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Green-Plating and Environmental Protection

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2 Green-Plating and Environmental Protection

2.1 Introductory Remarks

I concluded the previous chapter by introducing the concept of ‘green-plating’ and juxtaposing it with that of ‘gold-plating’. In my proposal, national measures going beyond Union requirements are divided in two categories: a) cases of green-plating, i.e. cases in which benefits prevail and b) cases of gold-plating, i.e. cases in which costs prevail. The distinction between these two concepts lies in the outcome of the costs/benefits analysis. This chapter focuses on one aspect of the benefits, namely the benefits of national measures going beyond Union requirements for the high level of protection of the environment, without, however, quantifying them in exact terms. Given this limited perspective concerning costs/benefits analyses, in this chapter only the term green-plating is used, unless I refer to the no-gold-plating policies.

The minimum high level of environmental protection established by measures based on Article 192 TFEU is the starting point of any case of green-plating. Without knowing what the required minimum level is, it is not possible to state that national law goes beyond such level. The concept of high level of environmental protection has already been analysed in detail by Misonne in 2011.¹ Hence, there is no need to discuss this concept once again. The focus of this chapter as regards this concept concerns the ongoing practice of green-plating and the effects that green-plating has on the development of EU environmental law.

As regards the former aspect, it has long been held in the literature that Member States do not go beyond the required level of protection

¹ Misonne (2011).

under EU measures based on Article 192 TFEU.² Empirical research performed in the United Kingdom and the Netherlands on request of the national government confirmed this picture for these two Member States.³ In this chapter, I argue that the picture presented in the literature was, at least until the development of the no-gold-plating policies in several EU Member States, not as accurate as one might think. This is because scholars looked at green-plating in broad terms, thereby missing many cases in which national requirements go or went beyond EU environmental standards. Even the empirical studies on actual cases of green-plating in the United Kingdom and the Netherlands provide a misleading picture of the ongoing practice. This is due to the fact that these studies were based on a bottom-up approach, meaning that the researchers asked industry to highlight which national measures were not required by EU law. This approach assumed a level of understanding of environmental regulation that did not resemble reality. This means that industry's failure to highlight green-plating does not mean that green-plating does not exist. Industry complained about green-plating, but it did not know what it was. A top-down systematic approach to green-plating is the only way to appreciate the extents of this phenomenon. Building upon the empirical research performed in my Ph.D. thesis defended in November 2013,⁴ Section 2.2 concludes that green-plating is more systematic and widespread than argued in literature so far. Moreover, Section 2.2 provides an overview of the reasons for green-plating, going beyond what has been stated so far in the literature.⁵

The picture painted in Section 2.2 changes with the development of the no-gold-plating policies in the United Kingdom, the Netherlands and other Member States and the coming of the Better Regulation Agenda, which, as discussed in Chapter 1, blame gold-plating for the perceived excess of regulatory burdens evoked by industry. It is in the last decade that the negative picture depicted in literature became reality, at least to a greater extent than it was at the time these scholars made their claims. Section 2.3

² Pagh (2006), Jans & Squintani et al. (2009), Jans & Vedder (2012) pp. 113–122.

³ In particular, the Davidson Review (2006) for the UK, and the ECORYS, OpdenKamp Adviesgroep en Europa Instituut, Koppen op EG-regelgeving. Eindrapportage definitief, Rotterdam 2006; see also Europa Instituut en Asser Instituut, National Koppen op EG-regelgeving. Tweede ronde van meldingen van het bedrijfsleven over 'koppen' in de Nederlandse wet- en regelgeving, juridisch bekeken, Leiden 2007 for the Netherlands.

⁴ The case studies concerned waste law, nature conservation law, air quality law, industrial emissions and environmental damage, see Squintani (2013), Chapters 4–8.

⁵ Cf. Jans & Squintani et al. (2009).

shows how national no-gold-plating policies can lead to a systematic elimination of national measures going beyond Union requirements. Still, such policies do not mean that green-plating does no longer occur.

