1. Setting the context

I. HISTORY AND DEVELOPMENT

European environmental law has a long history. At the founding stage of what we call today the European Union (EU), in the 1950s, environmental concerns were not on the agenda. Neither the European Coal and Steel Community Treaty (ECSC), nor the 1957 Treaty of Rome which established the European Economic Community (EEC) contained any policy or legal provisions directly related to the environment. The only notion which created an indirect link to the issue was contained in the preamble of the EEC Treaty stating that “the High Contracting Parties . . . affirm as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples” (Recital 3 of the EEC Treaty).

“Living and working conditions” is a direct reference to public health and occupational health and safety (OHS) and a sign of the anthropocentric approach to environmental law which typifies its early development. Arguably, environmental awareness at the international and European level generally started in the 1970s, when people around the world realised that economic growth and environmental concerns are closely interlinked. Consequently a wave of actions, policies and legislation emerged. A pivotal moment was the publication of the Club of Rome’s *Limits to Growth* in 1972. An important milestone in the (international) history of environmental law was the United Nations Conference on the Human Environment (the Stockholm Conference) in 1972 and, as a result, the

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creation of the United Nations Environment Programme (UNEP), as well as the Stockholm Declaration.\(^3\)

The process of realising the relevance of environmental concerns started with the European institutions announcing the need for an environmental action programme. This announcement by the European Commission in 1970, suggested that a programme was needed for the “protection and improvement of the environment”. The Commission called for “the power to issue provisions governing these [environmental] matters which would be directly applicable in each Member State and which, once adopted, would supersede the existing national provisions or fill gaps in national legislation”.\(^4\)

The “programme of action” was formally adopted in 1973 as a joint declaration of the Council and the Commission.\(^5\) Despite its non-binding character, it laid the foundation for the environmental law and policy to come.

Not having a special legal basis for environmental measures, Article 235 EEC (the at that time Article on “implied powers”) and Article 100a (legislation necessary for the realisation of what was then called the Common Market (later: “internal market”)) served to fulfil this purpose. An important milestone was the introduction of a legal basis on the environment into the EEC Treaty by the Single European Act in 1986. From that time, Environmental Title VII, Articles 130r to 130t formed the explicit legal basis for environmental law. However, for the provisions on the internal market in Article 100a, majority voting was necessary following the Single European Act. Unanimous voting was required under the environmental title (see also Chapter 3 V on decision-making). This difference goes some way to explaining the tendency to keep on introducing legislation on the environment under the internal market provisions of the Treaty, even after a specific Environment Title was introduced.

The Maastricht Treaty (the Treaty on European Union; TEU) in 1992 renamed the EEC Treaty to the “Treaty on the European Community”, or the European Community Treaty (ECT). It introduced qualified majority voting in environmental matters in Article 130r ECT as a general rule. Measures of a fiscal nature, as well as measures affecting town and country planning and some aspects of land use, as well as measures

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4 European Commission, First communication of the Commission about the Community’s policy on the environment, 22 July 1971, SEC (71) 2616.
relating to energy security and sources were still subject to unanimous voting under Article 130s ECT.

The Maastricht Treaty also promoted environmental objectives to the level of the overall objectives of the Community (now Union), in particular by including a reference to the environment in Articles 2 (promotion of “a sustainable and non-inflationary growth respecting the environment”) and Article 3k (establishment of a stand-alone policy area “in the sphere of the environment”). This change promoted the environment as a “key priority” into the Union’s objectives and recognised for the first time the need for an integrated, horizontal environmental policy throughout the Union, as well as the need for sustainable growth. The introduction of the “environmental guarantee” and the inclusion of the precautionary principle stresses this interpretation. Further, the role of the European Parliament was strengthened through the inclusion of the co-decision procedure (see Chapter 3 V).

The introduction of the Amsterdam Treaty in 1997 can be considered a second milestone in the history and development of European environmental law. The principle of sustainable development, already implicitly present in The Maastricht Treaty, was made a Union objective, in the same way as the principle of a high level of environmental protection (Article 2 ECT), which now had a “constitutional status” under European law. Union environmental legislation from Amsterdam onwards was now subject to an improved co-decision-making procedure. Further, the environmental guarantee in Article 100a was enhanced, even if no “right to a protection of the environment” was established (it does exist in some Member States, as further discussed below in Chapter 1 IV C). Additional improvements were the promotion of the integration principle to a general European law principle and the horizontal application of the subsidiarity and proportionality principles with regard to environmental aspects in decision making. The Treaty renumbered Articles 130r–130s ECT to Articles 174–176 ECT.

