The External Environmental Policy

5

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5.1 Introduction

After the CCP, the second most important area of EU international relations law is arguably the External Environmental Policy (EEP). For, whereas the largest part of the environmental legislation currently in force in the Member States stems from the supranational level,[1] most of the treaties and international regulations they subscribe to have involved Union action as well.

Ever since its inception in the 1970s, environmental policy in general has been the subject of acerbic criticism. A perennial complaint concerns the fiendish amount of bureaucracy that it allegedly entails, in order to counter problems that seem very remote and insufficiently evidenced. As regards the environmental policy of the EU—an organisation already lambasted for its excessive intrusion

[1]Countless myths surround the exact figure, with eurosceptics usually claiming a too high, and their opponents much a too low percentage. An excellent attempt at debunking the myths and arriving at an accurate estimation is made by Raunio and Wiberg (2017); see also Bertoncini (2009).

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into national affairs—the administrative burdens placed on public and private authorities stir up additional adverse reactions, leading to increased popular discontent with the Union's overall performance. Even in times such as the present, where the deteriorating ecological conditions loom large in the public mind and figure prominently on the agendas of most policy-makers, the rationality and efficiency of many protective measures continue to be questioned. Especially at an economic ebb, an oft-repeated argument is that the cost of complying with environmental rules hampers the competitiveness of EU businesses, especially when they have to face up to competitors from countries that do not uphold similarly strict standards.

With opposition bearing down from different sides at once, arduous struggles precede the resolution of virtually every issue that the EEP seeks to address. Evidently, arriving at tangible results to ensure the future of the planet requires a lasting political commitment, determination and resilience from the Union, the Member States, as well as their international partners.

In the sections that follow, we will shine a light on the EEP's most important elements, sketching some further tensions in the process. As before, we first discuss some general aspects of the policy, among which its rationale, objectives and guiding principles (Sect. 5.2). We then proceed to look into its purview, both in theory and in practice (Sect. 5.3). Our investigations are concluded with a reflection on the ambitions and achievements of the EEP in a global context, with special attention for the efforts of the EU and its Member States in formulating and upholding global emission standards (Sect. 5.4).

5.2 General Aspects of the EEP

5.2.1 Rationale

Even when the urgency of a particular environmental dossier may not be readily apparent yet, it nonetheless makes sense for countries to tackle the issue in a joint effort. After all, many of the pertinent problems that call for a regulatory response feature a transnational dimension by their very nature. Regardless of whether one thinks of large-scale emissions of harmful elements and substances, surface water pollution, abuse or overconsumption of physical resources—the detrimental consequences of unregulated behaviour in one country may also easily affect human beings in a neighbouring state or region.[2] An environmental policy limited to a single country is therefore bound to be much less effective. As remarked, businesses could then actually reap large commercial advantages from a low standard of environmental protection in certain countries, and decide to relocate

[2]Cf. the *'Principles concerning trans-frontier pollution'*, adopted on 14 November 1974 by the OECD.

their activities. Subsequently, the increase of economic prosperity that ensues in the receiving countries could induce the latter to lower their standards even further.

Precisely to prevent such races to the bottom from becoming a too regular occurrence, interstate dialogues have been initiated, and common attempts made at forging a synchronised environmental policy. Yet, from the very moment that a group of states, however large, manages to agree upon the establishment of such common rules, the problem is bound to re-emerge: for what may then be dubbed the 'internal' policy of the group needs to be complemented by an external equivalent, so as to tackle large-scale environmental issues more efficiently with other countries and organisations.

Once the idea has landed that the contemporary environmental problems are intrinsically global, it becomes equally clear that the challenges can no longer be met by a group of states alone, let alone by a single state. Among the European countries, the awareness of this fact only emerged long after the Second World War, followed by a protracted period where a one-sided emphasis was placed on societal restoration, raising welfare levels and economic integration. It is useful to go into the genesis of the EEP in a bit more detail, so as to better understand the ideas behind the rules that the EU countries have ultimately managed to agree upon.

