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Green-Plating and Legal Certainty

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3 Green-Plating and Legal Certainty

3.1 Introductory Remarks

I concluded the previous chapter by stating that environmental protection in the European Union should be seen as a chain made of Union and national standards, including stricter standards, which integrate with one another over time. The refinement of the EU high level of protection of the environment does not only benefit the environment, but it can also serve to identify and eliminate the negative effects that unclear EU provisions can have on society. This last sentence implies that there is a link between green-plating and legal certainty. Chapter 2 focused on the link between green-plating and legal certainty from two perspectives. First, legal certainty can be used to justify maintaining or introducing green-plating.¹ Second, green-plating can serve to improve the clarity of EU provisions.²

In this chapter, the linkage between green-plating and legal certainty is looked at from the perspective of the principle of sincere cooperation under Article 4(3) TEU. More precisely, I focus on the relationship between green-plating and legal certainty from the perspective of the duty of the EU legislator and judiciary to respect the Member States, established under the first sentence of Article 4(3) TEU. As introduced in Chapter 1,³ Article 193 TFEU is addressed to the EU legislator. The EU legislator shall refrain from restricting the adoption of more stringent protective measures. Minimum clauses in secondary law are a means by which the EU legislator fulfils this obligation. In light of the first sentence of Article 4(3) TEU, the EU legislative and judiciary powers shall

¹ Chapter 2, Section 2.2.3.

² Chapter, 2, Section 2.4.2.

³ Chapter 1, Section 1.3.

ensure, among others, legal certainty about the possibility of introducing or maintaining national measures going beyond EU requirements. This is especially important as regards the review of the legality of more stringent protective measures. Under the second sentence of Article 193 TFEU, Member States must comply with the Treaties when establishing more stringent protective measures. This is not an easy task, as discussed below. The EU legislature and the EU judiciary must endeavour to provide as much clarity as possible as regards what national measures can qualify as more stringent protective measures and whether they will withstand the legality review performed by the Court of Justice. Only then can the EU argue to cooperate with true sincerity with the Member States.

This chapter argues that minimum clauses can provide guidance to the Member States as regards both issues. Yet, for this to be the case in practice, legislative and judicial practice must be more streamlined. In order to sustain this argument, Section 3.2 provides an analysis of the manner in which the Court of Justice reviews the legality of green-plating. This analysis shows the randomness of the Court of Justice's jurisprudence on this point. This means that Member States can hardly predict whether their stricter standards will withstand judicial scrutiny by the Court of Justice. Further, Section 3.3 provides an overview of the various clauses used by the EU legislature indicating the room for green-plating. Also in this case, no clear *modus operandi* can be established. Accordingly, I postulate that the EU legislature and judiciary do not do their best to enhance legal certainty regarding green-plating.

Empirical data show that such uncertainty can affect the adoption of green-plating. At times, Member States refrain from establishing standards going beyond EU requirements, not because they do not want to, but because they are afraid that the Court of Justice will consider their standards to be in breach of the Treaties. In light of the importance of green-plating for the development of EU environmental law, as concluded in Chapter 2, such a finding is not only at odds with the principle of sincere cooperation. It is also in tension with the high level of protection principle under Article 191 TFEU.

In order to improve the ongoing practice, Section 3.4 juxtaposes the various kinds of minimum clauses in EU environmental law with the various elements of the legality review performed by the Court of Justice. This exercise allows me to build a model by which legislative practice is linked to that of the judiciary. Under this model, the level of clarity by

which clauses in secondary law indicate the room for green-plating is linked to the stringency of the legality review performed by the Court of Justice. If applied consistently, the model developed in this chapter into legislative and judicial practice contributes to the fulfilment by the EU legislative and judiciary powers of their obligation to cooperate sincerely with the Member States, fostering in turn the functioning of the EU system on environmental protection.

3.2 The Court of Justice's Legality Review of Green-Plating

The second sentence of Article 193 TFEU states that 'more stringent protective measures must be *compatible* with the Treaties'. Besides, Article 193 TFEU concludes by requiring that the Commission shall be notified of 'more stringent protective measures'. These two clauses concern the legality of green-plating in the form of more stringent protective measures. The requirement of being compatible with the Treaties, however, applies as regards all measures falling within the scope of EU law. Besides, certain national measures, regardless of whether they are more stringent protective measures or cases of spillovers and related measures, must be notified to the Commission before they can enter into force. Accordingly, in this section the various categories of cases of green-plating are dealt with in a unitary manner. What is stated as regards measures falling under Article 193 TFEU can be applied *mutatis mutandis* to cases of green-plating falling outside such a provision. First, in Section 3.2.1, the theory concerning the review of legality of green-plating is exposed. Section 3.2.2 focuses on the manner in which the proportionality principle is applied in practice. Three categories of green-plating are analysed under this section: a) positive lists, i.e. national requirements restricting human activities not explicitly mentioned in a document adopted under public law; b) national bans and c) other kinds of national measures. By looking at the first two categories of measures separately, some trends can be recognised. Yet, these trends are full of contradictions and questions left open. Besides, when all these trends are taken into consideration together, it becomes clear that Member States are left without clear guidance on how the Court of Justice reviews the legality of green-plating.

A better picture appears in Section 3.2.4, analysing the case law of the Court of Justice concerning the notification requirement. As a general rule, this requirement indeed does not have the force of invalidating a case of green-plating that has not been notified to the Commission. On

the contrary, cases of green-plating in the form of technical standards fall under the notification duty established by Directive 2015/1535/EU.⁴ Failure to notify the Commission of the national measure leads to its inapplicability.

Despite better predictability concerning the manner in which the Court of Justice reviews the notification duty, the overall picture remains negative. In Section 3.2.3, I show that this lack of clear guidance limits green-plating. In light of the role played by green-plating under the system of environmental protection envisaged by the Treaties, discussed in Chapter 2, it can hardly be argued that the fuzzy manner in which the proportionality principle is applied offers a proper basis for fostering the application of the principle of a high level of environmental protection and, more generally, of the principle of sincere cooperation under Article 4(3) TEU.

3.2.1 *The Review of Legality of Green-Plating: Theory Overview*

The clause ‘more stringent protective measures must be compatible with the Treaties’ has been extensively analysed in the literature. As argued by Krämer, ‘compatible with the Treaties’ means that more stringent protective measures must be compatible with any provision in the Treaties, in particular those on the free movement of goods or on undistorted competition.⁵ Until recently, it remained unclear whether the term ‘Treaties’ also covered secondary law. Some German academics argued that the term ‘Treaties’ in Article 193 TFEU excludes secondary and tertiary Union legislation.⁶ Other academics challenged this.⁷ The Court of Justice expressed its opinion about this matter in the *Windmills* case⁸ presented earlier.⁹ In this case the Court of Justice reviewed the legality of an Italian more stringent protective measure – compared to the measures in the Birds Directive and the Habitats Directive – in the light

⁴ Directive 2015/1535/EU 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, [2015] OJ L241/1.

⁵ Krämer (2011), p. 115. For example, Case C-510/99, *Criminal Proceedings against Xavier Tridon*, [2001] ECR I-7777, para. 46.

⁶ Epiney (2005), p. 126 with further references.

⁷ For example, Krämer (2011), p. 116, Pagh (1996), p. 242.

⁸ Case C-2/10, *Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl v Regione Puglia*, [2011] ECR I-6561 (*Windmills*).

⁹ Chapter 1, Section 1.3.3.

of Directives 2001/77/EC and 2009/28/EC.¹⁰ This demonstrates that the ‘compatible with the Treaties’ clause also covers Union secondary law. Ultimately, as Krämer argues, secondary law is based on the Treaties.¹¹ This is no different for national measures falling outside the scope of application of Union law or implementing Union obligations.

In addition to the Treaties and secondary law, cases of green-plating must comply with general principles of EU law. The Court of Justice stated in *Deponiezweckverband Eiterköpfe* that the Union proportionality principle is not applicable to reviewing the legality of more stringent protective measures, inasmuch as other provisions of the Treaty (e.g. Articles 34–36 TFEU) are not involved.¹² De Cecco rightly argues that in essence, more stringent protective measures, even when they partially serve to implement Union obligations, are national measures falling under the sovereignty of the Member States.¹³ With respect to Article 6(3) TEU and the protection of fundamental rights, a similar conclusion can be drawn: European Fundamental Rights are not applicable for reviewing the legality of more stringent protective measures, inasmuch as other provisions of the Treaties are not involved. Until recently, the same could be said of the Charter of Fundamental Rights of the European Union. More stringent protective measures cannot be regarded as ‘implementing Union law’ within the meaning of Article 51 of the Charter. With the *Akerberg* case, however, it has become unclear whether the broad interpretation given by the Court of Justice to Article 51 of the Charter also covers more stringent protective measures.¹⁴ On the other hand, cases of green-plating taking the form of measures *implementing* options left open in Union obligations can clearly

¹⁰ Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, [2001] OJ L 283/33; and Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, [2009] OJ L 140/16.

¹¹ Krämer (2011), p. 116.

¹² Case C-6/03, *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*, [2005] ECR I-2753.

¹³ De Cecco (2006), pp. 25 and 26. See Sections 3.2.2 and 3.2.3 above. See Case C-6/03, *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*, [2005] ECR I-2753, para. 61, last sentence.

¹⁴ Case C-617/10 *Aklagaren v Hans Akerberg Fransson*, ECLI:EU:C:2013:105 (*Akerberg*), paras. 17–21. According to AG Sharpston, national law falls within the scope of Union law when, inter alia, it implements Union law, regardless of the margin of discretion enjoyed by the Member States and of whether national law goes further than what is required by Union law, Opinion of AG Sharpston in Case C-427/06, *Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH)*, [2008] ECR I-7245 (*Bartsch*), para. 62 with reference to case law.

be reviewed in light of the general principles of Union law, the European Fundamental Rights and the EU Charter.¹⁵ For example, in the *Zuckerfabrik Franken* case, after mentioning the duty of the Member States to take all necessary measures to ensure the fulfilment of the Union's objectives,¹⁶ and having noted that Member States had discretion with respect to how to go about achieving the Union's goal, the Court of Justice reviewed the national implementing measures in the light of the Union principle of legal certainty and of the Union principle of proportionality (paragraphs 19–29). In the *Marthe Klensch and Others* case, the Court of Justice stated that when Union measures allow Member States to choose between various options for implementation, Member States have to comply with the Union principle of equality and Article 40(3) EEC (currently, 40(2) TFEU).¹⁷ Such a principle restricted Luxembourg in its choice of implementation options to those indicated by the Union measure concerned.¹⁸ As regards environmental protection, in the *Standley* case, the Court of Justice concluded that the provisions of the so-called Nitrates Directive¹⁹ left sufficient flexibility to the Member States to observe the Union principle of proportionality while adopting measures implementing the Union obligations arising from the Directive.²⁰

Naturally, general principles of Union law and European Fundamental Rights are relevant to reviewing the legality of 'more stringent protective measures' and other kinds of green-plating when, in the words of *Deponiezwerveverband Eiterköpfe*, 'other provisions' of the Treaty (and secondary Union law, I would like to add) are 'involved'. For instance, when

¹⁵ See Article 263, second paragraph, TFEU and Article 51 of the Charter. For literature, see, for example Jans & Vedder (2012), p. 31 and Lenaerts & Van Nuffel (2011), p. 852, both with references to case law.

¹⁶ Case C-77/81, *Zuckerfabrik Franken GmbH v Federal Republic of Germany* [1982] ECR 681, para. 18.

¹⁷ Joined cases C-201 and 202/85, *Marthe Klensch and others v Secrétaire d'État à l'Agriculture et à la Viticulture*, [1986] ECR 3477, paras. 8–12.

¹⁸ Council Regulation (EEC) no 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in article 5c of Regulation (EEC) no 804/68 in the milk and milk products sector, OJ 1984, L 90, p. 13. Article 2(1) of this Regulation stated: 'The reference quantity referred to in article 5c (1) of the abovementioned regulation shall be equal to the quantity of milk or milk equivalent delivered by the producer during the 1981 calendar year (formula A), or to the quantity of milk or milk equivalent purchased by a purchaser during the 1981 calendar year (formula B), plus 1%'.

¹⁹ Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources [1991] OJ L375/1.

²⁰ Case C-293/97, *The Queen v Secretary of State for the Environment and Ministry of Agriculture, Fisheries and Food, ex parte H.A. Standley and Others and D.G.D. Metson and Others*, [1999] ECR I2603 (*Standley*), para. 50.

national measures are in conflict with the rules on the free movement of goods, the proportionality principle is relevant for assessing any justification of the national measure.²¹ Here a distinction must be made between a) the *scope* of the review performed under the proportionality principle and b) its *intensity*.

a) The Scope of the Proportionality Principle in the Context of Green-Plating

Although the language used by the Court of Justice in its case law is sometimes confusing,²² it is generally accepted that, under the proportionality test, national law must be suitable, necessary and not excessively burdensome (the so-called proportionality *sensu stricto*).²³ The suitability test requires that national law must be capable of achieving the goals it pursued.²⁴ The necessity test evaluates whether national law could achieve its goals by means of measures with less impact on Union law.²⁵ Finally, proportionality *sensu stricto* means that even if national law is suitable and necessary, it still cannot be too burdensome upon the values affected.