The subsequent 2001 Treaty of Nice, introduced only minor changes to Article 175.

The most important change in the environmental area in the Lisbon Treaty in 2007 was the introduction of a separate legal basis on energy issues. Energy was formerly addressed by the provisions of the internal market (Article 114 Treaty on the Functioning of the European Union

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6 As further discussed below in Chapter 1 IV C.
7 See also G. Van Calster and K. Deketelaere, “Amsterdam, the IGC and greening the EU Treaty”, 7 European Environmental Law Review, 1 (1998), 12–25.
EU environmental law

(TFEU)), competition or under the environmental title. Article 194 TFEU has now introduced a separate legal basis. Under Article 194, energy policy needs to be developed having “regard for the need to preserve and improve the environment”. Additionally, Article 191(1) TFEU now includes an explicit reference to climate change in the objectives of environmental policy, even if this is a rather cosmetic change: the environmental legal basis has been frequently used as a basis for climate change legislation in the past. Further changes under Lisbon are the new Article 4(2)(e) TEU which lists “environment” under the area as a shared competence and recognises in Article 13 TFEU (formerly adopted as a Protocol to Amsterdam Treaty) animal welfare as an area of Union concern. Regarding public participation, Article 11(4) TEU establishes the possibility for European citizens to invite the Commission to submit a legislative proposal.8

To conclude, the area of European environmental law and policy emerged over the years from an area of “no interest” to one of the key areas of EU law, having cross-cutting horizontal effects to other policy areas.

II. SOURCES OF EUROPEAN ENVIRONMENTAL LAW

The EU legal order is complex. The Union has its own legal personality and is itself an actor under international law and thus bound by treaties and conventions to which it is a party (see Article 216(2) TFEU). Further, the EU has its own body of law.9

Firstly, primary EU law consists of the laws written down in treaties (for example the Treaty on European Union, the Treaty on the Functioning of the European Union and the Charter of Fundamental Rights of the European Union) and the general principles of EU law (for example Supremacy and the Principle of Direct Effect, further discussed in Chapter 4 II).

Secondly, the European institutions may subsequently create legislation on the basis of and under the conditions (including voting majorities etc.) provided for in primary law. Such legislation is called secondary law.

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There are two groups of secondary legislation. The first group consists of the binding acts which are listed in Article 288 TFEU, namely regulations, directives and decisions, as well as recommendations and opinions. Included in the second group of non-binding instruments, which are not listed under Article 288 TFEU, are declarations, resolutions and communications of the European institutions, as well as other actions and acts of these Institutions. Even though they are not binding, they are often used by the courts in interpreting Union law and thus have a strong moral value. All instruments are further explained in Chapter 4 I.

A third source of European environmental law is the case law of the European Court of Justice (ECJ). The judgments on the interpretation or validity of Union law are applicable ex tunc (from the outset) and erga omnes (binding for everyone). The position of ECJ case law within the European legal order is ambiguous. On the one hand it cannot be seen as being at the same level as secondary law, since it can interpret the latter. On the other hand the ECJ does not have the competence to assess the validity of primary law, hence it is not quite equal to primary law.

Fourthly, the obligations arising under international law prevail over Union secondary legislation.

It is noteworthy that the internal division of competence between the EU and the Member States extends to the international stage: the Union has the exclusive competence to negotiate and conclude international agreements. Mixed agreements are those where the Union and the Member States have joint competence. Article 191(4) TFEU explicitly specifies that, taking into account the division of competences, the Union and the Member States “shall cooperate with third countries and with the competent international organizations”. The need for international
cooperation in the area of environmental law is therefore explicitly recognised in the Treaty.