5.2.2 Historical Background

The environment is a relatively recent EU field of competence. Initially, environmental protection was not mentioned in the EEC Treaty, and it was not until 1973 that a European Environmental Action Plan (EAP) was launched, the first of what would become a series.[3]

As a specific legal basis was lacking, in order to enact the desired substantive rules, refuge had to be sought in the general competence clause of what was then Article 235 TEEC.[4] Multiple specific measures were adopted on this legal basis, in conjunction with Article 2 TEEC, which listed 'the improvement of living and working conditions' as one of the objectives of the European Economic Community. This slightly oblique approach survived a critical mustering by the Court of Justice.[5]

Box 5.1 Environmental Action Programmes

The multi-annual Environmental Action Programmes set out the key priorities and vision for the policy activities in the designated period. The

(continued)

[3]For a more detailed account, see Somsen (1996).

[4]Currently Article 352 TFEU.

[5]See e.g. Case 91/79, *Commission* v *Italy*, and Case 240/83, *Procureur de la République* v *Association de défense des brûleurs d'huile usagées*.

Box 5.1 (continued)
status and significance of these documents has massively increased since the first EAP was drawn up in the early 1970s. Nowadays, they are adopted in the form of a decision of the Parliament and the Council, following the ordinary legislative procedure. The seventh programme (2013–2020) identifies nine core objectives, ranging from the very general (e.g. to safeguard citizens from environment-related pressures and risks to health and well-being) to the fairly specific (e.g. making the Union's cities more sustainable).

The Single European Act, which entered into force in 1987, marked the beginning of a new era. At a time when the serious nature of the issues concerned was finally getting through to the public at large, environmental action became a central point of attention in EU policymaking. With the SEA, a separate title on the environment was inserted into the TEEC, as well as a so-called policy-linking clause, demanding that environmental concerns would be duly taken into account at the drafting of new laws and policies.[6] At Maastricht and Amsterdam, the environmental policy of the EU was expanded further, inter alia by adding sustainable development as one of the Union's main objectives.

Immediately when the environmental title was added to the TEEC in 1987, the internal competence was supplied with an external counterpart.[7] As with the CCP, the exact scope of the EEP was left to be decided in practice, with the EU Courts once again offering all due assistance; the main threads of their jurisprudence will be unweaved further below. First however, we will take a closer look at the key objectives and principles of the environmental policy in general.

5.2.3 Central Objectives and Guiding Principles

The central objectives of the Union's environmental policy, currently laid down in Article 191(1) TFEU, are four in number: first, the preservation, protection and improvement of the environment; second, the protection of human health; third, the stimulation and advancement of a prudent and rational utilisation of natural resources; fourth, the promotion of measures at the international level to deal with regional or worldwide environmental problems, in particular the problem of climate change. Ever since a title on the environment was inserted into the Treaties, the ambition has been to realise 'a high level of protection', a phrase that has gone on to lead a life of its own in scholarly writings.[8]

[6]Currently Article 6 TFEU. For an extensive analysis of the clause's meaning and effectiveness, see Dhont (2003).

[7]Currently Article 191(4) and Article 192 TFEU.

[8]Article 191(2) TFEU; see e.g. the various contributions in Macrory (2005).

Article 191(2) TFEU lists the three guiding principles, which have gradually also obtained a classic status. The *precautionary principle* dictates that if the (side-) effects of an object, technique, rule or behaviour are uncertain, one should in principle abstain from using, promulgating or promoting them. The *proximity principle* states that attempts at resolving a problem should always move as closely as possible to the root and source of a problem, so as to apply and implement solutions at the hard core. Finally, the *polluter pays principle* means exactly what one would think that it means: it entails that those that are responsible for any environmental harm should bear the full costs thereof as well.[9]

These objectives and principles originally had quite a soft status, but acquired more solid legal form with impressive velocity; at present, they appear to have become wholly justiciable. This means that any legal measures believed not to comply with those objectives and principles can be challenged before the competent EU or national courts, provided one can avail oneself of the necessary remedy.[10] Of course, such claims will not always be automatically successful, as an intense scrutiny of the relevant measure and a weighing of all the interests involved still has to take place.

