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Conclusions

Proceduralising Member States' Choice Regarding Green-Plating

Conclusions

The four chapters that make up this book show a common denominator, the lack of a proper understanding of the green-plating phenomenon. In Chapter 1, a clear political aversion for green-plating was shown. In Chapter 4, it has been shown that the main argument to adverse green-plating, i.e. its negative repercussion on economic development, is questionable from a substantive perspective. Moreover, it has been shown that real cost/benefit analysis to underpin the rejection of green-plating do not exist. Even in the United Kingdom, in which regulatory impact assessments evaluate the consequences of potential cases of green-plating, the government's reliance on assumptions and selective reading of data deprives these studies of the level of quality necessary to justify a political preference against green-plating. Fear of the unknown indeed cannot justify a political choice that, as shown in Chapter 2, affects the working of an instrument furthering the functioning of the high level of protection principle. Moreover, as it has been shown in Chapter 4, it cannot even be excluded that green-plating can stimulate economic development. The low political understanding of the green-plating phenomenon could thus be counterproductive. Still, not all blame should be placed on the Member States. Chapter 3 highlighted that EU institutions do not provide clear guidance regarding the room for green-plating. Such lack of clarity can surely be seen as a contributing factor to the low level of understanding of the green-plating phenomenon among Member States and (at least part of) civil society.

This statement hints to the existence of a linkage between the decision-making phase at EU level and that at national level in the context of green-plating. The question addressed here is whether EU

law can use this linkage in order to halt the ongoing political bias against green-plating. This question has two dimensions. First, whether a duty exists as regards Member States' choice to adopt green-plating. If answered in the affirmative, the second question is what the content of such an obligation is.

As regards the first question, as stated in 2012 in the context of a publication focusing on Member States' obligations in the context of ecological corridors under the Habitats Directive,¹ the answer is affirmative under specific circumstances. This example focused on the establishment of the EU regulatory framework on areas of conjunction between Natura 2000 sites. The Commission's proposal for the Habitats Directive required the Member States to avoid pollution in areas outside special area of conservations.² Furthermore, it required the Member States to ensure the protection of distinct features of the landscape that are of outstanding importance to wildlife. Member States could derogate from this obligation, if they took counterbalancing measures ensuring that systems connecting special protected areas (alias ecological corridors) were maintained. Within the Council, the Netherlands and Germany even proposed adding a sentence stating that linking areas have particular importance.³ Five months later, a provision, inserted in Article 3 of the proposal, imposed the obligation to maintain and, where appropriate, develop ecological corridors between special protected areas.⁴ Many delegations maintained reservations, though.⁵ In the end, the explicit reference to ecological corridors was not inserted in the Directive. Instead, preference was given to the concept 'features of the landscape', which clearly offers more flexibility to the Member States, than that of ecological corridors.⁶ Moreover, Article 3(3) of the Directive subjects the protection of features of the landscape to a necessity and appropriateness test, with the latter clearly providing Member States with considerable discretion about the adoption of whichever feature of the landscape, hence also ecological corridors. This finding can only be overruled if

¹ Squintani (2012).

² COM(88) 381 final, proposed Article 8.

³ European Communities, the Council, 13 November 1989, Doc. Num. 9862/89, Annex, p. 19.

⁴ European Communities, the Council, 8 April 1991, Doc. Num. 5572/91, Annex, p. 12.

⁵ *Idem*, where certain delegations stated that they could accept proposed Article 8 if it did not impose a formal obligation.

⁶ The only definition provided for the term 'features of the landscape' is in Article 10 of the Directive.

the development of ecological corridors is necessary for the protection of a Natura 2000 site itself, hence by linking the development of ecological corridors to Article 6 of the Habitats Directive.⁷

The lack of an obligation for the development of ecological corridors outside the realm of Article 6 of the Habitats Directive does not mean that Member States' choice on whether or not to introduce green-plating in this field is free of any kind of legal constraint from an EU law perspective. It should be noted that the establishment of the Habitats Directive represents the moment in which the legal relationship between the Union and the Member States concerning the conservation of certain habitats and species was established. The Treaties regulate the establishment and execution of this legal relationship by means of, in particular, the principles of subsidiarity, proportionality and sincere cooperation.⁸

In the example of the regulation of ecological corridors, the Union restricted its powers to the benefit of the Member States, during the negotiation rounds within the Council. Albeit implicitly, this was the result of two factors. First, Member States considered themselves as better placed to choose the measures to be taken in a concrete case (subsidiarity).⁹ Second, Member States feared that, in certain cases, the development of ecological corridors would have been too burdensome in relation to the objectives of the Habitats Directive (proportionality).¹⁰ In these circumstances, it is possible to argue that, in the light of the principle of sincere cooperation, Member States are not completely free as regards whether to develop ecological corridors or not. Indeed, how could the Member States argue to sincerely cooperate with the Union when, during the decision-making phase at Union level, they claim that they are better placed to take certain measures and to assess whether a measure is appropriate, if then at national level they do nothing?

⁷ Squintani (2012), Schoukens (2017), p. 51.

⁸ Article 4(3) TEU and Article 5(3 and 4) TEU. On these principles, see e.g. Lenaerts & Van Nuffel (2011), pp. 131–147 with references to literature and case law.

⁹ Several Member States had reservations with regard to the explicit reference to ecological corridors. At the end, the Habitats Directive refers to measures concerning features of the landscape, which is a concept allowing the Member States to choose between various instruments.