In view of the ruling of the Court in Justice in *Deponiezweckverband Eiterköpfe*, it has been argued in the literature that the proportionality principle *sensu stricto* is not applicable in the context of 'more stringent protective measures'.²⁶ However, in a more recent case the Court of Justice did refer to the proportionality principle *sensu stricto* when reviewing a more stringent protective measure.²⁷ In the *Windmills* case, reviewing the legality of Italian legislation, it stated that:²⁸

[...] the principle of proportionality referred to in Article 13 of Directive 2009/28, which is one of the general principles of European Union law, requires that measures adopted by Member States in this field do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately

²¹ Wiers (2002), p. 72, with reference to the review of national measures affecting the achievement of Union's goals in general.

²² Wiers (2002), p. 74, with an overview of the various expressions and reference to case law.

²³ For example, Emiliou (1996), p. 134, Barnard (2007), p. 81 and Wiers (2002), p. 73.

²⁴ Mortelmans (2008), p. 650.

²⁵ Emiliou (1996), pp. 29–32.

²⁶ Jans (2007), pp. 712–713.

²⁷ In Case C-6/03, *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*, [2005] ECR I-2753, para. 62, the Court of Justice did not mention this aspect of the proportionality test.

²⁸ Case C-2/10, *Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl v Regione Puglia*, [2011] ECR I-6561 (*Windmills*), para. 73.

pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

The last part of this passage clearly refers to proportionality *sensu stricto*. It should be noted that, in this case, the Union proportionality principle was referred to in Article 13 of Directive 2009/28/EC. Future case law will have to clarify whether the Court of Justice will apply the same reasoning to cases where a Union directive or regulation does not contain an explicit reference to the proportionality principle. Based on a rather old case, it can be sustained that in the context of a review based on primary EU law, the Court of Justice does not seem to exclude a review based on the proportionality *sensu stricto* test.²⁹

b) The Intensity of the Proportionality Review in the Context of Green-Plating

In the literature, it has been argued that more stringent (protective) measures should be subjected to a stricter proportionality test than that applied to other kinds of national measures affecting Union law. According to Jans, more stringent (protective) measures should be subjected to a proportionality test similar to that applied under Article 114(4–6) TFEU.³⁰ In his opinion, Member States have to demonstrate why the protection offered by the directive at hand does not offer a solution in the specific case. Jans bases his reasoning on the fact that any Union minimum standard must ensure the achievement of a ‘high level of protection’; otherwise, the directive itself would not fulfil the suitability test and thus be disproportional. However, if the high level of protection offered by a directive is an adequate level of protection, then the national level of protection cannot be necessary.³¹ In other words, Jans seems to test more stringent (protective) measures on the basis of the same necessity test as for the Union provisions concerned. In fact, he seems to test both measures with regard to the same ‘high level of protection’.

I argue that two situations must be distinguished. In chapter 2,³² I indicated that green-plating can take the form of measures pursuing

²⁹ Case 302/86, *Commission of the European Communities v Kingdom of Denmark*, [1988] ECR 4607.

³⁰ Jans (2007). Jans refers to exceptional situation justifying the need of higher protection.

³¹ Jans (2007), p. 715.

³² Chapter 2, Sections 2.1 and 2.2.

a higher goal than that pursued by the EU legislator, or of measures establishing a stricter means to achieve the EU goal.

If a national legislator pursues a *higher goal* than that pursued by the EU legislator, green-plating cannot be subjected to the same necessity test applied to the Union measure concerned. If the same necessity test applied, it would be extremely difficult to justify the necessity of maintaining or introducing green-plating. Article 193 TFEU would be deprived of most of its meaning. It should be noticed that in *Deponiezweckverband Eiterköpfe* the Court of Justice stated that in a more stringent (protective) measure, the level of protection is a matter falling under the competence of the Member States.³³ Accordingly, this case indicates that there is 'a high level of protection' (Union standard) and 'a higher level of protection' (national standard). I see no legal ground for which, after that Union law has allowed the Member States to introduce a higher level of protection, the Court of Justice should review the national standard on the basis of the 'lower' Union high level of protection.³⁴ In other words, the Union high level of protection and the national higher level of protection should be reviewed by *two* different necessity tests.

This reasoning seems to find confirmation in the *Tridon* case.³⁵ In this case the Court of Justice was called upon to review the compatibility of a case of green-plating from France with the free movement of goods. French law extended the legal regime applied under the CITES Regulation³⁶ to Annex A species (threatened or rare species)³⁷ also to Annex B species (species which are not threatened but which might be endangered by too intense trade).³⁸ At the hearing, the Commission submitted that the absolute prohibition of trade in specimens of species in Annex B to the CITES Regulation, particularly with respect to captive born and bred specimens, went beyond what was necessary to ensure the effective protection of those species.³⁹ The Commission submitted that the protection of the species in question could have been accomplished

³³ Case C-6/03, *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*, [2005] ECR I-2753, para 61.

³⁴ To a similar extent De Cecco (2006), pp. 25 and 26.

³⁵ Case C-510/99, *Criminal Proceedings against Xavier Tridon*, [2001] ECR I-7777.

³⁶ Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, [1997] OJ L 61/1.

³⁷ For this species, the Regulation aims at avoiding further degradation of the status of conservation and at its improvement.

³⁸ For these species, the Regulation aims at avoiding degradation of the status of conservation.

³⁹ Case C-510/99, *Criminal Proceedings against Xavier Tridon*, [2001] ECR I-7777, para. 57.

by measures less stringent than an absolute prohibition of trade, such as marking of birds by means of rings or microchip transponders, or blood analyses to establish the ancestry of the animal, as provided for by Regulation (EC) No 939/97.⁴⁰ The Court of Justice replied that the presence of a less stringent regime at Union level does not in itself justify the conclusion that the national measure concerned is disproportionate.⁴¹ A more stringent (protective) measure can be regarded as disproportionate to the aim pursued only if it appears that the aim may be achieved just as effectively by measures less restrictive of intra-Community trade. As we can see, two different tests were applied.

Differently, if green-plating takes the form of stricter means to achieve the EU goal, the Court of Justice should subject the national measure to the same necessity test of the Union measure. This is because the goal of the Union measure and of the national measure is the same. In such circumstances, I agree with Jans that it is difficult to find a justification for adopting a means that is stricter than the Union one for achieving the same Union goal, given that the Union means is supposed to be adequate and necessary. However, also in this case, I do not see grounds for stating that green-plating should be subjected to the same requirements applicable in the context of Article 114(4–6) TFEU. If the Treaty makers wanted this to be the case, they would have regulated this explicitly.

In conclusion, despite the slight uncertainty as regards the content and intensity of the proportionality test, as well as the scope of application of the Charter indicated in the previous sub-heading, this section shows that the theory concerning the review of green-plating is rather crystallised. The next section shows that certain aspects of judicial practice are not as crystallised as the theory.

3.2.2 *How the Proportionality Test Is Applied in Practice as Regards Green-Plating*

Although the EU proportionality principle is not applicable in reviewing the legality of green-plating as such, it does play a role if, once again in the words of *Deponiezweckverband Eiterköpfe*, ‘other provisions of the Treaty are involved’. When ‘other provisions’ are involved, the following question is relevant: Can Member States predict how the Court of Justice

⁴⁰ Commission Regulation (EC) No 939/97 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, OJ 1997 L 140/9.

⁴¹ Case C-510/99, *Criminal Proceedings against Xavier Tridon*, [2001] ECR I-7777, para. 59.

will review green-plating? The analysis below of the case law of the Court of Justice on this issue shows that only in some well-defined circumstances Member States can predict the manner in which the Court of Justice reviews in light of the proportionality principle. Indeed, when Member States use so-called positive lists, i.e. the prohibition of all products that are not inserted on a list established under public law, to protect human health or biodiversity, the Court of Justice applies the so-called proceduralisation of the proportionality principle. This scenario is presented first, in (a) below. In all other cases, the analysis of the case law of the Court of Justice does not show a clear *modus operandi*. National bans are usually reviewed in a rather stringent manner, but there are cases in which the review by the Court of Justice has been quite lenient, see (b) below. As regards other kinds of green-plating, each case is assessed in a manner which is peculiar to that case, see (c) below.

a) The Proceduralisation of the Proportionality Test in the Context of Positive Lists

In certain cases, the Court of Justice proceduralised the proportionality principle, meaning that national law was expected to establish a procedure to consider the economic interests affected by the national measure. This is a practice which is not new in the case law of the Court of Justice dealing with the free movement of goods.⁴² Such an approach is used when national measures allow the commercialisation of only those products which are listed in a document having binding force under public law. In the *Commission v Belgium* case⁴³ and in the *Nationale Raad van Dierenkwekers en Liefhebbers*, both dealing with nature conservation, we can see two examples of this approach applied to green-plating.⁴⁴ The former being only available in French and Dutch while being essentially a copy of the latter, I will focus first on the *Nationale Raad van*

⁴² On the proceduralisation of the proportionality principle see Barnard (2007), pp. 85 and 86. For cases following this approach see, for example, Case C-344/90, *Commission of the European Communities v French Republic*, [1992] ECR I-4719, paras. 8 and 16, and Case C-24/00, *Commission of the European Communities v French Republic*, [2004] ECR I-1277, para. 25 and Joined Cases C-154/04 and C-155/04, *The Queen, on the Application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health* (C-154/04) and *The Queen, on the Application of National Association of Health Stores and Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales* (C-155/04), [2005] ECR I-6451, para. 70.

⁴³ Case C-100/08, *Commission of the European Communities v Kingdom of Belgium*, [2009] ECR I-140 summary publication, para. 104 of the Dutch version.

⁴⁴ Case C-219/07, *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat*, [2008] ECR I-4475, paras. 33–38.

Dierenkwekers en Liefhebbers case. This case concerns a Belgian measure which, among other things, makes the holding of mammals subject to the prior inclusion of their species in a positive list and which also applies to specimens of species which are legally held in other Member States. In the context of the review in light of the principle of proportionality, the Court of Justice stated:

33 However, the Court has consistently held that legislation, such as that referred to in the main proceedings, which makes the holding of mammals subject to the prior inclusion of the species to which they belong in a positive list and which also applies to specimens of species which are legally held in other Member States is in compliance with Community law only if a number of conditions are satisfied (see, by analogy, *inter alia*, Case C-344/90 *Commission v France* [1992] ECR I-4719, paragraphs 8 and 16, and Case C-24/00 *Commission v France*, paragraph 25).

34 First, the drawing up of such a list and the subsequent amendments to it must be based on objective and non-discriminatory criteria (see, to that effect, *inter alia*, Case C-192/01 *Commission v Denmark* [2003] ECR I-9693, paragraph 53).

35 Secondly, that legislation must make provision for a procedure enabling interested parties to have new species of mammals included in the national list of authorised species. The procedure must be one which is readily accessible, which presupposes that it is expressly provided for in a measure of general application, and can be completed within a reasonable time, and, if it leads to a refusal to include a species – it being obligatory to state the reasons for that refusal – the refusal decision must be open to challenge before the courts (see, by analogy, Case C-344/90 *Commission v France*, paragraph 9, and Case C-24/00 *Commission v France*, paragraphs 26 and 37).

36 Lastly, an application to obtain the inclusion of a species of mammal in that national list may be refused by the competent administrative authorities only if the holding of specimens of that species poses a genuine risk to the protection of or compliance with the interests and requirements mentioned in paragraphs 27 to 29 of this judgment (see, by analogy, *inter alia*, Case C-344/90 *Commission v France*, paragraph 10, and Case C-24/00 *Commission v France*, paragraph 27).

37 In any event, an application to have a species included in the list of species of mammal which may be held may be refused by the competent authorities only on the basis of a full assessment of the risk posed to the protection of the interests and requirements mentioned in paragraphs 27 to 29 of this judgment by the holding of specimens of the species in question, established on the basis of the most reliable scientific data available and the most recent results of international research (see, by analogy, *inter alia*, *Alliance for Natural Health and Others*, paragraph 73).

38 Where it proves impossible to determine with certainty the existence or extent of the risk envisaged because of the insufficiency, inconclusiveness or

imprecision of the results of the studies conducted, but the likelihood of real harm to human or animal health or to the environment persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures.

As we can see, the Court of Justice makes use of a three-step approach, each step incorporating its own requirements. First, the positive list must have been drawn up by following objective considerations which do not discriminate. Second, there must be a procedure, provided for in a general binding rule, to ask for an amendment of the positive list. The procedure for asking for such amendments must be open to interested parties and must not take too long to be completed. Further, decisions not to amend the positive list must be duly motivated and challengeable in a court of law. Third, the decision not to amend the positive list must be based on a genuine risk that the goals pursued by the national legislator, which must be established on the basis of the most reliable scientific data available and the most recent results of international research taking into account the precautionary principle, will not be achieved.