5.3 Scope of the EEP

5.3.1 Tensions with the CCP: Theoretical Aspects

As already hinted at above, there exists a notable tension between the pursuit of economic interests on the one hand and the attainment of environmental objectives on the other. In EU law, this tension is reflected in the friction between the Common Commercial Policy and the External Environmental Policy, respectively.[11] Consequently, legal measures that have a clear environmental dimension yet also extend into CCP domain have become a regular subject of litigation.

In fact, often even the most basic of policy choices can give rise to controversy here. For example, under the CCP, if tariff preferences are granted to a third country, these risk stimulating the mass production and export of commodities when that suddenly becomes profitable. Those same commodities may however be identifiably harmful to the local environment as well.[12] The same applies to exports. For example, goods and substances outlawed in the EU for their detrimental

[9]For further reflections on the guiding principles, see Jans and Vedder (2012), pp. 41–51.

[10]See e.g. Case C-377/98, *Netherlands* v *Council and Parliament*; Case T-429/05, *Artegodan* v *Commission*; Case C-343/09, *Afton Chemical Limited* v *Secretary of State for Transport*.

[11]For a more general overview, see Wiers (2002).

[12]A recent example are the alternatives to fossil fuel (e.g. ethanol on the basis of maize or sugar), all too eagerly produced in large quantities in developing countries, but simultaneously proving to impact extremely negatively on their domestic agricultural resources.

environmental impact may well be allowed to be shipped to other continents without further consideration.[13]

The need to resolve the tension between the CCP and the EEP would be less pressing for lawyers if legally both policies were of the same nature. Unfortunately, this is not the case, as the CCP constitutes a field of exclusive competence, whereas in the EEP, the Union shares competence with the Member States.[14] Through the *ERTA* mechanism, the EU may widen its competences in the EEP, yet the problems are compounded by virtue of the fact that internal environmental rules are normally enacted in the form of minimum harmonisation.[15] This means that even if the dossiers concerned appear, from a certain point in time on, to reside within the ambit of the EU competence, the Member States remain entitled to agree on more stringent standards on those topics with external partners or organisations.[16] There thus remains considerably more room for the Member States to act on the global scene and exercise their powers than one prima facie might think. This contrasts with the CCP, where the Member States have been gradually squeezed out (albeit with a brief interlude in the 1990s), and where the EU at present pulls (almost) every chord.

Box 5.2 The EU, the Member States and Multilateral Environmental Agreements

Within the sphere of multilateral environmental agreements, matters can reach an additional level of complexity. In Summer 2015, Sweden proposed to include a new category of substances in the Stockholm Convention on persistent organic pollutants (a treaty to which both the EU and the Member States are parties). In the run-up to that moment, discussions had taken place within the Council and with the Commission, but no definite agreement could be reached to place the substances on the provisional list. In a subsequent infringement case (C-246/07), the ECJ ultimately condemned Sweden for violating the duty of sincere cooperation with its unilateral act. The Court also clarified the effect of minimum standards, ruling that Member States are not free to propose or adopt stricter measures if those were liable to bind the EU itself.

[13]For the same reason, commercial undertakings with regard to rare plants and animals also deserve further thought. This has led to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), covering more than 35,000 animal species and plants. The Union became a party to CITES in July 2015; on the earlier interaction, see e.g. Case C-370/07, *Commission* v *Council*.

[14]See Article 191(4) TFEU.

[15]Cf. Article 193 TFEU.

[16]Cf. Opinion 2/91, *Conclusion of ILO Convention No. 170 concerning safety in the use of chemicals at work*.