Regarding the effects that green-plating has on the development of EU environmental law, Section 2.4 concludes that green-plating facilitates the development of EU environmental law. Building upon the analysis of how EU environmental law and national law, most notably Dutch law, developed over the entire period of their existence, I provide examples of how cases of green-plating became the minimum EU requirements following a recasting or amendment of EU environmental measures. This is logical if we think that EU law does not fall from the sky, but builds upon existing experiences, as confirmed by the literature on the upload of national (environmental) law at EU level discussed in this chapter. Over time, what is green-plating today, could become the minimum EU standard tomorrow. This finding allows me to conclude that environmental protection in the European Union should be seen as a chain of national and EU measures that develops over time. Accordingly, no-gold-plating policies should not be seen as innocent expressions of national liberty. They can deprive the EU legislature of one of its driving factors, something that is hardly reconcilable with the principle of sincere cooperation under Article 4(3) TEU.

2.2 Green-Plating as Real-Life Phenomenon

In 2006, Pagh strongly criticised what he called '*the stricter*' mantra.⁶ The idea that a minimal level of environmental protection at Union level will be integrated with stricter national standards at the national level is misleading, most notably because it seems that Member States do not maintain or introduce national standards to provide a higher level of environmental protection.⁷ In 2009, building upon a first set of empirical data provided within the Avosetta Group network,⁸ my co-authors and I wrote that Member States only sparingly and incidentally use their power to lay down or maintain more stringent environmental standards after European harmonisation.⁹ Echoing these

⁶ Pagh (2006), pp. 5–15.

⁷ For example, Krämer (2011), p. 440 and Jans, Squintani et al. (2009), p. 435.

⁸ This network is composed by leading environmental law scholars from many EU member States. These data are still available at the Avosetta Group website, www.avosetta.org.

⁹ Jans, Squintani et al. (2009), p. 434.

publications, other scholars followed the view that green-plating is a paper chimera and not a real-life phenomenon.¹⁰ In 2011, Krämer wrote that national law relies heavily on the European Union for environmental measures, and that in many Member States national environmental law is more or less equivalent to EU-derived environmental law.¹¹

Three empirical studies, one performed in the United Kingdom, the Davidson Review, and two in the Netherlands, the ECORYS Report and the Europa Instituut en Asser Instituut Report,¹² all came to the conclusion that industry allegations of widespread green-plating practices in these two countries are misplaced. These reports moved from potential cases of green-plating indicated by industry. Only in a few cases did industry correctly point out green-plating, but these cases were considered not enough to sustain the statement that green-plating was a widespread phenomenon in either country.

In light of the literature review and the three empirical studies just presented, it is fair to state that the general impression is that green-plating is a chimera – it does not exist in real life. Yet, as written by my co-authors and I in 2009, our statement was not based on a fully developed empirical research.¹³ It was based on a first set of empirical data. Moreover, the empirical reports performed in the United Kingdom and the Netherlands moved from the assumption that industry was best placed to assess green-plating. This assumption proved to be wrong, as, in many cases, industry considered the minimum EU standard to be green-plating.

During my Ph.D. on which this book is based, five different environmental fields were researched systematically for green-plating, particularly in the Netherlands. The room for green-plating was established by analysing the EU measure and the national implementing measures in their totality. Court of Justice judgments and Commission implementation reports also provided information on the existence of green-plating from an EU-wide perspective. Cases of green-plating were divided in the three categories of measures falling under the concept: a) measures not keeping burdens to the minimum, b) more stringent protective measures and c) spillovers and related measures. In each of the five

¹⁰ Eg. Langlet & Mahmoudi (2016), p. 105; Faure and De Smedt (2013), p. 310.

¹¹ Krämer (2011), p. 440.