The Court of Justice's claim that its proceduralised approach to the review of positive lists under the principle of proportionality is consistent is quite accurate. Still, one aspect of the positive list assessed in the *Commission v Belgium* case was not reviewed in the light of this approach, but, as further discussed in the next section, by means of a different approach.⁴⁵ For the rest, the consistency in the application of the proceduralisation of the proportionality test approach seems to be confirmed by the fact that it is not used in the case of negative lists, such as that adopted under French law in the *Tridon* case.⁴⁶ This case concerns a decree of the French government, adopted in application, inter alia, of Article L.211–1 of the Code Rural. This provision prohibits for the wild species it lists, which include certain species of macaw, the destruction or removal of eggs or nests, the destruction, mutilation, capture or removal or the preservation by taxidermy of birds or, whether they are living or dead, the transport, door-to-door sale, use, offering for sale, sale or purchase thereof. Mr. Tridon was accused in the main proceedings of having transferred for consideration captive born and bred specimens of species of macaw whose use for commercial purposes is prohibited

⁴⁵ Case C-100/08, *Commission of the European Communities v Kingdom of Belgium*, [2009] ECR I-140 summary publication, in particular paras. 112 and 113.

⁴⁶ Case C-510/99, *Criminal Proceedings against Xavier Tridon*, [2001] ECR I-7777.

throughout national territory by the French government decree. By allowing the commercialisation of all wild species not listed under the decree, national law made use of a negative list. In assessing the proportionality of the national measure, which went further than required under EU law on the protection of birds, the Court of Justice did not make use of the proceduralisation of the proportionality test approach. It made use of a more casuistic *modus operandi* further discussed below.

b) The Proportionality of Green-Plating in the Form of National Bans

Except for the cases in which national law makes use of positive lists, the approach of the Court of Justice to the review in light of the proportionality principle changes on a case-by-case basis. This is true also for cases in which national law establishes a national or local ban.

Sometimes, the suitability test and the necessity test are not applied, because the effects of the national measure on the allegedly breached provision of EU law were too limited. This occurred in the *Windmills* case.⁴⁷ This case concerns a local measure prohibiting the location of new wind turbines not intended for self-consumption on sites forming part of the Natura 2000 network, with the possibility of exemption for wind turbines intended for self-consumption with a capacity not exceeding 20 kW. An undertaking confronted with this prohibition brought the matter to court. The national court decided to ask the Court of Justice for a preliminary ruling on, among other things, the compatibility of the national measure with Article 6(3) of the Habitats Directive. Before the Court, the undertaking that wanted to build a windmill farm argued that the national more stringent protective measure was in breach of Article 194 TFEU, regulating the European Union policy on energy. The Court of Justice replied:

56 Suffice it to observe in that connection that Article 194(1) TFEU states that European Union policy on energy must have regard for the need to preserve and improve the environment.

57 Moreover, a measure such as that at issue in the main proceedings, which prohibits only the location of new wind turbines not intended for self-consumption on sites forming part of the Natura 2000 network, with the possibility of exemption for wind turbines intended for self-consumption with a

⁴⁷ Case C-2/10, *Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl v Regione Puglia*, [2011] ECR I-6561.

capacity not exceeding 20 kW, is not, in view of its limited scope, liable to jeopardise the European Union objective of developing new and renewable forms of energy.

As indicated in paragraph 57, the Court of Justice did not proceed with reviewing the compatibility of the national measure with the suitability and necessity tests. The Court of Justice does not seem to doubt that the national measure has an effect on the achievement of the policy goals pursued by the European Union under Article 194 TFEU. Still the Court of Justice considered the scope of the national measure to be limited. Thanks to its limited scope, the national measure did not jeopardise the achievement of the European Union objective of developing new and renewable forms of energy. Hence, the national measure affected the goals pursued under Article 194 TFEU, but did not jeopardise it. There seems to be a kind of *de minimis* rule, or to use a more traditional term in the context of the free movement law, *remoteness* test,⁴⁸ as regards the negative effects that a more stringent protective measure has on the Treaties. The existence of a *de minimis* rule or remoteness test should be reassuring for the Member States. Thanks to such a *de minimis* rule or remoteness test, national law going beyond EU requirements does not need to be reviewed by the Court of Justice. Unfortunately, it is unclear when the *de minimis* rule or remoteness test applies and when the national legislator can be certain that its national measure falls under this test. Would the national measure at hand in the *Windmills* case have trespassed the *de minimis* rule or remoteness test if, for example, it had not allowed for the possibility of exemption for wind turbines intended for self-consumption with a capacity not exceeding 20 kW? What about if only 10 kW for self-consumption were eligible for the exemption? Or did the fact that the national measure only applied to windmills built in or nearby Natura 2000 locations mean that the national measure was so limited in scope that the achievement of the European Union objective of developing new and renewable forms of energy was not jeopardised? If this is the reason, would it apply also to a national measure covering the whole territory of a Member State? It can be assumed that it was a combination of the fact that this case concerned a local measure, having a limited geographical scope and allowing for exemptions that triggered the *de minimis/remoteness* test. We do not know. This is exactly the problem with this judgment. The Court of Justice is

⁴⁸ For a recent discussion on the exactness of this terminology see Gormley (2015), pp. 925–939.

silent on the exact reason for which it concluded that no further assessment was necessary. In light of this finding, I am of the opinion that this judgment does not provide enough information to clarify to the Member States when their more stringent protective measures can be considered to be exempted from review by the Court of Justice. It is impossible to predict when a *de minimis* rule or remoteness test will be respected. The *Windmills* case can hardly serve as a precedent on this issue.

In other cases, the national measure failed the proportionality test because it treated different objects or persons alike, or similar objects or persons differently. This means that the equality principle can be applied as a part of the proportionality principle. This has been the case, for example, in an infringement procedure against Belgium, *Commission v Belgium*, based on a breach of the free movement of goods.⁴⁹ Belgian law was more stringent than the Birds Directive and the CITES Regulation on a series of aspects concerning the protection of birds. As regards the absolute prohibition of being in possession of birds, and their derivatives, which are not listed in a specific list set up by the Flemish Government, the Court of Justice concluded:⁵⁰

111 Ladite interdiction absolue de détenir les espèces en question, qui constitue manifestement un obstacle considérable à l'utilisation et au commerce desdites espèces par les marchands d'oiseaux établis en Région flamande, ne saurait être regardée comme nécessaire pour atteindre l'objectif de lutte contre la fraude de grande envergure invoqué par le Royaume de Belgique.

112 En effet, dans la mesure où le Royaume de Belgique soutient pour sa part que le marquage au moyen d'une bague fermée anodisée est de nature à assurer la protection des oiseaux contre ladite fraude, cet État membre n'a pas démontré en quoi une interdiction absolue de détention par les marchands d'oiseaux, édictée par ailleurs à l'article 7 bis, cinquième alinéa, de l'arrêté royal de 1981 et qui touche indistinctement tous les spécimens d'oiseaux non mentionnés à l'annexe I de cet arrêté, serait proportionnée à l'objectif allégué de lutte contre la fraude.

113 Ladite interdiction, en privant les marchands d'oiseaux de la faculté d'obtenir des dérogations, apparaît comme étant d'autant plus disproportionnée qu'elle constitue une entrave au commerce de l'ensemble de ces marchands, partant, même ceux qui ne participent pas à la fraude internationale alléguée par le

⁴⁹ Case C-100/08, *Commission of the European Communities v Kingdom of Belgium*, [2009] ECR I-140 summary publication, in particular paras 112 and 113. In this case aspects of the national measure have been reviewed by the Court of Justice. The majority of the more stringent protective measures were reviewed in light of the proceduralisation of the proportionality test approach discussed above.

⁵⁰ Only the French and Dutch versions of this judgment are available.

Royaume de Belgique, alors pourtant que cet État membre n'a pas démontré que ces derniers seraient l'exception et que, par ailleurs, la détention et le commerce desdits spécimens par les particuliers ne sont pas prohibés.

As written in paragraph 112 of this judgment, the national measure was disproportionate because it limited the free movement of goods not only for those traders taking part in the fraud, but also for those traders who did not take part in it. This reasoning means that two different situations were treated similarly, hence breaching the principle of equality. In addition, the national measure was disproportionate because it did not apply to private persons who are not traders, meaning the general public. In other words, by treating traders not taking part in the fraud differently from the general public, national law treated differently two situations which are similar, thus breaching the principle of equality. As such, the linkage between the principle of equality and that of proportionality is not illogical. By treating differently two groups of persons which are similar from the perspective of the goal pursued by the measure at hand, the ability of such a regulatory measure to achieve its goal can be jeopardised. Accordingly, by breaching the equality principle, the national measure would also fail the suitability test under the proportionality principle. Besides, if the regulatory measure under scrutiny does not distinguish between two groups of persons, which are different from one another, from the perspective of the goal pursued by the regulatory measure at hand, such a measure would go beyond what is necessary to achieve its goal. Accordingly, by breaching the principle of equality, the national measure would also fail the necessity test under the principle of proportionality.

While the theoretical linkage between these two principles is logical, the manner in which the Court of Justice applied it in the *Commission v Belgium* case can be questioned. First, treating the general public differently from traders specialising in the trading of birds and their derivatives does not appear to be in breach of the principle of equality. The volume of birds and their derivatives dealt with by specialised traders can be expected to be significantly higher than that dealt with by a member of the general public. Accordingly, it is unclear why the Court of Justice considered that between these two groups of persons there were no objective considerations which allowed speaking of differentiation rather than discrimination.⁵¹ Furthermore, as regards the fact that the

⁵¹ On the relevance of this difference in the case law of the Court of Justice related to environmental protection see Case C-213/96, *Outokumpu Oy*, [1998] ECR I-1777.

national measure treated specialist traders taking part in the fraud and specialist traders not taking part in the fraud by means of the same regime, the principle of equality was breached specifically because the Flemish government did not prove that specialist traders not taking part to the fraud are an exception to the general practice. The Flemish government spoke of widespread (*grande envergure*) fraud as regards the trading in birds and their specimens by which birds born in the wild were illegally captured and then traded as if they were born in captivity, hence falling outside the scope of protection offered by EU law on the protection of birds.⁵² Neither the Commission, nor the Court of Justice, at least till paragraph 113, questioned the existence of such widespread fraud. Paragraph 113 does not specify what the Court of Justice meant when it stated that the Flemish government has not proven that specialist traders not taking part in the fraud are an exception. If the fraud is as widespread as argued by the Flemish government, how can the group of specialised traders not taking part in the fraud not be an exception? Further, what percentage of traders qualifies as exceptional? Is it 1%, 5% 10%, or 30%? And how do you prove it? I do not argue that the Belgian measure at hand in the main proceedings should have been considered in compliance with the principle of proportionality. My point is that the manner in which the Court of Justice made use of the principle of equality in the context of the proportionality principle in this case does not foster legal certainty. It actually raises more questions than it answers. Luckily, this judgment is only published in French and in Dutch.

Sometimes, the Court of Justice requires Member States to prove that less stringent means were not sufficient to achieve the goal pursued. This means that Member States have to prove that they comply with the necessity test. The most stringent form of application of this approach can be seen in the second infringement procedure against Austria concerning the ban of transporting goods via lorry on a part of the Austrian highway network connecting Germany and Italy,⁵³ also known as the *Inntalautobahn No. 2* case.⁵⁴ Given that limit values established under the Air Framework Directive⁵⁵ had been exceeded more times than allowed

⁵² Case C-100/08, *Commission of the European Communities v Kingdom of Belgium*, [2009] ECR I-140 summary publication, paras. 49, 90 and 109.

⁵³ Case C-28/09, *European Commission v Republic of Austria*, [2011] ECR I-13525.

⁵⁴ Enchelmaier (2013), pp. 183–202.

⁵⁵ Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, [1996] OJ L 296/55.

by the Directive, Austria introduced a sectoral traffic prohibition for lorries of over 7.5 tonnes. This was the second attempt by Austria to pass such a restriction; at the beginning of 2000s, a similar attempt failed to pass the proportionality test because Austria did not provide a study on the necessity of the traffic restriction.⁵⁶ Following the performance of such a study, the traffic restriction was proposed once again in a reinforced manner. Indeed, the *Inntalautobahn No. 2* case concerns a measure that is more radical than that at issue in the *Inntalautobahn No. 1* case. The lorries concerned by the implementation of the prohibition in the *Inntalautobahn No. 2* case were not only those on the 'north-south axis' (the Italy–Brenner–Innsbruck–Langkampfen–Germany link) and the 'north-west axis' (the Vorarlberg–Eastern Europe link), but also those on the 'south-west axis' (the Italy–Innsbruck–Vorarlberg/Lake Constance region link). According to estimates, when the first stage of the sectoral traffic prohibition was implemented on 2 May 2008, 35,000 lorry journeys a year were affected. With the implementation of the second stage on 1 January 2009, the measure was to affect 200,000 journeys a year, representing 7.3% of total journeys by lorry on the A12 motorway. The effects of the measure extended to about 300 km of the Austrian network of fast highways. The Commission considered the Austrian ban a measure more stringent than otherwise required under the Air Framework Directive. Such a measure was in breach of the Treaty provisions on the free movement of goods. The Court of Justice concluded:

139 Next, as regards the question whether the restriction of the free movement of goods goes beyond what is necessary to attain that objective, the Commission submits that measures such as an extension of the traffic prohibition for lorries in certain Euro classes to lorries in other classes or the replacement of the variable speed limit by a permanent 100 km/h speed limit, although liable to affect the free movement of goods, would have enabled the objective sought to be attained while restricting the exercise of that freedom to a lesser extent.

