Where eagles dare in EU environmental law: How far may Member States go through unilateral measures?

Dr. Leonie Reins

Structure of the webinar

- Aim of today:
  - Explain background, use and context of the environmental guarantee
  - Shed light on the interpretation of the environmental guarantee by the CJEU

1. Introduction: (historical) background and context
2. Textual interpretation of Article 193 TFEU
3. Interpretation by the CJEU
   - The constitutive elements of Article 193 TFEU

4. The environmental guarantee in EU legislative instruments

5. Conclusion and debate

1. Introduction: (historical) background and context

TITLE XX

ENVIRONMENT

Article 191

(ex Article 174 TEC)

1. Union policy on the environment shall contribute to pursuit of the following objectives:

— preserving, protecting and improving the quality of the environment,

— protecting human health,

— prudent and rational utilisation of natural resources,

— promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

2. 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.

1. Introduction: (historical) background and context

Article 193

(ex Article 176 TEC)

The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.

1. Introduction: (historical) background and context

CHAPTER 3

APPROXIMATION OF LAWS

5. Moreover, without prejudice to paragraph 4, if, after the adoption of a harmonisation measure by the European Parliament and the Council, by the Council or by the Commission, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.

2. Textual interpretation of Article 193 TFEU

- **“more stringent measures”**
  - Must, seek to achieve the same environmental protection objective as that pursued by the measure adopted at Union level (Case C-43/14, *ŠKO-ENERGO*, ECLI:EU:C:2015:120)
    - Measures cannot be *less ambitious* than the Union measure or “*change* arrangements for implementing secondary law”. (Case C-194/01, *Commission v Austria*, ECLI:EU:C:2004:248, para. 39.)
  - “[C]annot release Member States from the obligation to transpose a Directive” (Case C-322/00, *Commission v Netherlands*, ECLI:EU:C:2003:532)

2. Textual interpretation of Article 193 TFEU

- **“more stringent measures”**
  - Include, for example
    - Possibility of extending the scope of application of a particular Union standard
    - Passing of stricter thresholds
    - Establishment of more stringent procedural requirements
    - Establishment of a list of additional substances or activities to be regulated;
    - Removal of exceptions established under an EU measure and the setting of earlier time limits.

David Langlet and Said Mahmoudi; De Sadeleer (2014)

3. Interpretation by the CJEU - The constitutive elements of Article 193 TFEU

- In order for the environmental guarantee to be lawfully used by a Member State, there must be

1. A more stringent protective measure adopted by an EU Member State;
2. Compatibility of that measure with the Treaties; and
3. A notification of that measure to the Commission.

3. Interpretation by the CJEU - The constitutive elements of Article 193 TFEU

1. A more stringent protective measure

Case C-6/03, Deponiezweckverband Eiterköpfe, ECLI:EU:C:2005:222, paras. 57-64

- The Court held that:
- *"It is clear from the broad logic of Article 176 EC that, in adopting stricter measures, Member States* ***still exercise powers governed by Community law****, given that such measures must in any case be compatible with the Treaty. Nevertheless,* ***it falls to the Member States to define the extent of the protection to be achieved****".*

Para. 61 (emphasis bold added).

3. Interpretation by the CJEU - The constitutive elements of Article 193 TFEU

1. A more stringent protective measure

- Case C-284/95, *Safety Hi-Tech*, ECLI:EU:C:1998:352
- The Court held 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****."*

Para. 49 (emphasis bold added).

3. Interpretation by the CJEU - The constitutive elements of Article 193 TFEU

1. A more stringent protective measure

- Case C-318/98, *Fornasar and Others*, ECLI:EU:C:2000:337
- The Court held that:
- *"[E]ntitles the Member States to classify **any other waste** which a Member State considers to display one of the properties listed in Annex III to that directive as hazardous. Thus, such waste is considered hazardous only in the territory of the Member States which have adopted such a classification."*

Para. 48 (emphasis bold added).

3. Interpretation by the CJEU - The constitutive elements of Article 193 TFEU

1. A more stringent protective measure

- Case C-43/14, *ŠKO-Energo*, ECLI:EU:C:2015:120
- The Court held that:
- *"[A] measure, which, as indicated in the decision to refer, was intended to obtain additional revenue for operators of photovoltaic power stations, pursues objectives different from those of Directive 2003/87. Consequently, it cannot be regarded as a more stringent protective measure for the purposes of Article 193 TFEU."*

Para. 25

3. Interpretation by the CJEU - The constitutive elements of Article 193 TFEU

1. A more stringent protective measure

- Case C-281/11, *Commission v Poland*, ECLI:EU:C:2013:855
- The Court held that:
- *"[I]t does not appear that Articles 7 and 8(2) of Directive 2009/41 have, even in part, been transposed into national law, so that a* ***comparison*** *of the provisions of that directive to those constituting more stringent protection measures may not be carried out. Accordingly, the application of* ***Article 193 TFEU cannot be relied on*** *in the present case."*

Para. 115 (emphasis bold added).