A final factor exacerbating the aforementioned tension resides in the fact that different procedural arrangements apply, depending on whether a (proposed) EU measure has a predominant CCP or a predominant EEP focus. Admittedly, in the post-Lisbon era, qualified majority voting and full involvement of the Parliament are the rule in both the CCP and the EEP, wherewith the problems are indeed less acute than before.[17] However, as we have seen in the previous chapter, unanimity in the Council is still required for the adoption of CCP measures on certain subjects, whereas QMV might well apply to the measure if it has a predominant environmental focus. Conversely, pursuant to Article 192(2) TFEU, a special legislative procedure applies in the EEP for the adoption of certain types of measures (with unanimity in the Council and mere consultation of Parliament), whereas the ordinary legislative procedure could well apply in case the subject matter lies, for the largest part, within the scope of the CCP.[18]

In sum, the EEP may still regularly come into conflict with the CCP, not just for basic political reasons and in light of the goals they wish to attain, but also because of potentially overlapping legal bases, frictions between an exclusive and an (intricately) shared external competence, and clashing procedural regimes for the adoption of the relevant rules. Thus, in the actual, day-to-day conduct of the EEP and the CCP, tough choices have to be made. Many of these verge on the arbitrary, as frequently no inferences as to their correctness or incorrectness can be made with absolute certainty. Unsurprisingly then, legal disputes on the exercise of the respective competences have cropped up with great regularity.

5.3.2 Tensions with the CCP: Some Illustrations

In 2000, at Cartagena, an additional protocol was adopted under the International Convention on Biological Diversity (also known as the 'Rio Convention' of 1992). This Protocol had as its central objective the protection of biological diversity from the potential risks caused by living modified organisms (LMOs), developed with the aid of modern biotechnology. Especially the transboundary movement of these organisms formed a major cause for concern. The Protocol of Cartagena (or Biosafety Protocol, BSP) makes clear that any products stemming from new technologies had to be approached with the precautionary principle in mind. The BSP allows countries to balance public health interests against potential economic benefits, for example by entitling states to restrict imports of (goods containing) genetically modified organisms, if there is insufficient evidence that the products in question are really safe.

[17] See Article 207(2) and (4) TFEU and Article 192(1) TFEU.

[18] The tension could be greatly alleviated if the Council, in line with the final sentence of Article 192(2), were one day to decide by unanimity to let the ordinary legislative procedure apply for the adoption of those types of measures.

The legal question soon haunting the EU was whether the Protocol had to be concluded under CCP or the EEP competence: did it fall within an exclusive field or belong to a shared domain? The Commission opted for the former, yet the Council chose to conclude the agreement on the basis of the latter. Subsequently, the ECJ was approached.[19]

The Union's judiciary saw itself confronted with the choice to qualify the BSP either as an environmental treaty that had incidental effects on trade (in LMOs), or as an international trade agreement that took account of certain environmental standards. In its Opinion 2/00, the Court decided that the main purpose or component of the BSP was the protection of biological diversity against the harmful effects of transboundary movement of LMOs.[20] It thus had to be adopted as a mixed agreement, on the basis of (what is now) Article 192 TFEU.

This decision did much to raise the EEP's profile, and dealt a great blow to the Commission. The latter's lawyers had hoped to procure a judgment stating that even peripheral CCP elements necessitated a choice for the corresponding legal basis; therewith, many more measures would start to fall under that (exclusive) competence.

Scarcely one year later, matters seemed to take a turn in a rather different direction with the Court's judgment in the *Energy Star Agreement* case.[21] At stake was a treaty between the EU and the US concerning the coordination of energy-efficient labelling schemes, and the use of the 'Energy Star' logo for European office equipment.[22] Again, the Commission had advocated the use of the CCP competence, yet the Council once again preferred to resort to the EEP. This time around, the ECJ sided with the Commission. It asserted that the Agreement had a direct and immediate impact on trade in office equipment, whereas the environmental impact was indirect and would only manifest itself in the long term; moreover, the Agreement did not in itself prescribe new energy-efficiency requirements. For these reasons, the trade objective had to be accorded the most weight, so that the Agreement had to be enacted under the CCP. With the ruling in the *Energy Star* case, it became clear that no decisive battle had been fought in Opinion 2/00, for apparently, environmental aspects could at times still be outflanked by trade interests; neither field of competence would kowtow automatically to the other, and the scales were now largely back in balance.