140 As the Court stated in Case C-320/03 *Commission v Austria*, paragraph 87, before adopting a measure so radical as a total traffic ban on a section of motorway constituting a vital route of communication between certain Member States, the Austrian authorities were under a duty to examine carefully the possibility of using measures less restrictive of freedom of movement, and

⁵⁶ Case C-320/03, *Commission of the European Communities v Republic of Austria*, [2005] ECR I-9871 (*Inntalautobahn No. 1*).

discount them only if their inappropriateness to the objective pursued was clearly established.

141 With respect, first, to the possibility of extending the traffic prohibition for lorries in certain Euro classes to lorries in other classes, it must be recalled that the limit for emissions of oxides of nitrogen was fixed at 5 g/kWh for lorries in class Euro III and that class Euro IV reduced this to 3.5 g/kWh.

142 The Republic of Austria takes the view, however, that lorries corresponding to class Euro IV often emit more nitrogen dioxide than those corresponding to standard Euro III. For that reason, it considers that, before extending the traffic prohibition for lorries to lorries in class Euro III, a more thorough study should be made of the impact of nitrogen dioxide emissions on the environment.

143 In view of the fact that each successive Euro class undeniably includes a substantial reduction of emissions of oxides of nitrogen, it has not been shown that extending the traffic prohibition for lorries in certain Euro classes to lorries in other classes would not have been able to contribute to the objective sought as effectively as the implementation of the sectoral traffic prohibition.

144 With respect, secondly, to the Commission's suggestion of replacing the variable speed limit by a permanent 100 km/h speed limit, the Republic of Austria submits, relying on the data in the Ökoscience report, that that replacement would lead only to an additional annual reduction of 1.1% of nitrogen dioxide emissions in the zone concerned, whereas a reduction of those emissions by 1.5% is claimed for the sectoral traffic prohibition.

145 It must be observed that the information in the Ökoscience report relates *inter alia* to the speeds at which road users actually drove in that zone from November 2007 to October 2008. A significant part of that information thus relates to the situation of the Republic of Austria as it appeared at the end of the period prescribed in the reasoned opinion, which was 8 June 2008. That information may be taken into account in the assessment of the merits of the present action.

146 According to that report, at the time when a speed limit of 130 km/h applied at Vomp, the average speed of passenger vehicles was approximately 116 km/h, while during the investigation period in which a permanent speed limit of 100 km/h was introduced their average speed was 103 km/h. The introduction of the permanent speed limit thus brought about a reduction of only 13 km/h compared to the periods in which the speed limit was 130 km/h.

147 While the effect of a speed limit on the speed actually practised by road users may indeed be influenced by the way in which they accept the limit, the fact remains that it is for the Member State concerned to ensure that such a measure is actually complied with, by adopting compulsory measures with penalties if need be. The Republic of Austria cannot thus rely on the average speed measured in the zone concerned, 103 km/h, to assess the effect of implementing a permanent speed limit of 100 km/h.

148 Consequently, it appears that replacing the variable speed limit by a permanent speed limit of 100 km/h offers a potential for reducing nitrogen dioxide emissions which was not sufficiently taken into account by the Republic of Austria. Moreover, as may be seen from paragraph 67 above, the existence of that potential is corroborated by the IFEU report.

149 In addition, it must be noted that the restrictive effect on the free movement of goods of replacing the variable speed limit by a permanent speed limit of 100 km/h is less than that of implementing the sectoral traffic prohibition. That replacement would not affect the movement of lorries whose maximum authorised speed is in any case limited.

150 In those circumstances, it must be concluded, having regard to the criteria set out in paragraph 140 above, that it has not been shown that the two principal alternative measures put forward by the Commission as measures less restrictive of the free movement of goods are not appropriate. Without it being necessary to examine the other measures suggested by the Commission, the present application must therefore be allowed.

Besides the length of the Court of Justice's analysis of the necessity of the national measure, it is striking that at paragraph 147 the Court of Justice went so far in its review as to question the methodology applied by the study commissioned by the Austrian Government. Such a review is not in contrast with the general approach of the Court of Justice to justifications based on mandatory requirements.⁵⁷ Although Member States do not have to prove that no other conceivable measure could enable that objective to be attained under the same conditions,⁵⁸ Member States must base their assessments on appropriate evidence or analysis.⁵⁹ In its case law, the Court of Justice shows that, if the Commission does not confine itself to contesting such evidence and

⁵⁷ Enchelmaier (2013), pp. 199 and 200.

⁵⁸ E.g. Case C-333/14, *Scotch Whisky Association and Others v The Lord Advocate and the Advocate General for Scotland*, ECLI:EU:C:2015:845, para. 55; Case C-400/08, *European Commission v Kingdom of Spain*, [2011] ECR I-1915, paras. 75, 123; C-250/07, *Commission of the European Communities v Hellenic Republic*, [2009] ECR I-4369, paras. 17, 34; C-518/06, *Commission of the European Communities v Italian Republic*, [2009] ECR I-3491, para. 84; Case C-110/05, *Commission of the European Communities v Italian Republic*, [2009] ECR I-519, para. 66; Case C-158/94, *Commission of the European Communities v Italian Republic*, [1997] ECR I-5789, para. 54.

⁵⁹ E.g. Case C-254/05, *Commission of the European Communities v Kingdom of Belgium*, [2007] ECR I-4269, para. 36; C-185/04, *Ulf Öberg v Försäkringskassan, länskontoret Stockholm*, [2006] ECR I-1453, para. 22; C-137/04, *Amy Rockler v Försäkringskassan*, [2006] ECR I-1441, para. 25; C-8/02, *Ludwig Leichte v Bundesanstalt für Arbeit*, [2004] ECR I-2641, para. 45; C-42/02, *Diana Elisabeth Lindman*, [2003] ECR I-13519, para. 25; Case C-320/03, *Commission of the European Communities v Republic of Austria*, [2005] ECR I-9871 (Inntalautobahn No. 1).

analysis on legal issues,⁶⁰ the Court of Justice is willing to review the merits of the evidence. In this case, the Commission has presented a report disputing the findings of the Austrian Government's study. However, a close reading of the case and the information reported on both studies shows that the Court of Justice made selective use of the data in order to uphold the Commission's claim that the Austrian measure did not fulfil the necessity test.⁶¹ The reader will excuse me for entering the realm of mathematics to sustain this point.

According to the Commission, the so-called IFEU report showed that a permanent speed limit of 100 km/h would have been more effective than the traffic ban.⁶² Yet this study was based on a theoretical reduction of average speed from 130 to 100 km/h, thus a reduction of 30 km/h, corresponding to a reduction of emission by 1.8%. This reduction would have been 0.3% points higher than that achieved by the traffic ban introduced by Austria, which aimed at a 1.5% reduction. The Austrian government study had reviewed the speed limitation option as well, but it actually showed by means of empirical data that the average speed reduction was only of 13 km/h. Indeed, the average speed under the 130 km/h limit was 116 km/h, while under the 100 km/h limit the average speed was 103 km/h, corresponding to a reduction of emission of 1.1%.⁶³ This would have meant a reduction which was 0.4% points lower than that envisaged by the traffic ban. Even accepting the Court of Justice's argument made at paragraph 147 that, by strictly enforcing the 100 km/h limit, Austria could achieve a reduction of 16 km/h, the reduction of emissions achievable by the 100 km/h speed limit would have been significantly lower than that indicated by the IFEU report, even lower than that pursued by the traffic ban, if my understanding of the numbers is not mistaken.⁶⁴ The expression *iudex non calculat* underlines that lawyers should refrain from entering mathematical discussions. Yet

⁶⁰ For cases in which the Court of Justice did not assess the merits of the evidences and analyses, Enchelmaier (2013), p. 200 with reference to Case C-157/94, *Commission of the European Communities v Kingdom of the Netherlands*, [1997] ECR I-5699, para 63; Case C-158/94, *Commission of the European Communities v Italian Republic*, [1997] ECR I-5789, para 59.

⁶¹ A negative note as regards the *modus operandi* of the Court of Justice in this regard has also be moved by Enchelmaier (2013), pp. 199–202, albeit on (partially) different grounds.

⁶² Case C-28/09, *European Commission v Republic of Austria*, [2011] ECR I-13525, para 67.

⁶³ *Idem*, para 68.

⁶⁴ According to the formula $30:1.8=16:x$, a 16km/h reduction would lead to a 0.96% emissions reduction, hence 0.54% points less than envisaged by the Austrian government and 0.84% points less than estimated on the basis of the IFEU report.

it is highly improbable that an additional average reduction of 3 km/h would lead to a reduction of emissions that is 0.3% points higher than the one pursued by means of the proposed traffic ban.

In light of this analysis, I am of the opinion that the Court of Justice's approach to the necessity test in this case is biased due to a general idea that the Austrian measure greatly affected the transport of goods in one of the major road routes of Europe. Accordingly, what is the value the Court of Justice's approach in this case for predicting the outcome future cases? If the validity of Member States' studies can be so lightly discredited by the Court of Justice, how can they be certain that their cases of green-plating will withstand a review in light of the proportionality principle?

Probably the only lesson to be learned is that national bans are not welcomed by the Court of Justice. Case law in the field of species conservation shows that national bans are in principle rejected by the Court of Justice on grounds related to the necessity test. This was, for example, the case in the infringement procedure against Germany, known as the *Crayfish* case.⁶⁵ Under German law applicable at the time of the proceedings, the import of all species of live crayfish was subject to the grant of a licence. Under national law regulating the granting of the licence, a licence might be granted only for the purposes of research or teaching. The importation of live crayfish for commercial purposes, in particular for restocking private pools or for consumption was, thus, prohibited. Yet there was the possibility to apply for derogation. The German provisions went beyond EU law on the protection of species. In reviewing the German measure, the Court of Justice stated:

24 As far as the prevention of the risks of crayfish plague and of faunal distortion is concerned, the Commission submits that this objective could have been achieved by measures having less restrictive effects on intra-Community trade.

25 For example, instead of simply prohibiting imports of all species of live freshwater crayfish, the Federal Republic of Germany could have confined itself to making consignments of crayfish from other Member States or already in free circulation in the Community subject to health checks and only carrying out checks by sample if such consignments were accompanied by a health certificate issued by the competent authorities of the dispatching Member State certifying that the product in question presented no risk to health, or instead confined itself

⁶⁵ Case C-131/93, *Commission of the European Communities v Federal Republic of Germany*, [1994] ECR I-3303; see also Case C-100/08, *Commission of the European Communities v Kingdom of Belgium*, [2009] ECR I-140 summary publication, para. 104 of the Dutch version.

to regulating the marketing of crayfish in its territory, in particular by subjecting to authorisation only the restocking of national waters with species likely to be carrying the disease and restricting release of animals into the wild and restocking in areas in which native species are to be found.

26 However, the Federal Government has not convincingly shown that such measures, involving less serious restrictions for intra-Community trade, were incapable of effectively protecting the interests pleaded.

27 Moreover, the conditions which importers are required to observe under the authorisation system applied by the German authorities so as to mitigate the harshness of the import ban laid down by the Federal legislation, which require the traders concerned to comply with all health measures, to use imported crayfish in a way which prevents them from being released into the environment and to ensure that the water in which they are kept is disinfected, show that the defendant Government itself considers that those means, less restrictive of intra-Community trade than a total import ban, are sufficient for achieving the objective of protecting native crayfish against crayfish plague and faunal distortion.

28 It follows that the Commission's complaint is well founded.

As we can see from the cited paragraphs, the Court of Justice required Germany to prove that the less stringent means suggested by the Commission, or those used by Germany itself as a means of exception, were not appropriate to achieve the goal pursued by Germany by means of a total ban. In paragraph 27, the Court of Justice seems to require Germany to transform the derogation regime into the general rule.

If such a *modus operandi* of the Court of Justice towards national bans is applied consistently, no such ban could withstand the legality review of the Court. This is not the case. There are cases in which the Court of Justice assessed the national law banning a certain human activity by providing guidance suggesting to the national court that the proportionality test is respected. This was the case in the *Windmills* judgment.⁶⁶ As indicated above,⁶⁷ this judgment concerns a local measure prohibiting the building of windmill farms in or nearby Natura 2000 sites. The second part of the preliminary question referred by the national court concerned the compatibility of such a ban with Directive 2001/77/EC on the promotion of electricity produced from renewable energy sources in the internal electricity market and Directive 2009/28/EC on the

⁶⁶ Case C-2/10, *Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl v Regione Puglia*, [2011] ECR I-6561 (*Windmills*).