¹² ECORYS, OpdenKamp Adviesgroep en Europa Instituut, Koppen op EG-regelgeving. Eindrapportage definitief, Rotterdam 2006; see also Europa Instituut en Asser Instituut, National Koppen op EG-regelgeving. Tweede ronde van meldingen van het bedrijfsleven over 'koppen' in de Nederlandse wet- en regelgeving, juridisch bekeken, Leiden 2007.

¹³ Jans and Squintani et al. (2009), p. 419.

environmental fields researched, multiple examples of each kind of green-plating occurring in a variety of Member States were retrieved. This finding allowed me to conclude that green-plating is more widespread and systematic than literature and empirical studies showed. Hence, green-plating is a real-life phenomenon, although the no-gold-plating policies developed in the second half of 2010s jeopardise its existence. The many pages consisting of the empirical studies composing my Ph.D., which is available at the repository of the University of Groningen,¹⁴ are not reproduced in this book. Here, I limit myself to providing some examples of green-plating. These examples are divided into cases of green-plating establishing a higher goal than that required by the EU legislator (Section 2.2.1) and cases of green-plating establishing stricter means/instruments to achieve the EU goals than those required by the EU legislator (Section 2.2.2). Not all cases of green-plating presented in this section still exist today; some have been eliminated in light of the national no-gold-plating policies, as further discussed in Section 2.3.

Besides showing that green-plating is a real-life phenomenon, this section provides an overview of the reasons for maintaining or introducing national measures going beyond the EU minimum requirements (Section 2.2.3).

2.2.1 Establishing Higher Goals Than Required by the EU Legislator

The most intuitive cases of green-plating concern cases in which national law pursues a higher environmental goal than the EU does. In Chapter 1, I have already mentioned at the *Deponiezweckverband Eiterköpfe* case,¹⁵ in which a German measure fixed lower thresholds for organic waste remaining in waste accepted in landfill than the Landfill Directive did.¹⁶ In other words, more organic waste must be recovered than required by the EU legislator. This is an example of a national measure establishing a higher target than required by the EU legislator.

The goal-oriented approach followed in the field of waste law, as in other fields, provides for a clear benchmark on which to assess the presence of this kind of green-plating. Following the 6th Environmental Action Programme¹⁷ and the Thematic Strategy on the Prevention and

¹⁴ Persistent link: <http://hdl.handle.net/11370/59d395e2-eb3f-464e-83d8-f8c6735965ba>

¹⁵ Case C-6/03, *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*, [2005] ECR I-2753.

¹⁶ Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, [1999] OJ L 182/1.

¹⁷ Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, [2002] OJ L 242/1.

Recycling of Waste,¹⁸ in December 2005 the Commission presented its proposal for a New Waste Framework Directive,¹⁹ repealing Directive 2006/12/EC,²⁰ which had codified the Waste Framework Directive.²¹ Included among the reasons for the recasting process was the mention of bringing the Waste Framework Directive in line with the new approaches adopted by the Thematic Strategy (such as life cycle thinking). This required the introduction of a specific objective, namely that of reducing the environmental impact from waste generation and management, taking into account the whole life cycle (Article 1),²² the introduction of minimum standards and the use of the end-of-life criterion (mainly Article 4).²³ One of the provisions operationalising this approach is Article 11(2) stating:

In order to comply with the objectives of this Directive, and move towards a European recycling society with a high level of resource efficiency, Member States shall take the necessary measures designed to achieve the following targets:

- (a) by 2020, the preparing for re-use and the recycling of waste materials such as at least paper, metal, plastic and glass from households and possibly from other origins as far as these waste streams are similar to waste from households, shall be increased *to a minimum* of overall 50% by weight;
- (b) by 2020, the preparing for re-use, recycling and other material recovery, including backfilling operations using waste to substitute other materials, of non-hazardous construction and demolition waste excluding naturally occurring material defined in category 17 05 04 in the list of waste shall be increased *to a minimum* of 70% by weight [emphasis added by the author].