[19]As mentioned in Chap. 1, Sect. 1.6, in principle, the ECJ can be approached at all times before, but not after the conclusion of an international agreement; if rescission were to prove necessary then, international liability may ensue. The Commission was well aware of this, and did not argue for termination or renegotiation. It claimed to seek a ruling to obtain clarity for the future, also as regards the management of the BSP.

[20]Opinion 2/00, *Cartagena Protocol*.

[21]Case C-281/02, *Commission* v *Council* (Energy Star Agreement).

[22]Named after a programme for energy efficient office equipment originally developed by the American Environmental Protection Agency, which had quickly become the world standard.

The enduring nature of the difficulties in overcoming the tension between the EEP and the CCP is exemplified by the *Rotterdam Convention* case.[23] The conclusion of this Convention posed a particular challenge, as it pertained to international trade in hazardous chemicals. One could be forgiven for thinking that, in this case, a choice for either Article 192 or Article 207 TFEU would have been wholly arbitrary. At the same time, in light of the *Cartagena Protocol* and *Energy Star* precedents, the heat was on to establish the predominant purpose or component of the treaty concerned. While the Commission posited that the Rotterdam Convention had to be approved on the CCP legal basis, the Council decided to resort to the external environmental competence instead. When the ECJ was approached to rule on the matter, the Court remarkably found the agreement to be hybrid, regarding its substance to fall between the poles of a predominant environmental objective and a predominant trade objective. It did acknowledge that the protection of human health and the environment was clearly the most important concern in the mind of the Convention's signatories; yet, the document also contained rules governing trade in hazardous chemicals that have a direct and immediate effect on such trade. For that reason, it needed to be concluded on a dual legal basis, meaning that the erroneous decision of the Council had to be annulled.[24]

This could be interpreted as largely downplaying the problems indicated earlier. After all, with the position taken in the *Rotterdam Convention* case, the ECJ seemed to confirm that the CCP and EEP are not irreconcilable. Judging from *Cartagena* and *Energy Star* however, a categorical choice between the two can ordinarily not so easily be avoided.[25]

Even when the tension between an exclusive and a shared competence can indeed sometimes be overcome through the use of a dual legal basis, this does not take away the potential incompatibilities between differing procedural regimes. In case of a dual legal basis, the procedure has to be followed that ensures a maximum of democratic legitimacy (i.e. unanimity in the Council, and co-decision or the assent of Parliament).[26] While some might consider this an attractive standard approach for the future, a too frequent use should be avoided, as it flies in the face of the *lex specialis* rule, the attribution of powers principle, and arguably the prohibition of *dé*

[23]Case C-94/03, *Commission* v *Council* (Conclusion of the Rotterdam Convention).

[24]Correspondingly, in the judgment in Case C-178/03, *Commission* v *Council*, delivered on the same day, the Court ruled that this also held true for the Regulation incorporating the Rotterdam Convention in EU law.

[25]As confirmed in Case C-411/06, *Commission* v *Parliament and Council*, where the Court, despite serious doubts with regard to the choice of legal basis, refrained from broadening the application of the *Rotterdam Convention* judgment, and saw the measure concerned as falling squarely within the environmental competence.