⁶⁷ Chapter 1, Section 1.3.3 and Chapter 2, Section 2.1.

promotion of the use of energy from renewable sources.⁶⁸ The way in which the Court of Justice reviewed the national measure in light of these two directives should be looked at separately.

As regards Directive 2001/77, Article 6(1) thereof requires Member States to evaluate the legislative and regulatory framework with regard to administrative procedures, in particular authorisation procedures, which are applicable to production plants for electricity produced from renewable energy sources. The objectives of that evaluation procedure are to streamline and reduce administrative barriers and to ensure that the rules applicable to that type of production plant are objective, transparent and non-discriminatory. The Court of Justice only answered the questions concerning the objectiveness and transparency of the procedure. According to the Court of Justice:

63 In that connection, it should be pointed out, first, that a total ban on the construction of new wind turbines in areas forming part of the Natura 2000 network, deriving from a legislative provision, is not contrary to the objectives of streamlining and reducing administrative barriers and, in principle, constitutes a sufficiently transparent and objective procedure.

This paragraph shows that the Court of Justice considers a total ban to be a streamlined procedure. Apparently, the absence of a procedure is a streamlined procedure. The Court of Justice seems also to consider a total ban a transparent and objective procedure. Yet the Court of Justice is not fully sure. The expression ‘in principle’ suggests that there could be cases in which a total ban is not a transparent and objective procedure. Accepting that a total ban is a procedure, it is hard to see how a total ban could fail to be a *transparent* procedure. Accordingly, the formula ‘in principle’ refers to the possibility that a total ban is not an *objective* procedure. However, the Court of Justice did not assess the objectiveness criterion of its own; rather, it dealt with the objectiveness criterion only in conjunction in the last requirement mentioned under Article 6(1) of the Directive, i.e. that national procedures are non-discriminatory. The Court of Justice stated:

64 Next, as to whether the measure is discriminatory, it should be recalled that the prohibition of discrimination laid down in Article 6(1) of Directive 2001/77 is

⁶⁸ Respectively, Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, [2001] OJ L 283/3, and Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, [2009] OJ L 140/16.

simply a specific expression of the principle of equality, which is one of the fundamental principles of European Union law and requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, *inter alia*, Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraph 67; Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633, paragraph 56; and Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 23).

65 In the present case, it is for the referring court to determine whether the difference in treatment between the projects for the construction of wind turbines and projects relating to other industrial activities proposed for sites forming part of the Natura 2000 network may be justified on the basis of objective differences between those two kinds of project.

66 In that context, the referring court must have regard to the particular features of wind turbines, taking account in particular of the dangers which they may represent for birds, such as the risk of collision, disturbances and displacement, barrier effects forcing birds to change direction and habitat loss or degradation.

As we can see, the Court of Justice did not provide a definitive answer. It simply repeated the requirements under the principle of equality and then asked the national court to assess whether the national measure treated the building of windmills differently from other kinds of industrial plants for the production of electricity coming from renewable energy sources, and whether such a discrimination could be justified by objective criteria. As regards this last aspect of the assessment, the Court of Justice instructed the national court to take into account the specific features of wind turbines and their negative effects on birds. In light of the tone used by the Court of Justice in listing the negative effects of wind turbines on birds, and the fact that none of the other possible power plants affects birds in the same way as wind turbines do, the Court of Justice seems to steer the analysis of the national court towards the conclusion that the national measure is not discriminatory.

As regards the review in light of Directive 2009/28/EC, Article 13(1) thereof provides that 'Member States shall ensure that any national rules concerning the authorisation, certification and licensing procedures that are applied to plants and associated transmission and distribution network infrastructures for the production of electricity, heating or cooling from renewable energy sources [...] are proportionate and necessary'. In particular, Member States are required to take appropriate steps to ensure that those rules are 'objective, transparent, proportionate, do not discriminate between applicants and take fully into account the

particularities of individual renewable energy technologies'. The Court of Justice stated:

73 In this regard, the principle of proportionality referred to in Article 13 of Directive 2009/28, which is one of the general principles of European Union law, requires that measures adopted by Member States in this field do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, *inter alia*, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13, and Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni and Others* [1994] ECR I-4863, paragraph 41).

74 It is for the referring court to determine whether the national measure at issue is proportionate. That court must take account in particular of the fact that the legislation at issue in the main proceedings is confined to wind power plants and does not extend to other forms of renewable energy production, such as photovoltaic plants. Moreover, the prohibition applies solely to new wind turbines for commercial purposes, as wind power plants intended for self-consumption and having a capacity not exceeding 20 kW are excluded from the scope of that prohibition.

As we can see, once again, the Court of Justice does not answer the question in a definitive manner, but it simply repeats the requirements under the proportionality principle. It then instructs the national court to apply the test. As regards the requirements for the proportionality principle, it is striking that the Court of Justice referred to the three limbs of the proportionality test as defined in *Fedesa*. Indeed, the Court of Justice explicitly refers to the suitability test, the necessity test and the proportionality *sensu stricto* test. As stated above, it is argued in the literature that this last test should not be applied by the Court of Justice in the context of more stringent protective measures.⁶⁹ It could be that in this case the Court of Justice evaluated the review of the national measure in light of an EU secondary measure. After having followed a democratically legitimated legislative process, such a measure provides a balance between environmental protection, energy security and economic considerations. This could be the reason for which the Court of Justice felt confident in evoking a test that could allow the judiciary to sit on the chair of the legislative power. The fact that the national measure did not aim to achieve a national goal strengthens such a consideration.

⁶⁹ Jans (2007), pp. 712–713.

Indeed, the total ban aimed to achieve the goals of the Habitats Directive. The national measure simply establishes a means/instrument to achieve the EU goal that is more stringent than the one previewed by the EU legislator. Given that the goal pursued by the national measure had been established by the EU legislature, it is easier to argue that the proportionality *sensu stricto* test does not place the judiciary in the position to trespass the boundaries established by the *trias politica* principle.

Another unclear aspect of the Court of Justice's reply to the preliminary question posed by the Italian court concerns the fact that the Court of Justice referred the matter back to the national court. It is the national court that has to apply the proportionality principle. At first glance, such an approach could be seen as welcome from the perspective of the judicial subsidiary theory.⁷⁰ Yet it is unclear why the matter was referred back to the national court as regards the proportionality test under Directive 2009/28/EC, while it was dealt by the Court of Justice itself as regards Article 194 TFEU and, albeit only partially, Directive 2001/77/EC. The manner in which, at paragraph 74, the Court of Justice stresses the peculiar features of the national measure suggests that the Court of Justice had already reached a conclusion on this matter. It should be noted that paragraph 74 refers to the very same features used by the Court of Justice at paragraph 57 to come to the conclusion that the total ban did not breach Article 194 TFEU. If the national measure was not capable of jeopardising the European Union objective of developing new and renewable forms of energy under Article 194 TFEU, how can it jeopardise the goal of promoting energy from renewable sources pursued by Directive 2009/28/EC? Why did the *de minimis/remoteness* approach discussed above not apply here? Further, why was the Court of Justice of the opinion that it had enough information to provide a definitive answer as regards the compatibility of the national measure with the European Union objective of developing new and renewable forms of energy under Article 194 TFEU, while it did not have enough information to state the same about the objective of promoting energy from renewable sources under the Directive? Are these two objectives so different as to justify such different approaches in answering the preliminary questions? Similarly, why was the Court of Justice of the opinion that it had enough information to conclude that the national measure at hand in the main proceeding fulfilled, at least in principle, the requirement of

⁷⁰ On judicial subsidiarity see Bogojevic (2015), pp. 5–25. More vaguely on this concept, Krämer (1996b), p. 17; and Tridimas (2011), p. 740.

offering an objective procedure under Article 6 of Directive 2001/77/EC, while it does not have enough information to establish whether the national measure establishes a proportionate and necessary procedure under Directive 2009/28/EC? What is the difference between the requirement of 'objective procedure' and that of 'proportionate and necessary procedure' under the two directives?

When the judgments of the Court of Justice discussed in this section, concerning national measures banning certain human activities, are compared, it becomes clear that it is impossible to predict how the Court of Justice will apply the necessity test. The three cases analysed above highlight the presence of at least four different approaches: i) a *de minimis/remoteness*-test based approach,⁷¹ ii) an equality test-based approach,⁷² iii) a strict necessity test-based approach⁷³ and iv) a judicial subsidiarity-based approach.⁷⁴ Taking all the above into consideration, national legislators and courts will not be able to find much guidance in the case law of the Court of Justice about the manner in which this court assesses national bans.

c) The Proportionality Review of Green-Plating Other Than Positive Lists and National Bans

When the case law dealing with positive lists, in which a proceduralisation-based approach was followed is taken into consideration next to the judgments of the Court of Justice concerning national measures banning certain human activities, at least five different approaches to legality review can be established. If an even broader approach to the review of green-plating is taken, by looking at all different kinds of green-plating, at least two other approaches can be identified, thus bringing the total of approaches to at least seven.

First, there are cases in which the proportionality principle is applied in a rather theoretical and marginal manner, i.e. without the need of

⁷¹ Case C-2/10, *Azienda Agro-Zootecnica Franchini srl and Eolica di Altamura Srl v Regione Puglia*, [2011] ECR I-6561 (Windmills), case as regards compatibility with Article 194 TFEU (paras 56 and 57).

⁷² Case C-100/08, *Commission of the European Communities v Kingdom of Belgium*, [2009] ECR I-140 summary publication; and Case C-2/10, *Azienda Agro-Zootecnica Franchini srl and Eolica di Altamura Srl v Regione Puglia*, [2011] ECR I-6561 (Windmills), as regards compatibility with Directive 2001/77/EC (paras 64–66).

⁷³ Case C-28/09, *European Commission v Republic of Austria*, [2011] ECR I-13525; and Case C-131/93, *Commission of the European Communities v Federal Republic of Germany*, [1994] ECR I-3303 (Crayfish).

⁷⁴ *Idem*, as regards the compatibility with Directive 2009/28/EC.

presenting scientific studies as it was the case in the *Inntalautobahn No. 2* case. For example, this soft necessity test-based approach was followed in the *Aher-Waggon* case.⁷⁵ This case concerns a German measure that made aircraft registration in Germany conditional upon compliance with noise limits not required by EU law. As regards the proportionality of the measure, the Court of Justice stated:

20 It is also settled case-law that national legislation which restricts or is liable to restrict intra-Community trade must be proportionate to the objectives pursued and that those objectives must not be attainable by measures which are less restrictive of such trade (Joined Cases C-34/95, C-35/95 and C-36/95 *KO v De Agostini and TV-Shop* [1997] ECR I-3843, paragraph 45, and Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 75).

21 As regards the imposition of stricter standards than those laid down in the Directive, suffice it to state that, as the German Government has explained, limiting noise emissions from aircraft is the most effective and convenient means of combating the noise pollution which they generate. Without extremely costly investment, it is generally difficult to reduce noise emissions appreciably by carrying out works in the vicinity of airports.

22 Furthermore, the restriction, through stricter rules governing noise emissions from aircraft, on the possibility of registering an aircraft in Germany applies to all aircraft, new or used, irrespective of their origin, and does not prevent aircraft registered in another Member State from being used in Germany.

23 As regards, more particularly, the exemption from those stricter standards for aircraft registered in the Member State in question before the Directive was implemented, those aircraft must, as the German Government has explained, also comply with the stricter noise standards when they undergo technical modification, even if it has no bearing on noise emissions, or when they are temporarily withdrawn from service. Furthermore, their number can be determined by the German authorities.

24 The national authorities were thus entitled to consider that the number of aircraft not meeting the stricter noise standards was necessarily going to fall and, therefore, that the overall level of noise pollution could not fail to diminish gradually. Furthermore, the effectiveness of that policy of progressively eliminating from the national fleet aircraft not meeting the stricter noise standards would be undermined if their number could be increased, to an extent not foreseeable by the national authorities, by aircraft from other Member States.

25 Legislation of the kind at issue in the main proceedings therefore does not appear to be disproportionate.

⁷⁵ Case C-389/96, *Aher-Waggon GmbH v Bundesrepublik Deutschland*, [1998] ECR I-4473.

As it appears from the cited paragraphs, no specific study was required. A rather theoretical and light approach to the necessity test sufficed in paragraph 21. Besides, as regards the discriminatory nature of the national measure, which shows that once again the equality principle was applied as a part of the proportionality principle, the Court of Justice failed to appreciate that, as indicated by Jacobs, aircraft previously registered in another Member State could not be registered in Germany even though aircraft of the same construction which had already obtained German registration before the German measure was adopted could retain that registration.⁷⁶ Indeed, at paragraphs 22 and 23 the Court of Justice applied the equality principle in a rather simplified manner, which did not take into consideration the real meaning of the national measure at hand for the registration of foreign aircraft marketed before the entry into force of the contested measure.