In areas of shared competence, Member States’ and the Union’s rights and duties arising under an international treaty are detached from each other. Only when secondary legislation transposing the international legislation exists does the Commission enforce the convention and, consequently, the Member States are bound to comply with this legislation. If the convention is only declared by a Council decision, and not transposed into EU secondary law, the convention is not directly binding on the Member States. However, they do have the option to adhere to the convention themselves and transpose it into national law.13

Finally, a newer source of EU environmental law are the Environmental Action Programmes. The first five action programmes, from a legal point of view, were mere political statements, even though they were always considered an important basis for environmental policymaking. However, the Maastricht Treaty created a Treaty basis for the adoption of action programmes (Article 130s(3)). In Article 192(3) TFEU the Lisbon Treaty finally included that general action programmes “setting out priority objectives to be attained” are to be adopted by the European Parliament and the Council, following a Commission proposal by the ordinary legislative procedure. Thus, starting from the 7th Environmental Action Programme these have been adopted as formal legal acts. The action programmes commonly establish mid-term and long-term goals and create synergies with other long-term strategies of European environmental law. The implementation measures to achieve the goals outlined in the action programmes are adopted independently. It is fair to say that one cannot find additional hard “law” in the programmes.

III. HEADS OF POWER OR “COMPETENCES”

“Heads of power” is translated in EU jargon as “competences” or “competencies”. There are generally three categories of competence in the EU: exclusive, non-exclusive and supportive.14 In accordance with

Setting the context

Article 2(1) TFEU, if the Union has exclusive competence in a specific area, “only the Union may legislate and adopt legally binding acts, the Member States [are] able to do so themselves only if so empowered by the Union or for the implementation of Union acts”.

Member States therefore are not allowed to adopt legislation in these areas, even if they go beyond the measures taken by the Union. Regarding the area of the environment, the Union only has exclusive competence to regulate the conservation of marine biological resources under the common fisheries policy (Article 3(1)(d) TFEU). By contrast, in the area of a shared competence,

the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence. (Article 2(2) TFEU)

Three fundamental principles are crucial in determining the division of competences between the Union and the Member States: the principles of subsidiarity (Article 5(3) TEU) and proportionality (Article 5(4) TEU; these principles are further discussed in Chapter 2) as well as the principle of attributed powers or “conferral” (Article 5(2) TEU and Article 4(1) TEU), meaning that only the EU has those powers which have been expressly attributed to it. The principal of conferral establishes whether an EU competence exists at all.\(^{15}\) The principles of subsidiarity and proportionality determine the extent to which the Union can exercise the competence (see Article 5(1) TEU).

Article 4(2)(e) TFEU includes “environment” (as well as “energy” under Article 4(2)(i) TFEU) as an area of shared competence. Hence with deference to the subsidiarity and proportionality principle, the institutions have to justify why an environmental matter is better regulated on a Union wide basis rather than at a national level (for a detailed explanation see Chapter 1 III).

Further, the Union has a supportive competence to carry out actions, as well as support, coordinate or supplement the actions of the Member States amongst others in the area of protection and improvement of human health (Article 6(a) TFEU).

For legislation based on Article 192 TFEU, Article 193 TFEU opens up the possibility for Member States to introduce more stringent measures.

This is referred to as the environmental guarantee under the environmental title. A similar provision is included in the internal market provisions (Article 114 TFEU), as discussed in Chapter 3 III.

IV. OBJECTIVES OF THE EU’S ENVIRONMENTAL POLICY

Article 3 TEU establishes the overall objectives and aims of the EU. The third paragraph contains several references regarding the environment: “[The Union] shall work for the sustainable development of Europe . . . and a high level of protection and improvement of the quality of the environment.” Accordingly, the Union’s overall objectives in the area of the environment are threefold: sustainable development; a high level of protection; and improvement of the quality of the environment.

The preamble of the TEU underlines this intention “taking into account the principle of sustainable development . . . and environmental protection”. However, there is no further reference in the Treaty of what specifically these objectives entail. There is neither definition nor specification for either “sustainable development and high level protection” or “quality of the environment”. Nor is there a definition of the “environment” itself. The overall aims are further supplemented and specified by the provisions of Article 191 TFEU. Article 191(1) lists the following objectives for environmental policy making:

a) preserving, protecting and improving the quality of the environment,
b) protecting human health,
c) prudent and rational utilisation of natural resources,
d) promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

(Emphasis added)

The second paragraph further specifies that “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”.

The objectives under Article 191 are not listed in hierarchical order; they are equally important. This is further underlined by Article 11 TFEU, which requires the integration and promotion of environmental protection requirements and sustainable development into the definition and implementation of all Union policies and activities. Notwithstanding the inclusion of the protection of human health as a focal point for EU environmental policy, Article 191 clearly indicates that the policy is not purely anthropocentric. Moreover, the reference to prudent and rational
utilisation of natural resources also indicates the immediate link with energy policy.