[26]See e.g. Case C-166/07, *Commission* v *Council* (International Fund for Ireland), paragraph 69. In case two procedures would have to be combined in which the one prescribes co-decision (the ordinary legislative procedure) and the other a right of assent for the Parliament, the former procedure would have to be preferred, since it guarantees the most intense democratic involvement (after all, when the latter is applied, Parliament can only accept or reject the proposal, and not try to amend it).

tournement de pouvoir. Moreover, the authors of the Treaties deliberately chose to install separate regimes and not to amalgamate the two. From this one ought to infer that a combined approach should only be followed in the most exceptional of circumstances.[27]

Overall then, the EEP and CCP are external competences of equal import and gravity. Whereas the bandwidth of both policies can be stretched rather far, in theory as well as in practice, neither should be rendered nugatory by an excessively wide reading of the one over the other. Admittedly, in recent years, the tensions between the two have abated, but the Solomon-like verdicts of the ECJ, as well as the rules resulting from the entry into force of the Lisbon Treaty, have fallen short in eradicating them altogether.

5.4 Ambitions and Achievements of the EEP in a Global Context

As remarked above, the largest part of the environmental legislation currently in force in the Member States stems from the supranational level, and the dimensions of the pertinent EU rules are little short of astounding. Legislation has inter alia been passed aiming to improve the quality of water, tackling air and noise pollution, assuring the safety of chemicals, setting standards for waste disposal, protecting European native wildlife, plants and habitats. As mentioned, seven EAPs have been adopted since 1972, with the current one running until 2020.[28] It includes an enabling framework that sees the EU attaining its goals through a better implementation of legislation, better information by improving the knowledge base, more and wiser 'green' investments, and full integration of environmental requirements and considerations into other policies.

Although the Union's internal ambitions are incontestably praiseworthy, in order to tackle the problems that are nowadays intrinsically global, much depends on the success of its external environmental policy as well. It is therefore to be applauded that in the past decades, the EU has taken a leading role in the negotiations on international frameworks for the protection of the earth's environment.

At the 1997 UN Conference on Climate Change in Kyoto, attempting to lead by example, the Union committed its Member States to reduce greenhouse gas emissions by 8% by 2012, in comparison to 1990 levels. This was followed up by

[27]To be sure, situations in which a dual legal basis is employed crop up with a certain regularity, and the Court does not mind giving its blessing to the practice. Overall though, the 'combination approach' does remain the exception rather than the rule.

[28]Some of the targets set in earlier secondary legislation already extended that far: see e.g. Directive 1999/31/EC on the landfill of waste, OJ [1999] L 182/1 (requiring Member States to reduce landfill waste by 65 % by 2020).

the EU Climate Change Package in 2008, sent out as a specific pledge to the Intergovernmental Commission on Climate Change.[29]

On the road to a comprehensive follow-up to the Kyoto Protocol, the EU also played a major role. Initially, it proved incapable of preventing a premature collapse of negotiations, due to unbridgeable divisions between developed and developing nations. Consequently, the 'Copenhagen Accord' of 2009 wound up an overly minimalist deal. The UN regime talks were reinvigorated at the 2011 summit in Durban, following successful agenda setting from the EU in cooperation with developing countries. The novel objective became to adopt a binding outcome with the widest possible support base, which was accomplished with the Paris Agreement in December 2015. The latter constitutes the first-ever universal deal on climate change, aiming to keep the increase in global average temperature to well below 2°C above pre-industrial levels in the long term, and actually endeavour to limit the increase to 1.5°C. Governments have agreed to come together every 5 years to set more ambitious targets as required by science, report on how they are doing, and track progress towards the long-term goal through a robust transparency and accountability system.

Box 5.3 The EU and the Paris Agreement

Not only were the efforts of the EU crucial in building the coalition that endorsed the eventual Paris text, the Union was equally instrumental in its speedy ratification. The treaty opened for signature in 22 April 2016. To enter into force, at least 55 countries representing at least 55% of the cumulative worldwide emissions had to deposit their acts of approval, something that was expected to take about a year. A number of countries immediately decided to move much faster, triggering a veritable 'ratification race'. The EU rushed to ratify on 5 October 2016, with its deposit leading to the crossing of the magic threshold, enabling the Agreement's entry into force the next month.