¹⁰ Some Member States, such as Spain and Greece, asked to transform the proposed obligation into a competence. This suggests that they feared too much interference in their national competences. In particular, the reference to the appropriateness criterion in Article 3 suggests that Member States feared the imposition of overly high burdens with regard to measures taken outside a Natura 2000 site.

Accordingly, I submit that the invocation of Article 5(3 and 4) TEU by the Member States during the law-making phase at Union level has an implication for Member States' freedom of choice during the implementation phase at national level, which is triggered by Article 4(3) TEU. The consequence of the linkage between Article 5(3 and 4) TEU and Article 4(3) TEU in the example here discussed is that Member States must make a choice about whether to develop ecological corridors. Of course, this reasoning does not only apply in the context of the Habitats Directive. It applies in all cases in which the invocation of the principles of proportionality and subsidiarity during the decision-making phase at EU level leads to room for green-plating, instead of EU obligations, at national level.

The linkage between the decision-making phase at EU level and that at national level in the context of green-plating can thus be used to limit Member States discretionary power about whether to adopt green-plating or not, at least to a certain extent.

This conclusion should not come as a shock. As stated by Dworkin: 'Discretion, like the hole in the doughnut, does not exist except as an area left open by a surrounding belt of restrictions'.¹¹ This finding implies that if a competent authority is competent to do something, then it has to perform an assessment of the values involved in a concrete case in order to establish whether the competence should be used or not. This is a rule of law existing at national level in order to restrict the freedom that law gives to the executive power. For example, such a rule can be found in the Netherlands in the doctrine of good administration (in Dutch: *behoorlijk bestuur*).¹² In Italy, this rule belongs to the doctrine of discretion (in Italian: *discrezionalità*),¹³ and in Germany to that of misuse of discretionary power (in German: *Ermessensmissbrauch*).¹⁴ In France, it is covered by the doctrine of discretionary power (in French: *pourvoir discrétionnaire*).¹⁵ Finally, in Britain, this rule belongs to the doctrine of discretionary powers that may be reviewed in the light of whether the exercise of the power has been subjected to an assessment, and of

¹¹ Dworkin (1977), p. 31.

¹² Damen et al (2009), pp. 307 ff.

¹³ Perfetti et al (2007), pp. 299–301.

¹⁴ In particular the aspect of *Willkürverbot*, see Bok (1992), pp. 147–149, with reference to case law.

¹⁵ See Guadement (2001), pp. 579–586, in particular p. 582, with further reference to literature.

whether all relevant considerations have been taken into account.¹⁶ Given its general recognition, this rule can be read within the letter of Article 4(3) TEU via the road of *ius commune* and by way of general principles of law.¹⁷ It can hence be applied to the freedom that Member States, in particular the executive power,¹⁸ have as regards green-plating.

Turning to the second question, i.e. what the content of such an obligation is, it should be noted that the existence of a duty to consider the green-plating option does not mean that Member States have to adopt green-plating. Member States are free to attach the weight that they prefer to the values involved in the assessment. They are thus free not to pursue green-plating. Indeed, the existence of an obligation in this regard would deprive the principles of subsidiarity and proportionality of much of their meaning. Moreover, the existence of a duty to adopt green-plating would be in contrast with the very meaning of this term, as defined in Chapter 1. Indeed, green-plating starts when EU substantive obligations end, or are absent.

My argument is that the linkage between Article 5(3 and 4) TEU and Article 4(3) TEU could be given form by a duty to evaluate the circumstances applicable to a concrete situation. Such an evaluation should be done in a transparent manner in order to provide information to the Union.¹⁹ Indeed, the principle of transparency and the duty to justify a decision are two important rules of law that are capable of becoming general principles of Union law.²⁰ Besides, as stated in the conclusions of Chapter 4, this should occur by means of ad hoc costs/benefits analyses taking into account the potential long-term benefits of green-plating. This means that the linkage between Article 5(3 and 4) TEU and Article 4(3) TEU could be used to establish a *procedural* duty concerning green-plating. The use of ad hoc costs/benefits analyses including long-term assessment of the potential benefits of green-plating would allow

¹⁶ See e.g. Leyland & Anthony (2008), pp. 215–218 with further references.

¹⁷ For a similar use of national law by the CJEU see, in particular, Joined Cases C-7/56 and C-3/57 to C-7/57, *Dinecke Algera, Giacomo Cicconardi, Simone Couturaud, Ignazio Genuardi, Félicie Steichen v Common Assembly of the European Coal and Steel Community*, ECR English Special Edition, p. 39. See Reichel (2008), p. 245.

¹⁸ At national level, a distinction exists between legislative discretion and administrative discretion. The legislative power usually enjoys a greater amount of freedom than the executive, see Schwarze (2006), p. 298.

¹⁹ This seems to occur in the United Kingdom, see, for example, DEFRA/WAG/DOENI, *Consultation on options for implementing the Environmental Liability Directive*, November 2006, p. 8.

²⁰ Prechal & De Leeuw (2008), pp. 223–225 and 238.

for moving away from the dogmatic, or in any case politically biased, approach to green-plating taking place in countries such as the Netherlands and the United Kingdom. In turn, it would provide a basis for helping to develop EU environmental law. Would this not be a nice way to give concrete form to the principle of sincere cooperation in the field of green-plating? I would very much say so.