Article 191(3) specifies the criteria which have to be “taken into account” in environmental law making:

- available scientific and technical data,
- environmental conditions in the various regions of the Union,
- the potential benefits and costs of action or lack of action,
- the economic and social development of the Union as a whole and the balanced development of its regions.

There are many indications in Article 191 which prima facie may suggest the proscribed use of “best available technique” (BAT; see more in Chapter 6 II). However, in reality not all, indeed very little, EU environmental law imposes the duty to employ whatever best technology is available on the market, regardless of cost. While the precautionary principle (further discussed in Chapter 2 IV) supports the use of BATs, other principles pull it in another direction. In particular, the many bells and whistles surrounding the principle of a high level of environmental protection lead to BATNEEC (best available technology not entailing excessive costs) rather than BAT being the standard reference in many European environmental laws. Moreover, the very principle of sustainable development aims to balance environmental, economical and social development.

In contrast with, for instance, the provisions on the internal market where “quantitative restrictions on imports [and exports] and all measures having equivalent effect shall be prohibited” (emphasis added) (Article 34, [35] TFEU), the environmental title does not contain an explicit prohibition of environmental pollution. Hence, unlike in the internal market area, the environmental objectives cannot be enforced in and of themselves on grounds of the Treaty basis. They require transposition and elaboration using secondary law to become enforceable. This interpretation is supported by the notion that “proposals” (employed in Article 114) refers to specific measures, not, as in Article 191, to “policy” as a whole.

A. Sustainable Development as a Union Objective

The first objective listed under Article 3 TEU is the achievement of sustainable development. Its introduction into the Amsterdam Treaty in 1999 was a milestone in European environmental law-making. It is further strengthened in the 7th indent of the Preamble to the TEU: “Determined
to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market . . .”

The principle and its importance are further strengthened in Article 191 and in the integration principle in Article 11 TFEU.

However, as for most key concepts and terms of European environmental law, no definition of sustainable development is provided in primary law. Nor do the various strategies on sustainable development contain a specific overarching definition. As a consequence the legal operation and enforceability of the principle can be questioned (for a discussion of the principle of sustainable development see also Chapter 2 III). This remains the case even if one can assume that the integration of sustainable development in the EU’s objectives is directly linked to the developments in international environmental law (the Rio Conference and its aftermath), where the concept and its consequences have arguably been further clarified.

B. High Level of Environmental Protection

The second paragraph of Article 191 TFEU complements the aims by including a reference to the high level of protection. However, much like Article 3 TEU, Article 191 TFEU does not define the various elements either. For example, there is no indication of what a “high level of protection” entails and how it can be achieved. One possible way of determination is to look at the current long-term strategies and policy in the environmental area, such as at the Environmental Action Programmes, as discussed in Chapter 1 II. The 7th Union Environment Action Programme, for example, identifies amongst others the protection, conservation and enhancement of the Union’s natural capital; as well

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as changing the Union into a resource-efficient, green and competitive low-carbon economy as the objectives.\textsuperscript{19}

Further, the ECJ held that a high level of environmental protection has to be balanced against economic interests.\textsuperscript{20} Article 191 TFEU itself clearly indicates that the Union’s quest for a high level of environmental protection is not imposed dogmatically. A variety of considerations in Article 191 indicate nuances in this principle.

First of all, Article 191 TFEU obliges the institutions to take the differing situations in the Union into account. On the one hand, from a technical point of view, Article 191(2) TFEU refers to the “environmental conditions in the various regions of the Union”. Indeed, Member States’ geography, even within one and the same State, differs to such an extent that it would not make sense to impose the same standards and rules upon all Member States. “Differing situations” within the Union may also be taken in a socio-economic meaning.

A second nuance of the high level of protection may be found in the reference to the “economic and social development of the Union as a whole and the balanced development of its regions”. This consideration traditionally receives less attention in the European Commission’s proposals; however, it invariably surfaces during Council discussions. This often triggers protest by observers and activists. It is, however, in line with the principles included in Article 191 TFEU.

The cost/benefit analysis prescribed by Article 191 TFEU has to be understood both in a technical (environmental) sense and from an economic point of view.