One of the Union's most advanced instruments for meeting its global commitments is the Emissions Trading System (ETS), created in 2003.[30] The ETS binds key industries on the territory of the Member States with regard to

[29]The Package established the '20:20:20 plan', spelling out that by 2020, 20% of the energy consumed in the EU is to come from renewable sources; by that same year, energy efficiency is to be improved by 20%, and greenhouse gas emissions are to be reduced by 20% compared to 1990s levels. Meanwhile, the Union has pledged to raise these targets, bringing the latter down by 40% in 2030. See further Kulovesi (2012).

[30]Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, OJ [2003] L 275/32, amended by Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community, OJ [2009] L 140/63.

the amounts of carbon dioxide that may be emitted.[31] The sophisticated 'cap-and-trade' system has introduced a ceiling of maximum quantities, whereby undertakings need to buy permits in order to cover transgressions of the fixed limitations. Such allowances can be traded, so that reductions may be made where they are most cost-effective.[32] Over time, the number of permits available under the ETS is set to decrease, which should lead to scarcity and consequently to higher prices—rendering it more attractive for polluters to opt for and invest in eco-friendly alternatives.

In its life cycle so far, the ETS has had to cope with many childhood sicknesses: tax fraud (carbon credits being bought in one country without VAT charges and sold in another with VAT included), unfair commercial practices (end users footing the bill for permits that companies had received earlier at no cost) and cybercrime (large-scale theft of allowances by hacking into Member States' digital registries). In addition, the scheme met with various legal challenges, leading to two CFI judgments that temporarily compromised further progress in controlling emission levels. In *Poland* v *Commission* and *Estonia* v *Commission*,[33] the Court ruled that the Commission was not allowed to apply a single method for assessing all the national allocation plans of all the Member States, and could not replace data included in the various national plans with its own data, acquired on the basis of a single method of assessment for all Member States. In so doing, the Commission was said to have exceeded the margin for manoeuvre that had been conferred by the ETS Directive, breaching the distribution of powers between the Member States and the Commission, and encroaching upon the exclusive competence of the Member States in determining the total quantity of allowances they could allocate in respect of each trading period. The rulings were confirmed on appeal.[34] It is important to note however that they related to the 'second phase' of the system under the legal framework, established in 2003, and that a new agreement on the national allocation plan for the two countries was reached in the interim. In 2009, as part of the 'third phase', it was decided to replace all national allocation plans by a harmonised system of auctioning or free allocation through single Union-wide rules.

Aircraft emissions were meant to be included in the scheme from 2012 onwards. This however sparked a backlash from the industry and countries like China and India, refusing *en bloc* to comply with the scheme and threatening to launch commercial retaliation measures. In response, it was decided to 'stop the clock'—giving an exemption to flights coming to and from airports outside of the EEA, so that the scheme only covered those taking place within the territory of the

[31]Participation in the EU ETS is mandatory for companies in these sectors, but in some of these, only plants above a certain size are included; and certain small installations can be excluded if governments put fiscal or other measures in place that cut their emissions by an equivalent amount.

[32]Financial sanctions can be imposed on those that do not dispose of sufficient allowances to cover their emissions.

[33]Case T-183/07, *Poland* v *Commission* and Case T-263/07 *Estonia* v *Commission*.

[34]Case C-504/09 P, *Commission* v *Poland* and Case C-505/09 P, *Commission* v *Estonia*.

Member States (plus Iceland, Liechtenstein and Norway). This concession has been tied to the commitment by the International Civil Aviation Organisation to come up with an alternative that requires all airlines to compensate for their share. In 2016, the ICAO approved a fine-grained carbon offsetting and reduction scheme, which is yet to be implemented in full.