Second, there are cases in which the national measure is considered in conformity or in breach of the Treaties without even applying a proportionality review; therefore this category could be called silent proportionality test-based approach. A case in which the national measure was considered in keeping with the Treaties without applying the proportionality test can be seen in *PrussenElektra*.⁷⁷ This case concerns a German measure under which network operators in Germany had to purchase electricity produced from renewable sources within their area of supply at fixed minimum prices. The Court of Justice did not only consider that the national measure was not discriminatory, it also refrained from assessing the proportionality of the contested measure, despite the fact that the private parties in the main proceedings, the Commission and the Advocate General all had contested the compatibility of the national measure with this principle.⁷⁸

As regards a case in which a national measure was considered in breach of the Treaties without applying the proportionality test, reference can be made to Case C-64/09, *Commission v France*,⁷⁹ concerning the review of an allegedly more stringent protective measure under the

⁷⁶ Jacobs (2006), p. 190.

⁷⁷ Case C-379/98, *PreussenElektra AG v Schleswig AG*, in the presence of *Windpark Reußenköge III GmbH and Land Schleswig-Holstein*, [2001] ECR I-2099.

⁷⁸ This can be evinced from the Opinion of AG Jacobs, in this case, paras. 192, 200, 210, 235, and 236.

⁷⁹ Case C-64/09, *European Commission v French Republic*, [2010] ECR I-03283.

so-called End-of-Life Vehicles Directive.⁸⁰ French law allowed the removal of a scrap vehicle from the register of car owners only if a certificate proving that the vehicles had been factually destroyed was provided by an official shredder. The directive only required a certificate to prove that the vehicle had been given to an official shredder. French law was hence stricter than required by EU law. Given that only French shredders provided a certificate that a scrap vehicle had been factually destroyed, the French measure limited the free movement of goods, according to the Commission. The Court of Justice stated:

35 In the first place, recital 1 in the preamble to Directive 2000/53 states that the directive seeks to minimise the impact of end-of-life vehicles on the environment, but does not provide for complete harmonisation and thus does not prevent Member States from adopting more stringent protective measures (see, *inter alia*, Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, paragraph 27). Such measures must, however, be compatible with the provisions of the EC Treaty and, *inter alia*, must not frustrate the achievement of the objective pursued in the second instance by that directive, namely to ensure the smooth functioning of the internal market and to avoid distortions of competition in the Union.

36 In that regard, the Court finds, as has been pointed out by the Commission, that Article 5(3) of Directive 2000/53 provides a precise description of the procedure to be followed for cancelling the registration of an end-of-life vehicle, in order to ensure, as stated by recital 2 in the preamble to the directive, coherence between national approaches. In the context of that procedure, a very specific function is given to a key document entitled ‘certificate of destruction’.

37 That function of the document may not be altered. Even if it were to be conceded that the French system affords better traceability of end-of-life vehicles, it is clear that that system was giving the ‘certificate of destruction’ a function different from that laid down in Article 5(3) of Directive 2000/53. Such an alteration of the function of that certificate is liable to jeopardise the coherence between the national approaches referred to in the preceding paragraph and, consequently, the functioning of the internal market.

38 Likewise, the issue of a document entitled ‘receipt of acceptance for destruction’ which, in the French Republic’s submission, fulfils the function of the ‘certificate of destruction’ provided for in Article 5(3) of Directive 2000/53 is liable to give rise to confusion capable of undermining the achievement of the objective pursued by that provision.

39 It follows from the foregoing that the third plea is also well founded.

⁸⁰ Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of-life vehicles, [2000] OJ L 269/34.

As we can see from the cited paragraphs, the Court of Justice linked the second sentence of Article 193 TFEU to the secondary objectives of the Directive, i.e. the smooth functioning of the internal market. Once the Court of Justice concluded that the national measure was liable to jeopardise the achievement of such objective, it concluded that the plea of the Commission was well founded. No justification was taken into account, despite the fact that France had explicitly relied on environmental considerations.

3.2.3 Fuzzy Proportionality as a Barrier to Green-Plating

The analysis performed above confirms that the Court of Justice's review of green-plating is rather random. The following seven approaches were recognised, based on case law analysis:

- i) a *de minimis/remoteness* test-based approach;⁸¹
- ii) an equality test-based approach;⁸²
- iii) a strict necessity test-based approach;⁸³
- iv) a proceduralisation-based approach;⁸⁴
- v) a judicial subsidiarity-based approach;⁸⁵
- vi) a soft necessity test-based approach;⁸⁶ and
- vii) a silent proportionality test-based approach.⁸⁷

It should be noted that this is an open list. No clear *modus operandi* could be recognised as regards the application of most of these approaches. This finding is in line with those of De Búrca, who reviewed how the

⁸¹ Case C-2/10, *Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl v Regione Puglia*, [2011] ECR I-6561 (Windmills), case as regards compatibility with Article 194 TFEU (paras 56 and 57).

⁸² Case C-100/08, *Commission of the European Communities v Kingdom of Belgium*, [2009] ECR I-140 summary publication; and Case C-2/10, *Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl v Regione Puglia*, [2011] ECR I-6561 (Windmills), as regards compatibility with Directive 2001/77/EC (paras 64–66).

⁸³ Case C-28/09, *European Commission v Republic of Austria*, [2011] ECR I-13525; and Case C-131/93, *Commission of the European Communities v Federal Republic of Germany*, [1994] ECR I-3303 (Crayfish).

⁸⁴ Case C-100/08, *Commission of the European Communities v Kingdom of Belgium*, [2009] ECR I-140 summary publication, para. 104 of the Dutch version. Similarly, Case C-219/07, *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat*, [2008] ECR I-4475, paras. 33–38.

⁸⁵ *Idem*, as regards the compatibility with Directive 2009/28/EC.

⁸⁶ Case C-389/96, *Aher-Waggon GmbH v Bundesrepublik Deutschland*, [1998] ECR I-4473.

⁸⁷ Case C-379/98, *PreussenElektra AG v Schleswig AG*, in the presence of *Windpark Reußenköge III GmbH and Land Schleswig-Holstein*, [2001] ECR I-2099; Case C-64/09, *European Commission v French Republic*, [2010] ECR I-03283.

Court of Justice applies the proportionality test in general.⁸⁸ Generally speaking, the more the national measure affects a fundamental freedom, the more strictly the Court of Justice applies the proportionality test. I do not disagree with Jacobs that the Court of Justice has been quite lenient towards environmental protection in the context of the legality review performed in light of the free movement of goods.⁸⁹ Yet, as highlighted by Jacobs himself, this leniency has been mostly focused on accepting the environment as a ground for applying the *Cassis-de-Dijon* line of justifications, at times bypassing the limitation concerning discriminatory measures.⁹⁰ Jacobs did not refer to the manner in which the proportionality test was applied. The review of positive lists for protecting biodiversity or national bans for various environmental purposes and other kinds of green-plating shows the lack of a clear *modus operandi* of the Court of Justice, with judgments that can be considered particularly stringent and others being particularly lenient. I could not find a trend that Member States can use to predict the approach to, and therefore the outcome of, the legality review performed by the Court of Justice.

Such a lack of legal certainty does affect Member States' choice to adopt green-plating. In the fields of nature conservation and waste management, there are cases in which the Netherlands had doubts about the possibility that certain stricter measures would have withstood a legality review in light of the provisions on the free movement of goods. For example, in the context of nature conservation the Netherlands prevented a provision prohibiting the import of non-endangered exotic species from entering into force.⁹¹ To prevent species becoming endangered,⁹² Section 13(1)(b) of the Flora and Fauna Act provision prohibited the exploitation of non-endangered exotic species listed by order. During the parliamentary debate, some members of the Dutch parliament referred to Article 193 TFEU (then Article 130t EEC) to support the adoption of this provision. They added that such a prohibition would have been compatible with Article 36 TFEU (then Article 36 EEC). After an initial positive attitude toward the adoption of this provision, the

⁸⁸ De Búrca (2000), pp. 97–99.

⁸⁹ Jacobs (2006).

⁹⁰ See also Gormley (2015).

⁹¹ Before the reform occurred with the Nature Protection Act 2016, such a possibility was regulated under Section 13(1)(b) of the Flora and Fauna Act.

⁹² Proceedings of the Second Chamber of the States General, Kamerstukken II 1997/98, 23 147, nr. 74 later slightly changed, see Proceedings of the Second Chamber of the States General, Kamerstukken II 1997/98, 23 147, nr. 106.

government stated that the import and export of goods is a matter that cannot be easily regulated unilaterally; international collaboration is required to avoid conflict within Europe and with the World Trade Organisation (WTO).⁹³ Ultimately, the government and parliament agreed to suspend the entry into force of Section 13(1)(b) of the Flora and Fauna Act. Following the remarks made by the Commission, stating that the implementation of Section 13(1)(b) of the Flora and Fauna Act would represent an unjustifiable violation of current Article 34 TFEU,⁹⁴ the government blocked the entry into force of this section.

As regards waste management, Article 3 of the Old Waste Directive, requiring the Member States to encourage waste prevention, recycling and reuse, was transposed in the Netherlands by means of an extended legal framework, aiming to avoid waste rather than solving the problem of waste disposal.⁹⁵ Most importantly, Chapter 5 of the Waste Act⁹⁶ allowed the government to take measures restricting the production or commercialisation of environmentally unfriendly products,⁹⁷ and to take measures restricting how waste was collected and processed, including measures establishing return systems and separate collection systems. Notwithstanding the good intentions of the Dutch legislator, the prevention of waste remained a problem.⁹⁸ Chapter 5 of the Waste Act remained mostly unapplied, at least until 1991.⁹⁹ Experts used the words 'symbolic value' and 'disappointing results' when referring to the provisions on waste prevention in the Waste Act.¹⁰⁰ Indeed, the government only took a few measures on the collection of certain materials,

⁹³ Proceedings of the Second Chamber of the States General, Kamerstukken II 1997, Handelingen, 9–613.

⁹⁴ Proceedings of the Second Chamber of the States General, Kamerstukken II 2000/01, 23 147, nr. 127, p. 2.

⁹⁵ Proceedings of the Second Chamber of the States General, Kamerstukken II 1974/75, 13 364, nrs. 1–3, pp. 68 and 74.

⁹⁶ Afvalstoffenwet, Stb. 1977, 455.

⁹⁷ Environmentally-unfriendly goods are goods which, after having been used, due to their nature, composition, weight or volume, are not suitable for recovery. The Minister explained that Articles 27 and 28 aimed, in the first instance, at regulating and reducing the commercialisation of certain goods on the Dutch market. Measures limiting the production of these goods would have been taken in the context of international agreements, Proceedings of the Second Chamber of the States General, Kamerstukken II 1974/75, 13 364, nrs. 1–3, p. 89.

⁹⁸ Addink (1991a), p. 11.

⁹⁹ Neuerburg & Verfaillie (1991), p. 353.

¹⁰⁰ Groen (1988), p. 245 and Henselmans (1988), p. 215 with reference to: CRMH, *Advies eigener beweging over afvalpreventie (beperking van het ontstaan van afval en de bevordering van het hergebruik)*, Rijswijk, June 1987.

such as glass and paper, and products, such as refrigerators.¹⁰¹ One of the reasons impeding the application of Chapter 5 of the Waste Act was the fear of affecting the functioning of the internal market.¹⁰²

I would be surprised if similar considerations did not block green-plating in other Member States as well. The unpredictability of the legality review performed by the Court of Justice is a rather well-known phenomenon. In light of the findings presented in Chapter 2, namely that green-plating fosters the development of the high level of protection of the environment under Article 191 TFEU, the fuzzy approach to the proportionality test described in this section is deplorable. It surely does not represent a laudable example of how to cooperate sincerely with the Member States. They are indeed left with little guidance on how to shape the content of national measures so as to maximise the possibility of complying with the Treaties. Section 4 provides a model to improve predictability as regards the *modus operandi* of the Court of Justice. This model links the review of legality with the manner in which the EU legislator has regulated the room for green-plating in measures based on Article 192 TFEU. In order to properly develop this model, Section 3 provides an analysis of the manner in which the room for green-plating can be identified. First, however, to complete the analysis of how the Court of Justice reviews the legality of green-plating, the role played by the notification duty in this regard remains to be seen.

3.2.4 Notification as a Tool for the Review of the Legality of Gold-Plating?

Article 193 TFEU concludes by requiring that the Commission shall be notified of 'more stringent protective measures'. Notwithstanding its mandatory formulation, the actual relevance of this obligation is questionable. First, little information is available on its use.¹⁰³ In 2012, I made multiple requests to the Commission for access to information under Regulation (EC) 1049/2001.¹⁰⁴ These requests aimed to establish whether the Commission had information about the use of more stringent protective measures in the context of several directives. In most cases, the Commission answered that the information was not available

¹⁰¹ Neuerburg & Verfaillie (1991), p. 353.

¹⁰² Ibidem.

¹⁰³ Jans, Squintani et al. (2009), p. 434.

¹⁰⁴ Regulation (EC) 1049/2001 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L 145/43.

to it.¹⁰⁵ In those cases where the Commission did have information, I asked whether such information derived from notifications under Article 193 TFEU and its predecessors, from notification obligations in secondary Union environmental law, or from other sources. The Commission answered that such information was not acquired from notifications made under Article 193 TFEU. The information derived, in particular, from other sources, such as national reports produced in the context of the preparation of implementation reports.