The use of the term ‘to a minimum’ in these provisions makes clear that, if a Member State aimed at more ambitious targets than those indicated in this article, it would go beyond the EU requirements. This is exactly

¹⁸ COM(2005), 666 final.

¹⁹ 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.

²⁰ Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste, [2006] OJ L 114/9. This Directive replaced Directive 75/442 in 2006. However, this replacement only covered linguistic aspects. No change occurred with regard to the content.

²¹ COM(2005), 667 final.

²² *Idem*, p. 2.

²³ *Ibidem*.

what occurs in the Netherlands. As recognised by the government, the National Waste Management Plan 2009–2021 sets stricter binding standards than the Directive requires.²⁴ By 2015, the preparation for reuse and recycling of waste materials, including at least household paper, metal, plastic and glass, or comparable waste, should be increased to an overall 60% by weight and, by 2021, the preparation for reuse and recovery of other materials shall be increased to 95% by weight. As we can see, by setting binding targets which are more stringent than those required by the New Waste Framework Directive, the Netherlands has adopted more stringent measures. Similar findings apply to other Member States. In 2013, a broad comparative study performed for the Committee of the Regions reports that recycling targets for household waste for the regions of Scotland (UK) and Grand Besançon (F) as well as for the Greater Manchester District (UK), regional recycling targets of Flanders and Wales and a national target for Spain are more ambitious than the target of the Directive, either because they are higher or because they must be reached earlier.²⁵

Higher goals can also be found in the field of air quality law. In the 1980s, Union law established immission limit values and emissions limit values.²⁶ However, immissions-oriented measures focused on individual pollutants and there was no harmonised assessment and management framework. In the 1990s the Air Framework Directive established such a

²⁴ VROM, *Landelijk Afvalbeheerplan 2009–2021 (LAP2)*, pp. 91 and 92.

²⁵ Ecologic Institute (Albrecht Gradmann), Umweltbundesamt Österreich (Thomas Weissenbach (main author) and Hubert Reisinger) and RIMAS (Francesca Montevocchi), *Ambitious waste targets and local and regional waste management*, European Union, June 2013, p. 44 and 45. This report, performed on request of the Committee of the Region, states that for the target year 2020, the comparable target value for recycling of household waste of Wales is 64%. Flanders sets its even more ambitious recycling target of 70% even sooner for the year 2015.

²⁶ Under EU air quality law, an emission limit value looks at what *exists* a man-driven activity. An immission limit value looks at what *enters* this environmental medium. Immissions-oriented measures were included in Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates, [1980] OJ L 229/30; Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air, [1982] OJ L 378/15; and Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide, [1985] OJ L 87/1. Examples of emissions-oriented measures were Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants, [1984] OJ L 188/20; Council Directive 88/609/EEC of 24 November 1988 on the limitation of emissions of certain pollutants into the air from large combustion plants, [1988] OJ L 336/1 and Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants, [1989] OJ L 163/32.

framework.²⁷ This Directive did not replace the existing immissions-oriented directives. It established the basis on which assessment methods and immissions limit values had to be established. The immissions limit values were then established in four daughter directives which replaced the 1980s directives.²⁸ During the implementation of these Directives, the Dutch legislator stated that transposing the First Daughter Directive's deadlines would have meant downgrading the existing levels of ambient air quality, which were higher than that required under the 1980s directives,²⁹ something that the Ministry refused to do. The Air Quality Directive does not change the limit values for the various pollutants, but it adds target and limit values for PM_{2.5} (Article 15 and 16). In the context of the review of the implementation of the Air Quality Directive, the European Environment Agency commissioned an evaluation of current limit and target values as set in the Air Quality Directive. The evaluation indicates that several Member States have established stricter limit values than required.³⁰ As regards sulphur dioxide, Austria, the United Kingdom, Hungary, Poland and Sweden reported that they have more stringent limit values and/or that they allow fewer exceedances. Similarly, as regards nitrogen dioxide, Austria, Hungary, Poland and Sweden reported that they have more stringent limit values and/or that they allow fewer cases of exceedances. The United Kingdom (Scotland), Finland, Estonia and Austria have stricter standards for particulate matters (PM₁₀ and/or PM_{2.5}). The United Kingdom and Hungary also have stricter standards for lead and benzene.³¹ As regards benzene, Poland also has a stricter limit value than required. Poland and Hungary also have stricter standards for carbon monoxide.