A practical example of the application of a high level of environmental protection objective are two rulings by the General Court regarding the “substances of very high concern” (SVHC) under the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation.\textsuperscript{21} In these judgments the court expanded the Commission’s and European Chemicals Agency’s (ECHA’s) powers to include SVHCs on the candidate list which triggers additional information requirements. The Court found this to be in line with the Regulation’s objective of a high level of environmental protection.\textsuperscript{22}


\textsuperscript{21} Case T-134/13 Polynt and Sitre v ECHA, ECLI:EU:T:2015:254, as well as case T-135/13 Hitachi Chemical Europe and Others v ECHA, ECLI:EU:T:2015:253.

\textsuperscript{22} Case T-135/13, at 46 and 112, as well as Case T-134/13, at 46 and 106.
C. The Quality of the Environment and its Legislation

Any effort to increase the quality of legislation and, thus, the quality of the environment should of course be welcomed. Concrete means of a technical nature include a far-reaching duty of the Commission to report on the effectiveness of existing legislation; built-in reviews of the provisions; varying provisions over time; and so on. Reporting duties are widely used in the Union’s environmental legislation, as are multi-annual programmes. The latter are used, for example, for emission standards, which remain valid for only a number of years (often five years). The legislation concerned then provides either for indicative values for the second and subsequent periods, or merely provides for new legislative initiatives to fill the gap after the initial period. This and other techniques prevents the Union from resting on its laurels, once legislation in a particular field has been issued.

D. The Right to the Protection of the Environment

In the past, some Member States tabled proposals to include a “right to a clean and healthy environment” in the Treaty. The Treaty does include some provisions with respect to fundamental rights and non-discrimination, including a procedure for action in the event of a breach by a Member State of the principles on which the Union is founded. However, so far, the Treaty does not contain a right to the protection of the environment. The calls for the inclusion of such right floundered on the confusion with which it is surrounded. Comparative analysis shows that quite a number of Member States (Austria, Belgium, Finland, Germany, Greece, the Netherlands, Portugal, Spain) have a constitutional basis for environmental protection. This imposes a duty on the State to take regulatory action to protect and improve the environment. Whether such right has to be seen as a “human” or “fundamental” right with respect to the environment is far from certain.

The international discourse in this respect is confusing. Principle 1 of the Rio Declaration may be a good example of the difficulties surrounding the issue. Because so many States were represented at this Conference, the Rio proceedings do carry considerable weight in the debate. Principle 1 reads: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” This is far less radical than what was stated in the Declaration of Stockholm: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a
solemn responsibility to protect and improve the environment for present and future generations.

One of the stumbling blocks for the recognition of a “human” or “fundamental” right for the protection of the environment is the condition that its contents be sufficiently precise (as with all other human rights). In other words, in order to sustain such a right, its content should be the same, regardless of the (historical and geographic) circumstances.

As for the environment, the situation is unclear: what sort of a fundamental right is it? Are we all entitled to a clean environment, or a healthy one, or one which generally suits human beings? How about the rights of the environment itself? Some activists claim that the concept of “human rights” and of “sustainable development” might be irreconcilable, in light of the essentially anthropocentric character of the former.

Some authors stress the fact that a right to environmental protection is self-enforcing. It could, for instance, accelerate the development of instruments such as environmental impact assessments, or access to justice. However valid this argument may be, in our view one should be careful not to confirm the existence of the human right itself, by arguing that it is self-enforcing.

E. Protecting Human Health

This objective refers to human health only and not to animal health. Interestingly, Article 13 TFEU on animal welfare states that animals are sentient beings and that animal welfare requirements have to be taken into account to the policies on “agriculture, fisheries, transport, internal market, research and technological development and space”; it does not list environmental policy. Whilst one may argue that animal health and animal welfare are included under the broad interpretation of the word “environment” and thus need to be respected in environmental policy objectives, the case remains that animal welfare legislation in the EU tends to be adopted under the agriculture title of the Treaty.

F. Promoting Measures at International Level to Deal with Regional or Worldwide Environmental Problems, and in Particular Combating Climate Change

This objective was included in the Maastricht Treaty and establishes that the environment is not limited to Union territory but expands to the
international level to deal with transboundary, regional and worldwide environmental problems. The reference to climate change was integrated into the provision after Lisbon and emphasises the Union’s strong belief that it may take the necessary measures to deal with this international concern. The competences of the Union at the international level are described in Chapter 1 III.