3. Interpretation by the CJEU - The constitutive elements of Article 193 TFEU

2. Compatibility of the "More Stringent Protective Measure" with the Treaties

- Case 203/96, *Dusseldorp and Others*, ECLI:EU:C:1998:316, paras. 35-50
  - First indication of the restrictive nature of the environmental guarantee
- Confirmed by the Court in Case C-510/99, *Tridon*, ECLI:EU:C:2001:559
- Case C-129/16, *Túrkevei Tejtermelő Kft.*, ECLI:EU:C:2017:547
  - Measure must not only comply with the Treaties, but also with "the general principles of EU law".

3. Interpretation by the CJEU - The constitutive elements of Article 193 TFEU

2. Compatibility of the "More Stringent Protective Measure"

- Do fundamental rights also need to be respected in the context of the use of the environmental guarantees?
  - AG Opinion Kokott, Case C-60/18, *Tallinna Vesi*, ECLI:EU:C:2018:969

3. Interpretation by the CJEU - The constitutive elements of Article 193 TFEU

3. Notification of the More Stringent Protective Measure to the Commission

- Case C-2/10, *Azienda Agro-Zootecnica Franchini and Eolica di Altamura*, ECLI:EU:C:201:502
  - The Court held that neither the wording nor the purpose of Article 193 TFEU

    "[…] *provides any support for the view that failure by the Member States to comply with their notification obligation under Article 193 TFEU in itself renders unlawful the more stringent protective measures thus adopted."*

    para. 53.

Quick recap

- the action pursued…
- must be in accordance with the Treaties
  - hence also in accordance with Articles 34-36 TFEU on the prohibition of quantitative restrictions between Member State
    - respect the rules regarding the free movement of goods and trade, and cannot constitute an arbitrary restriction on trade
- must also respect the nature of the harmonisation objective pursued through secondary legislation
  - cannot be different and “must consist in the extension of the harmonisation rule by pursuing a greater level of [environmental] protection” (de Sadeleer, referring to Kraemer (2007))

4. The environmental guarantee in EU legislative instruments

- Can/ May a Directive *prohibit* EU Member States from adopting more stringent protective measures?

Article 193
(ex Article 176 TEC)

The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission.

- "[T]here is a clear risk that the functioning of the internal market is undermined if the Member States are allowed to apply more stringent measures in all situations" (Langlet and Mahmoudi)
- The CJEU's "jurisprudence on this matter is inconclusive and unclear" (Holwerda)

4. The environmental guarantee in EU legislative instruments

Instrument	Recital/Article
Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances	Recital (11)
Regulation (EU) No 517/2014 of the European Parliament and of the Council of 16 April 2014 on fluorinated greenhouse gases	Recital (24)
Regulation (EU) 2017/852 of the European Parliament and of the Council of 17 May 2017 on mercury	Recital (11)
Directive 2015/2193/EU on the limitation of emissions of certain pollutants into the air from medium combustion plants	Recital (24)
Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading	Article 10

4. The environmental guarantee in EU legislative instruments

DIRECTIVE (EU) 2015/2193 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 25 November 2015

on the limitation of emissions of certain pollutants into the air from medium combustion plants

(24) In accordance with Article 193 of the Treaty on the Functioning of the European Union (TFEU), this Directive does not prevent Member States from maintaining or introducing more stringent protective measures. Such measures may be needed for example in zones not complying with air quality limit values. In those cases, Member States should assess the need to apply stricter emission limit values than the requirements set out in this Directive, as part of the development of air quality plans pursuant to Directive 2008/50/EC of the European Parliament and of the Council ([1]). Such assessments should take account of the outcome of an exchange of information on the best emission-reduction performance that can be achieved with best available and emerging technologies. The Commission should organise such exchange of information with Member States, the industries concerned, including operators and technology providers, and non-governmental organisations, including those promoting environmental protection.

4. The environmental guarantee in EU legislative instruments

DIRECTIVE (EU) 2016/802 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 11 May 2016

relating to a reduction in the sulphur content of certain liquid fuels

(codification)

(14) In accordance with Article 193 TFEU, this Directive should not prevent any Member State from maintaining or introducing more stringent protective measures in order to encourage early implementation with respect to the maximum sulphur content of marine fuels, for instance using emission abatement methods outside SO_x Emission Control Areas. Such measures are required to be compatible with the Treaties and are to be notified to the Commission.

(15) A Member State, before introducing new, more stringent protective measures, should notify the draft measures to the Commission in accordance with Directive (EU) 2015/1535 of the European Parliament and of the Council ([1]).

DIRECTIVE (EU) 2015/1535 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 9 September 2015

laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification)

Conclusion

- The wording of Article 193 TFEU may, at first sight suggest that there is plenty of room for MS for more stringent protective action
  - In practice it has to ensure:
    - That such a measure seeks to attain the same objective as that pursued by the relevant EU legal instrument
    - It may not violate the provisions of the EU legal instrument in question
    - Nor the Treaties or any general principles of EU law
  - The Court is legalistic or restrictive rather than activist

Sources

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