This is probably the consequence of the fact that, according to the case law of the Court of Justice, the notification requirement of Article 193 TFEU is fulfilled if a Member State notifies its more stringent protective measures along with the notification of the measures implementing the Union act.¹⁰⁶ No *special* '193 notification' is required. Moreover, in the *Windmills* case,¹⁰⁷ the Court of Justice ruled that even if a Member State failed to notify the Commission of 'a more stringent protective measure', this does not affect the legality of that measure.¹⁰⁸ In sum, a violation of the notification duty under Article 193 TFEU does not affect the legality of more stringent protective measures.

It goes without saying that if more stringent protective measures take the form of so-called technical standards in the context of current Directive 2015/1535/EU¹⁰⁹ they are subject to the notification requirements of that Directive as well. According to this Directive, the Commission must be notified before national measures introducing technical standards for products or Information Society Services are adopted, if

¹⁰⁵ In the context of nature conservation see letter of I. Codescu of 22 June 2012, reference number ENV.A.1./MV/ts/Ares(2012) 756413 (the last six numbers were written by hand). In the context of waste management, air quality and industrial emissions, see email of G. Gerzsenyi of 20 March 2012, no reference number.

¹⁰⁶ Case C-194/01, *Commission of the European Communities v Republic of Austria*, [2004] ECR I-4979, para. 73, referring to the duty to notify other dangerous substances than those listed under the EU-LHW, enshrined in Directive 91/689/EEC.

¹⁰⁷ Case C-2/10, *Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl v Regione Puglia*, [2011] ECR I-6561 (*Windmills*).

¹⁰⁸ See also Case C-129/16, *Túrkevei Tejtermelő Kft. v Országos Környezetvédelmi és Természetvédelmi Főfelügyelőség*, ECLI:EU:C:2017:547. See also Dougan (2000), p. 880 with further reference to case law.

¹⁰⁹ Directive 2015/1535/EU 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, [2015] OJ L241/1; previously, Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulation OJ 1998 L 204/37.

they do not serve to implement Union obligations.¹¹⁰ Under Directive 2015/1535/EU, there is a standstill clause in place, meaning that national law cannot be adopted as long as the Commission has not given its approval, which may be silent.¹¹¹ If this standstill obligation is violated, national law cannot be applied. The same conclusion holds for national measures that are technical standards that fall outside the scope of application of Union environmental measures, including cases of spill-overs and ‘related measures’. On the contrary, national measures implementing Union obligations, including cases of green-plating, are not subject to the standstill obligation under the Directive. Article 5(1) of the Directive states:

Member States shall communicate to the Commission any draft technical regulation, *except where it merely transposes the full text* of an international or European standard, in which case information regarding the relevant standard shall suffice [author emphasis].

As we can see, when technical standards serve to transpose the full text of a European standard, Member States do not need to notify the Commission of the draft technical regulation. They only have to communicate information about the relevant European standard.

3.3 Clauses Indicating the Room for Green-Plating

As already stated, the EU legislator’s duty to cooperate sincerely with the Member States means, among other things, that the EU legislator must guide the Member States towards the room left for green-plating in Union law. In this section, I describe first the two categories of clauses used by the Union legislator to indicate this room, namely: a) minimum clauses and b) options. Both categories are further subdivided as described in Section 3.3.1. Next, in Section 3.3.2 I analyse the kind of information that Member States can derive from these various kinds of clauses about the opportunity for green-plating. As explained in this section, the various clauses provide different levels of clarity as regards, first, what kind of measure a Member State can take under Article 193 TFEU and, second, what level of protection

¹¹⁰ Technical measures also covers requirements adopted in the light of the environment and affecting the life cycle of a product after it has been placed on the market (Article 1(4) Directive).

¹¹¹ The Commission has three months to express disapproval. For an example of the application of this Directive, see Case C-433/05, *Criminal Proceedings against Lars Sandström*, [2010] ECR I-2885.

is allowed. In Section 3.4, I argue that such guidance should influence the manner in which green-plating is reviewed.

3.3.1 *Legislative Techniques to Show the Room for Green-Plating*

There are two main legislative techniques used by the EU legislator to show the Member States the room for green-plating. First, the Union legislator shows the opportunity for green-plating by means of minimum clauses. In the literature,¹¹² two kinds of minimum clauses are distinguished: a) explicit minimum clauses and b) implicit minimum clauses. Second, the Union legislator indicates the room for green-plating by means of options. The main difference between these two kinds of legislative techniques is that the latter is, generally speaking, more specific than the former. Indeed ‘options’ usually refers to a given measure that can be adopted or non-adopted by the Member States in the implementation phase.

It is unclear whether the EU legislator is aware of such techniques. By looking at the implementation reports of the Commission, it is possible to see that this institution keeps track of the use that Member States make of options. Similarly, the implementations reports provide information about the presence of national targets that are stricter than those established by the EU legislator. In Chapter 2, I made specific reference to the Commission’s reports showing that Member States had adopted stricter targets for waste recovery and air pollution than those required under relevant EU law. Instead, few references can be found to the presence of national measures establishing stricter means than those required by the EU legislator to achieve an EU goal. Despite the attention given by the Commission to what Member States do when implementing options and minimum clauses related to the *height* of the level of protection of the environment, I have not retrieved documents showing that the three EU institutions mainly involved in the legislative process are aware of the difference between minimum clauses and options as regards the manner in which they indicate the room for green-plating. This difference is further explained below.

a) Minimum Clauses

Minimum clauses usually state that Member States are *allowed* to take more stringent measures. As discussed in Chapter 1,¹¹³ they reassure the

¹¹² See Hofhuis (2006), pp. 71–83, with further references.

¹¹³ Chapter 1, Section 1.3.4.

Member States that EU measures based on Article 192 TFEU comply with Article 193 TFEU. A distinction exists between explicit minimum clauses and implicit minimum clauses.

Explicit minimum clauses are clauses literally stating that Member States are allowed to maintain or introduce more stringent protective measures.¹¹⁴ At times, explicit minimum clauses are formulated in relation to the content of the EU measure based on Article 192 TFEU as a *whole*. For example, Article 16(1) of the Environmental Liability Directive states: 'This Directive shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage, [...]'.¹¹⁵ Similarly, Article 14 of the Birds Directive states: 'Member States may introduce stricter protective measures than those provided for under this Directive.' Article 15 of the old CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) Regulation followed a similar wording. Interestingly, when the old CITES Regulation was renewed, Article 15 was not repeated. Still, Recital 3 of the CITES Regulation states: 'Whereas the provisions of this regulation do not prejudice any stricter measure which may be taken of maintained by the Member States, in compliance with the Treaty, in particular with regards to the holding of species covered by this regulation.'

In some cases, explicit minimum clauses are not related to the whole of the content of the EU measure based on Article 192 TFEU at hand. They relate only to a specific part thereof. For example, Article 7(2) of the Air Quality Directive states: 'In each zone or agglomeration where fixed measurements are the sole source of information for assessing air quality, the number of sampling points for each relevant pollutant shall not be less than the minimum number of sampling points specified in Section A of Annex V.' As we can see, this provision clearly states that Section A of Annex V pursues only minimum harmonisation, and thus that the Member States are allowed to have more sampling points. Similar formulations can be seen for example in Article 7(3) of the Noise Directive,¹¹⁶ which allows the Member States to maintain or introduce more stringent requirements for strategic noise maps than those

¹¹⁴ See Sevenster (1992), pp. 68–69 for an enumeration of old directives and regulations falling within this category.

¹¹⁵ See also Recital 29 of the Directive.

¹¹⁶ Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise, [2002] OJ L 189/12.

indicated in Annex IV to that Directive. Similarly, Article 8(4) of the same Directive allows the Member States to maintain or introduce more stringent requirements for action plans than those indicated in Annex V.

Implicit minimum clauses are, instead, clauses that by mean of their content and purposes lead to minimum harmonisation.¹¹⁷ Usually these provisions are recognisable by the use of terms such as ‘not later than’, ‘at least’ or ‘not more than’. For example, Article 7(2) of Directive 2003/4/EC states: ‘The information to be made available and disseminated shall be updated as appropriate and shall include at least: [. . .].’¹¹⁸ An enumeration of information followed this sentence. The dictum ‘at least’ makes clear that the Directive only requires a minimum amount of information to be made available and disseminated. Member States may decide to make available and disseminate other information than those listed under Article 7(2) of the Directive. A formulation similar to that of Article 7(2) of Directive 2003/4/EC can be seen in Article 16(1) of the CITES Regulation, which states: ‘Member States shall take appropriate measures to ensure the imposition of sanctions for at least the following infringements of this Regulation: [. . .]’. An enumeration of infringements follows this sentence. Once again, the dictum ‘at least’ allows the Member States to introduce sanctions for other infringements than those indicated under Article 16(1).

b) Opt-In and Opt-Out Clauses

In addition to minimum clauses, Union environmental measures often include *opt-in* and *opt-out* clauses addressed to the Member States. By making use or non-use of such clauses, Member States go beyond EU requirements.¹¹⁹ Usually, these clauses allow for specific measures to be adopted (*‘opt-in* clauses’) or not to be adopted (*‘opt-out* clauses’). For example, Article 15(2) of the New Waste Framework Directive (Directive 2008/98/EC) represents an example of an *opt-in* clause.¹²⁰ It states: ‘Member States may decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the

¹¹⁷ See Sevenster (1992), pp. 68–70 for several examples of such clauses.

¹¹⁸ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, [2003] OJ L 41/26.

¹¹⁹ As regards the linkage between opt-out clauses and green-plating see Veltkamp (1998), p. 188 and Jans & Vedder (2012), p. 114, footnote 64. See also Misonne (2011), p. 198.

¹²⁰ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, [2008] OJ L 312/3.

waste came and that the distributors of such product may share these costs.’ Accordingly, Member States may hold more subjects liable than required by Union law. Although no reference is made to the level of environmental protection provided, it can be assumed that enlarging the pool of liable subjects to include the producers and distributors of the products from which the waste came encourages these subjects to produce and distribute products with a lower waste impact.

Instead, Article 8(4) of the Environmental Liability Directive provides an opt-out clause. It states:¹²¹

The Member States may allow the operator not to bear the cost of remedial actions taken pursuant to this Directive where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by: (a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in Annex III, as applied at the date of the emission or event; (b) an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place.

If a Member State does not use this option, the regime in Article 8(1) applies. In other words, the operator bears the costs, leading to a higher level of internalisation of environmental costs and, arguably, a higher level of environmental protection.

It is also possible that secondary Union environmental measures contain provisions permitting a choice between two or more different legal instruments or regimes. We could call these kinds of clauses ‘*A-or-B* clauses’, in which Member States must choose between A or B. The decision to use option A rather than option B, or vice versa, can influence the level of environmental protection at national level. For example, Article 16(1) of the IPPC Directive stated:

Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive when:

¹²¹ Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, [2004] OJ L 143/56.

(a) they have a sufficient interest; or (b) they maintain the impairment of a right, where administrative procedural law of a Member State requires this as a precondition.

If a Member State does not implement the option offering the lowest high level of environmental protection among those offered by the EU measure at hand, it does not keep burdens to the minimum.

3.3.2 *Information Carried by Minimum Clauses and Options*

The various legislative techniques described in the previous section provide the Member States with information about the room for green-plating. Three kinds of information are distinguished in this section: a) information about the *existence* of the room for green-plating, b) information about the *kind* of measure that is allowed and c) information about the *height* of the level of protection of the environment that can be pursued. All minimum clauses and options provide information about the existence of the opportunity for green-plating. Only certain clauses provide information about the kind of measure that is allowed and the height of the level of protection that can be pursued. In most of the cases only information about what kind of measure is allowed is provided. In certain cases, not even this information is provided. In total, clauses indicating the room for green-plating can be divided in three categories:

- a) clauses only showing the existence of the room for green-plating;
- b) clauses showing the existence of the room for green-plating and the kind of measure that can be adopted; and
- c) clauses showing the existence of the room for green-plating, the kind of measure that is allowed and the height of the level of protection that can be pursued.