Environmental NGOs are divided as regards the merits of the ETS. Some continue to believe that the scheme distracts from more effective actions, ambitious energy taxation schemes, a funding of special incentives, and improved governance/enforcement structures. Environmentalists have also slammed the abundance of allowances allocated during the 'first phase', which was said to have resulted in ludicrously low prices. The economic crisis, coupled with high imports of international credits, exacerbated the surplus. That in turn led to a weaker incentive to reduce emissions. The Commission responded by postponing foreseen auctions of allowances, so as to rebalance the supply/demand ratio in the short term and decrease price volatility. A linear reduction factor was fixed and a market stability reserve established to absorb the excesses. As even under its 'third phase', the EU appeared unlikely to deliver the emission cuts that scientists say are needed, structural reform is foreseen for the 'fourth phase', spanning the 2021–2030 period. A modernisation fund will help to upgrade infrastructures in lower-income Member States, and an innovation fund means to provide financial support for renewable energy, capture and storage, and low-carbon innovation projects.

From a global perspective, the ETS is anyhow bound to remain a limited success if non-EU countries do not follow suit.[35] Importantly, China has moved to implement a national carbon-market mechanism, after piloting a series of regional emission trading schemes. Until recently, India rejected calls to quantify its targets on the ground that this would jeopardise its quest for alleviating domestic poverty, yet it is becoming ever more forthcoming in tying itself to serious reductions. The UN has developed an active system to assist the developing countries in cutting their emissions (the Clean Development Mechanism), but to arrive at substantial results, determined contributions from the world's largest polluters remain essential. Unfortunately, the US Congress has repeatedly failed to pass 'cap-and-trade' legislation. Evidently, if major international partners do not abide by their 'Paris promises' and engage in similar initiatives, the EU scheme will never succeed in averting or reversing climate change. Without a broad, lasting momentum, even in Europe the sentiment could ultimately prevail that the costly and bureaucratic exercise ought to be shelved.

[35]Norway, Iceland, Liechtenstein and Switzerland have aligned themselves with the system. Similar plans have been mooted to connect the ETS with its Californian counterpart.

5.5 Conclusion

In light of the fact that most of the efforts made by the EU and the Member States in the field of the EEP have borne at least some fruit, most of the critique on the excessive costs and meagre results of the regulation concerned appears terribly misguided. As the previous sections have showcased, agreement has been reached on countless specific objectives in a plethora of laws, and the Union's active global presence has resulted in manifold conventions with third states and international organisations. In Europe, the area seems nowadays more depoliticised than before, especially when contrasted with the ongoing debates in the US. This makes it somewhat easier to engage in structural reforms, and take up new, more ambitious commitments every few years.

From a legal perspective, the EEP is alas not without its qualms. For one thing, as we have seen, the inextricable linkages between several EEP and CCP dossiers can lead to quasi-endless litigation. While the insight is hardly comforting, the complexity of this interrelation might be the price to pay for being the second most important domain of EU external competences.[36]

Since environmental policy is a shared domain, a 'competence creep' may take place that eventually squeezes the Member States out of the game altogether. For that reason, we see the latter keeping a close watch at the negotiation stage of international agreements. They concentrate on the issues lying within their own domain, and via the Council, try to minimise the Commission's discretion through strict negotiation directives.[37] The vigilance of special committees, made up of civil servants from the Member State's environmental ministries, also prevents the Commission from going *ultra vires* and exceeding the specified scope of manoeuvre.[38] Nevertheless, it does strike one as rather outmoded that the actors engage in such power play in this field. As remarked, we are dealing here with a domain that is so clearly of overriding common interest that clinging to remaining vestiges of national sovereignty borders on the ridiculous. The EU appears very well suited to take on the principal role and establish regulatory frameworks across the board—even when this anything but quells the resistance of those who complain of obnoxious intrusions into their sovereignty. It has, strikingly, still not become common wisdom that a dogged insistence on the preservation of residual competences only leads to disappointing results, and forms one of the quickest ways to convert grand ambitions into empty rhetoric. As inconvenient as the truth may be, the EEP's targets are perhaps better pursued through a conscious and wholeheartedly supported supranational approach, which has so far nearly always succeeded in delivering the goods.

[36]Cf. Cremona (2012).

[37]Within the parameters of the Court's ruling in Case C-425/13, *Commission* v *Council* (EU-Australia ETS negotiations).

[38]For illustrations, see Thieme (2001).

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