP requirement could also prove to be useful in affirming the legality of national opt-up measures.[145]

In the future, the HLP requirement might also be applicable in relation to the acceptance of national measures that impact on the free movement of goods, insofar as

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138 See *Parliament* v. *Commission*, n. 69 above.

139 Art. 114 TFEU: 'The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective'.

140 Weatherill, n. 30 above, at p. 441.

141 Art. 193 TFEU.

142 *Fornasar*, n. 43 above, para. 46; Case C-6/03, *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, para. 27.

143 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: A High Level of Protection?* (Europa Law, 2005), pp. 1–16; J.H. Jans, 'Minimum Harmonisation and the Role of the Principle of Proportionality', in M. Führ, R. Wahl & P. von Wilmowsky (eds), *Umweltrecht und Umweltwissenschaft; Festschrift für Eckard Rehbinder* (Erich Schmidt Verlag, 2007), pp. 705–17. On the dimension of 'gold-plating' see J.H. Jans, L. Squintani, A. Aragão, R. Macrory & B.W. Wegener, 'Gold Plating of Environmental Measures?' (2009) 6(4) *Journal of European Environment and Planning Law*, pp. 417–35.

144 By analogy with the *Safety Hi-Tech* (n. 2 above) and *Bettati* (n. 48 above) cases.

145 When adopted in accordance with Art. 193 TFEU, this continues from *Deponiezweckverband Eiterköpfe*, n. 142 above, paras 27ff.

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environmental protection is concerned, and in situations where Member States act on their own initiative and in fields that have not yet been harmonized at EU level. Various steps have already been taken in that regard in the area of health protection and education, with an impact on the burden of proof and the assessment of proportionality. National measures that have an impact on freedom of establishment or equal access to education may be justified if they meet a certain threshold. According to the ECJ, proactive national measures that restrict freedom of establishment may indeed be justified insofar as they satisfy a new criterion – that of making a 'contribution to achieving a high level of protection' of health[146] – without going beyond what is necessary to achieve that goal.[147] Moreover, any difference in access to education that could be indirectly discriminatory on the basis of nationality may also be justified by the objective of maintaining a balanced high-quality medical service open to all 'in so far as it contributes to achieving a high level of protection of health'.[148]

These observations demonstrate that the HLP requirement, in the Treaty as well as in secondary legislation, has grown some teeth through case law. It could grow more. HLP requirements are indeed powerful enough to transcend the various apparent categories and wordings that characterize primary law, thus endorsing decompartmentalized approaches and creating a true new dynamic.

However, I consider that the HLP requirements are not yet sufficiently strong to exist as autonomous principles that emerge 'beyond the texts'.[149] They remain tethered to the Treaties. As a consequence, they could still easily be jeopardized if they are not explicitly maintained as part of primary EU law, and attempts have already been made in that regard. Such a removal would raise important questions on the legitimacy of EU powers regarding environmental protection. The origin and developments of HLP requirements are indeed closely linked to the process of European integration. They germinated not from serenity but from fear – the fear of the lowering of pre-existing levels of protection. Nor do they emanate from earlier or parallel developments which occurred at the international level and which could maintain their dynamism. They are deeply linked to the conferral of competences from the national to the transnational, in this case the European, level, and to the questions regarding harmonization and the appropriate standard of protection that emerged through this process. It is therefore essential to bring these requirements more effectively into the light in order to consolidate and develop their potential, should it be minded to further promote that specific ambition in the framework of substantial large-scale legislative and regulatory integration.

146 Case C-169/07, *Hartlauer* [2009] ECR I-01721, para. 47; Case C-73/08, *Bressol* [2010] ECR I-2735, para. 62.

147 With references to Case C-158/96, *Kohll* [1998] ECR I-1931, para. 50; Case C-157/99, *Smits and Peerbooms* [2001] ECR I-5473, para. 74; Case C-385/99, *Müller-Fauré and Van Riet* [2003] ECR I-4509, para. 67; Case C-372/04, *Watts* [2006] ECR I-4325, para. 105.

148 *Bressol*, n. 146 above, para. 62.

149 D. Misonne, *Droit européen de l'environnement et de la santé: L'ambition d'un niveau élevé de protection* (Anthemis, 2011), pp. 286–7; N. de Sadeleer, 'The Principle of a High Level of Environmental Protection in EU Law: Policy Principle or General Principle of Law?', in *Mijörättsliga Perspektiv Och Tankevändor* (Iustus Förlag, 2013), pp. 447–65, at 450.

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The evolution of the HLP in case law stands in contrast to the feeble impact of the requirement on the legislative process itself.[150] Judges would be hard pressed to find much justification for compliance with HLP requirements in the (pre-)legislative history of EU acts. Even the regulatory impact assessments that accompany European Commission proposals do not systematically address the HLP requirement when assessing possible policy options. A 'test of the high level of protection' is nowhere to be found, although such a test would be anchored in primary EU law and would befit the Commission's role as 'guardian of the Treaties'. Is it because, in developing new administrative practices,[151] no thought was given as to whether these more superior regulation processes should have been cast in a very particular mould – a mould that, even in a flow of modernization, must comply with the hierarchy of sources of EU law, at the top of which primary EU law imposes a certain ambition to environmental protection? These final reflections are beyond the scope of this contribution, but may open the door to further stimulating debates.

150 As observed regarding the revision of Directive 96/62/EC on Ambient Air Quality Assessment and Management [1996] OJ L 296, leading to the adoption of Directive 2008/50/ EC on Ambient Air Quality and Cleaner Air for Europe [2008] OJ L 152, or the revision of the Waste Framework Directive (n. 101 above), leading to the adoption of Directive 2008/98/EC on Waste [2008] OJ L 312; see Misonne, ibid., at pp. 91–114.

151 D. Vogel, *The Politics of Precaution*, n. 10 above, at p. 12. See also T. Deville, *L'analyse d'impact des réglementations dans le droit de l'Union européenne* (Larcier, 2014).

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