It should be noted that my analysis of EU secondary law concerning the use of these different legislative techniques has not revealed any pattern in the manner in which the EU legislature operates. No clear *modus operandi* emerged in this context. As stated above, the EU legislature does not seem to make conscious use of these different legislative techniques.

a) *Clauses Only Showing the Existence of the Room for Green-Plating*

In the previous section, I showed that, at times, explicit minimum clauses are formulated in relation to the content of the EU measure based on Article 192 TFEU *as a whole*. Article 16(1) of the Environmental

Liability Directive and Article 14 of the Birds Directive were used as examples of this legislative technique. These two clauses essentially state that green-plating under these two Directives is allowed. The only information with which the Member States are provided concerns the existence of the opportunity for green-plating. Faced with these kinds of clauses, Member States do not know what kind of measure is allowed and what height of the level of protection can be pursued. These two kinds of information can only be retrieved by interpreting the other provisions of these two Directives in light of such minimum clauses. Yet, Article 14 of the Birds Directive, for example, does not state that Member States can pursue a level of conservation which is ‘outstanding’, rather than the required ‘favourable’ level. Similarly, Article 14 of the Birds Directive does not state that a certain bird not listed under Annex I to the Directive can be protected by means of the same regulatory framework as that applied for birds that are listed on Annex I to the Directive. Such a finding is typical for explicit minimum clauses that are formulated in relation to the content of the EU measure based on Article 192 TFEU as a whole. All other clauses provide extra information.

b) Clauses Showing the Existence of the Room for Green-Plating and the Kind of Measure That Could Be Adopted

In Section 3.3.1, I showed that certain explicit minimum clauses are linked to a specific provision of an EU measure. For example, I mentioned that Article 7(2) of the Air Quality Directive uses an explicit minimum clause to show that Member States could establish more sampling stations than those required under one of the Annexes to the Directive. A closer look at Article 16 of the Environmental Liability Directive shows that, after saying that green-plating is allowed under that directive, it adds: “[...] including the identification of additional activities to be subject to the prevention and remediation requirements of this Directive and the identification of additional responsible parties.” Both articles provide more than just the information about the existence of the room for green-plating. They also show what kind of measure can be adopted. Article 16 of the Environmental Liability Directive shows that Member States can identify additional activities to be subject to the prevention and remediation requirements of this Directive. This clause, however, does not state how many more activities can be covered. Similarly, Article 7(2) of the Air Quality Directive does not provide information about the quality of the air that can be pursued. Hence, both

clauses are silent about the height of the level of protection that can be pursued. This is a typical feature of this kind of clause.

Implicit minimum clauses follow this same finding. Implicit minimum clauses are always linked to a specific provision in an EU measure. In Section 3.3.1, I referred to Article 7(2) of Directive 2003/4/EC and Article 16(1) of the CITES Regulation as examples of this kind of clauses. Both of these provisions provide information about the existence of the room for green-plating. Additionally, they indicate what kind of measure is allowed. Under Article 7(2) of Directive 2003/4/EC extra information can be made available or disseminated. Under Article 16(1) of the CITES Regulation, extra sanctions can be established. None of these provisions indicates the height of the level of protection that can be pursued. The amount of extra information or extra sanctions that Member States can adopt based on these clauses is undetermined. Even when implicit minimum clauses are linked to limit values, they only indicate the kind of measure that is allowed, and not the height of the level of protection that can be pursued. For example, the hour limit value for sulphur dioxide established under Annex XI to the Air Quality Directive is set at 350 $\mu\text{g}/\text{m}^3$, and is *not* to be exceeded *more than* 24 times per calendar year. Based on this information, Member States know that they can set stricter limit values. Yet the Directive does not say how much more stringent the national limit value might be.

The above findings can apply also as regards opt-in clauses. Opt-in clauses can indeed omit information about the height of the level of protection that can be pursued at the national level. For example, in Section 3.3.1, I referred to Article 15(2) of the New Waste Framework Directive stating that Member States may decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the waste came and that the distributors of such a product may share these costs. This provision includes two options. Both options show the kind of measure that can be established. Under the first option Member States may hold financially liable, in full or in part, the producer of the product from which the waste came. Under the second option, Member States may choose that the distributors of such products shall share these costs. The latter option is silent as regards the share that can be attributed to the distributors. Similarly, the first option does not define the concept of 'partly borne'; the height of the level of protection of the measure is left to the Member States. In contrast, the first option provides information about the height of the level of

protection when it states that the costs can be ‘fully borne’ by the producer of the product from which the waste came. As we can see, certain opt-in clauses can be formulated in such a manner that the height of the level of protection that can be pursued is additionally indicated to the Member States. This category of measures is further discussed in the next section.

Similarly to opt-in clauses, A-or-B clauses do not always provide information about the height of the level of protection that can be pursued. This depends on the manner in which such clauses are formulated. For example, in Section 3.3.1 I referred to the A-or-B clause in Article 16(1) of the IPPC Directive. Under this option, Member States can choose between a locus standi based on sufficient interests or impairment of rights. Member States know what kind of measure is allowed. Yet the meaning of ‘sufficient interest’ or ‘impairment of a right’ is not further defined, thus, Member States can decide the height of the level of protection under both options.

c) Clauses Showing the Existence of the Room for Green-Plating, the Kind of Measure That Is Allowed and the Height of the Level of Protection That Could Be Pursued.

As anticipated in the previous section, opt-in clauses and A-or-B clauses can, at times, provide all three kinds of information concerning green-plating. They can indicate the presence of the room for green-plating, they can indicate what kind of measures is allowed, and they can indicate the height of the level of protection that can be pursued. For example, the option to hold the producer of the product from which the waste came fully liable for the costs of processing the waste shows that not only the kind of measure is known to the Member States under this provision. The Member States also know how far they can go with the height of the level of protection: they can hold the producer of the product from which the waste came *fully* liable.

This is also a characteristic typical of opt-out options. In Section 3.3.1, I referred to Article 8(4) of the Environmental Liability Directive to provide an example of opt-out option. Under this option, Member States know that they do not have to go beyond the EU requirements under that provision of the Directive. The default rule under the Directive, namely the rule that applies if the opt-out clause is not transposed, not only shows the kind of measure that is allowed, but also the height of the level of protection that can be pursued.

3.4 Lighting the Path: A Model to Spur Legal Certainty as Regards the Legality Review of Green-Plating

In Section 3.2, I concluded that there are different approaches to the review of the legality of green-plating. Some approaches imply a stricter legality review than others. There is indeed no doubt that a strict necessity-based approach, such as that seen in the *Inntalautobahn No. 2* Case, is more stringent than the soft necessity test-based approach seen in the *Aher-Waggon* Case. In Section 3.3, I showed that there are different approaches to guide the Member States as regards the room for green-plating. Some clauses provide more information than others and therefore they ensure more clarity about what Member States can do. Opt-out clauses indeed offer much more clarity than general minimum clauses. I argue that by relying on the principles of sincere cooperation and legal certainty, it is possible to link the manner in which the EU legislature indicates the room for green-plating with the manner in which the EU judiciary reviews the legality of green-plating. This approach is inspired by the principle of legitimate expectations,¹²² which was officially recognised as being a principle of EU law as early as the 1970s.¹²³ Yet I do not argue that the legislative technique adopted by the EU legislator gives the Member States the right not to be contested in their national choices concerning green-plating. The requirements developed by the Court of Justice in the context of this principle are too stringent to support such a claim.¹²⁴ The point is that, by linking the decision-making phase with the legal review phase, more legal certainty and a higher level of sincere cooperation can be achieved than under current practice.

As a matter of logic, opt-out clauses are the clearest instrument to indicate space for green-plating. Such clauses clearly indicate which measures the Member States do *not* have to take to pursue a higher level

¹²² On this principle see, Tridimas (2006), pp. 242, and 286–289, Groussot (2005), pp. 15 and 16, and Usher (1988), p. 52.

¹²³ Case 2/75, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v C. Mackprang*, [1975] ECR 607, para 4; Opinion of AG Warner in Case 2/75, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v C. Mackprang*, [1975] ECR 607, p 622–623. Before this case was this principle was called ‘protection of (legitimate) confidence’ Case 1/73 *Westzucker GmbH v Einfuhr- und Vorratsstelle für Zucker* [1973] ECR 723, ECLI:EU:C:1973:78 paras 6 and 10; Case 81/72 *Commission v Council* [1973] ECR 575, ECLI:EU:C:1973:60 paras 10 and 13; Opinion of EG in Case 169/73 *Compagnie Continentale France v Council of the European Communities* [1975] ECR 117, ECLI:EU:C:1974:135. I am thankful to Daniel Overgaauw for this suggestion.

¹²⁴ Case T-20/91, *Helmut Holtbecker v Commission of the European Communities*, [1992] ECR II-2599, para 53.

of protection than that strictly required by Union law. As regards the legality of national measures not using opt-out clauses, there is almost no doubt that such national measures comply with Union law since the Union legislator itself proposes these measures. Accordingly, they should benefit from the least stringent forms of legality review among those indicated in Section 3.2, namely the *de minimis/remoteness*-based approach, the soft necessity test-based approach, or even the silent proportionality-based approach.¹²⁵

General minimum clauses, such as those worded similarly to Article 193 TFEU, are instead clauses that allow for the most uncertainty. General minimum clauses do not provide information about what kind of measures can be taken and about what level of protection can be pursued. Such clauses only provide information about the existence of the possibility to adopt stricter measures. In such circumstances, no presumption of legality can apply. In case the national measure pursues a stricter means than required by the EU legislator to achieve the EU goal, the most stringent of the approaches to legality review among those seen in Section 3.2 should be applied, namely the strict necessity test-based approach or even the silent proportionality-based approach.¹²⁶ The review should also include the proportionality *sensu stricto* as the EU goal is pursued. Instead, if based on a general minimum clause, the national measure pursues a higher goal than the one pursued by the EU legislator, one of the intermediary forms of proportionality could be followed, such as the proceduralisation-based approach or the judicial subsidiarity-based approach.

Opt-in clauses and minimum clauses linked to specific provisions, such as Article 4(6) of the Air Framework Directive, which allowed the adoption of stricter limit values, are somewhere in the middle. The level of clarity offered by the latter clauses depends on how they are formulated. In most cases, these kinds of clauses provide information about what kind of measure can be established, but they do not provide information about the height of the level of protection that is compatible with Union law. If an opt-in or minimum clause is clearly formulated, and a Member State follows such indications accurately, there should be a presumption that national law is compatible with Union law, at least

¹²⁵ In this context, reference is made to the silent proportionality-based approach leading to the acceptance of the national measure.

¹²⁶ In this context, reference is made to the silent proportionality-based approach leading to the rejection of the national measure.

as regards the instrument used. This would mean that the necessity test does not need to be performed in an intensive manner. When opt-in minimum clauses, next to indicating the competence to green-plating, and the kind of measure that can be adopted in this regard also indicate the height of the level of protection that can be pursued, then the same legal regime should apply as to opt-out clauses.

These considerations lead to the following scheme (Table 3.1), which, if applied consistently, will increase legal certainty and the level of sincere cooperation between the EU institutions and the Member States.

3.5 Conclusions: From Uncertainty to Clarity as Regards Green-Plating

In this chapter, I showed that the manner in which the legality of green-plating is reviewed by the Court of Justice is unclear. At least seven different approaches applied by the Court of Justice could be retrieved in this regard. It is therefore difficult to predict how the Court of Justice will review green-plating, and hence whether the national measure will be approved by the EU judiciary. Such a lack of clarity has a real impact on Member States' decision to introduce or maintain green-plating. Having seen in Chapter 2 the importance that green-plating has for the functioning of the system envisaged under the Treaties to protect the environment, the existence of a lack of clarity as regards the legality review of green-plating should not be praised or ignored. Further, this chapter also showed that there is no clear *modus operandi* as regards the manner in which the EU legislature guides the Member States in the context of their power to maintain or introduce green-plating. Two different main legislative techniques employed by the EU legislator to indicate the room for green-plating, i.e. minimum clauses and options, were described as regards which information they actually provide. In most of the cases, no information is provided as regards the height of the level of protection of the environment that Member States may pursue. Only opt-out clauses and certain opt-in clauses provide such information. More often only the kind of measure that can be adopted is indicated. This is especially the case for specific minimum clauses, i.e. clauses linked to a specific provision and certain opt-in clauses. At times, general minimum clauses, i.e. clauses which are not linked to a specific provision and are worded in general terms, only provide information about the existence of the room for green-plating.

Table 3.1 The relationship between minimum clauses and legal certainty

Kind of clause	Level of clarity about green-plating	Level of stringency of legality review	Approaches to proportionality
Opt-out clauses	HIGH: known competence, known kind of measures, and known height of level of protection	LOW	<i>de minimis/remoteness</i> -based approach, the soft necessity test based-approach, or even the silent proportionality based-approach
Opt-in clauses	MEDIUM-HIGH: known competence, known kind of measures and (possibly) known height of the level of protection	MEDIUM-LOW	proceduralisation-based approach or the judicial subsidiarity-based approach – in case of high level of clarity see approaches to opt-out clauses
Specific minimum clauses	MEDIUM: known competence, and known kind of measures	MEDIUM	Proceduralisation-based approach or the judicial subsidiarity-based approach.
General minimum clauses	LOW: known competence	HIGH-MEDIUM depending on whether a stricter means or a higher goal is pursued	in case of a higher means: strict necessity test-based approach or even the silent proportionality-based approach, including the proportionality <i>sensu stricto</i> test – in case of a higher goal: proceduralisation-based approach or the judicial subsidiarity-based approach

Inspired by the principle of legitimate expectations, in Section 3.4 I proposed to link the various legislative techniques employed to guide the Member States vis-a-vis green-plating and the legality review of green-plating performed by the Court of Justice. In essence, the more guidance the EU legislature provides, the less stringent the legality review by the Court of Justice should be, at least in those cases in which Member States correctly apply the indications provided by the EU legislator. In this manner, clarity and sincere cooperation between the EU institutions and the Member States can be enhanced. In turn, such improvements meliorate the conditions for the proper functioning of the EU system of environmental protection.