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

²⁸ Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, [1999] OJ L 163/41; Directive 2000/69/EC of the European Parliament and of the Council of 16 November 2000 relating to limit values for benzene and carbon monoxide in ambient air, [2000] OJ L 313/12; Directive 2002/3/EC of the European Parliament and of the Council of 12 February 2002 relating to ozone in ambient air, [2002] OJ L 67/14 and Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air, [2004] OJ L 23/3.

²⁹ Stb. 2001, 269, explanatory memorandum, pp. 18 and 20.

³⁰ De Leeuw & Ruysenaars (2011), p. 30, and Annex A.

³¹ As regards the United Kingdom, the limit values for lead entered into force in 2008. The limit values for benzene are more stringent in Scotland and Northern Ireland.

In addition, several Member States have limit or target values for other pollutants.

In the field of nature conservation, it is difficult to establish whether the Member States pursue higher targets than those proposed by the Birds Directive³² and the Habitats Directive,³³ given that the targets are not specific. Yet it is not impossible. The Birds Directive aims at preserving the status of conservation of birds and at maintaining, protecting and re-establishing their natural habitats.³⁴ Therefore, in addition to provisions to protect birds from direct threats – such as from being killed and captured – the Birds Directive protects birds from indirect threats, such as the destruction of their breeding sites. Article 1 of the Birds Directive states that it relates to the conservation of all species of naturally occurring birds in the wild in the European territory of the Member States to which the TEU applies. It covers the protection, management and control of these species and lays down rules for their exploitation. Further, it specifies that it also applies to the eggs, nests and habitats of birds. It has thus a broad field of application. Still, the Directive does not apply to domestic species and to exotic species. Finally, it does not apply to species occurring in the former colonies of certain Member States and birds occurring, for example, in Russia³⁵ but not in the Member States. Member States protecting species not covered by the Directive can be considered to pursue a higher goal than that required by the EU legislator.³⁶

The Netherlands established green-plating in this regard. The Birds Act 1936, as amended in the 1970, defined protected birds as any bird occurring in the wild in Europe with the exception of the domesticated mute swan (*Cygnus olor*), domesticated species of pigeons and other species listed in Hunting Act 1954. The term ‘Europe’ came from the Birds Act 1912 and indicated that birds not occurring in the wild in the Netherlands were also protected as soon as they were found on Dutch

³² Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, [1979] OJ L 103/1. Now recast by Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, [2010] OJ L 20/7.

³³ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, [1992] OJ L 206/7.

³⁴ Fois (2008), p. 77.

³⁵ For example, bird species regularly migrating between Africa and Russia, passing by the EU, is covered as it would be considered a *regularly* occurring bird.

³⁶ Outside of the scope of application of an EU measure, it is only possible to speak of green-plating, and not of more stringent protective measures, as discussed in Chapter 1, Section 1.4.

territory, for example by being introduced by man. This sought to avoid conflicts between Dutch law and the Paris Convention for the Protection of Birds 1902 to which, *inter alia*, Russia belonged.³⁷ The field of application of the Birds Act 1936 thus exceeded the borders of the European Union (at that time European Economic Communities). Furthermore, in 1993 the Dutch legislator changed Section 3 of the Birds Act 1936 to cover birds resulting from cross-breeding between one or more protected species listed by administrative order.³⁸ This amendment intended to implement the CITES Regulation,³⁹ and not only protected birds from being exploited but also from other human activities.⁴⁰ Therefore, in pursuing a consistent regime, Dutch law extended the field of application of the legal regime of the Birds Directive to cross-breeding of bird species, which is not covered by the Directive.

As regards habitats protection, twelve years after the Birds Directive was adopted, the Commission adopted a proposal for a directive implementing the Bern Convention.⁴¹ The Habitats Directive establishes rules to protect conservation areas and measures to protect species in need of strict protection. The Directive pursues the creation of the so-called Natura 2000 network, which is a network of areas of special conservation within the Union territory.⁴² The Habitats Directive protects species of wild flora and fauna naturally occurring on the European territory of the Member States from both direct and indirect threats (Article 1). In addition, and most importantly, the Habitats Directive differs from the Birds Directive in that the Habitats Directive protects certain habitats independently from the protection of species. It recognises their intrinsic value and protects them by requiring the Member States to designate certain areas as Special Areas of Conservation (SAC) and to avoid

³⁷ Proceedings of the Second Chamber of the States General, Kamerstukken II 1910/11, 249, nr. 3, p. 5.

³⁸ This amendment was enacted by Stb. 1993, 586, Section I, letter C. These provisions were implemented by Section 1 of Stb. 1994, 625.

³⁹ 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.

⁴⁰ Stb. 1994, 625, explanatory memorandum, p. 12.

⁴¹ Convention on the Conservation of European Wildlife and Natural Habitats, Bern, September 19, 1979, ETS No.104. Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (Bern Convention), [1982] OJ L 38/3. The Bern Convention was explicitly mentioned as one of the grounds for the proposal of the Habitats Directive, COM(88) 381 final, p. 2.

⁴² Fois (2008), p. 78.

pollution and damage resulting from human activities which seriously affect their integrity (Articles 3–6).⁴³

The Habitats Directive aims to contribute to ensuring biodiversity through the conservation of natural habitats and wild fauna and flora in the European territory of the Member States (Article 2(1)). Article 2(2) of the Directive specifies that measures taken pursuant to the Habitats Directive are aimed at the conservation of natural habitats of *Community interest*. As regards the meaning of Article 2(2), the Commission stated in its guidance on the protection of species under the Habitats Directive that:

*The concept of FCS [Favourable Conservation Status, LS] is not limited to the Natura 2000 network or to the species protected by this network (i.e. Annex II species). It applies to the overall situation of all species [and habitats, LS] of Community interest (Annexes II, IV and V), which needs to be assessed and surveyed in order to judge whether it is favourable or not.*⁴⁴

As we can see, the Commission refers only to species of Community interest.⁴⁵ There is no reason why this reasoning should not also apply to habitats. Indeed, the specification in Article 2(2) of the Directive shows that the actual goal of the Habitats Directive is that of protecting certain natural habitats. The protection of such habitats is how the Directive contributes towards ensuring biodiversity. Therefore, habitats not having a Community interest are not regulated by the Habitats Directive. A combined reading of letter b and Article 1, letter c shows that such habitats of Community interests are

terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural, in danger of disappearance in their natural range or having a small natural range, following their regression or by reason of their intrinsically restricted area, or presenting outstanding examples of typical characteristics of one or more of the nine following biogeographical regions: Alpine, Atlantic, Black Sea, Boreal, Continental, Macaronesian, Mediterranean, Pannonian and Steppic. Such habitats can be listed under Annex I.

⁴³ Krämer (2011), p. 190 refers to the slow implementation rate of the Member States and of the far-reaching opposition of German *Länder* to the Directive. Today, approximately 12% of the terrestrial area of the Member States is covered by this provision, mostly overlapping with the areas under the Birds Directive.

⁴⁴ Commission of the European Communities, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC*, Final version February 2007, p. 10, available at http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm#interpretation [last accessed on July 2017].

⁴⁵ The Commission bases this statement on Article 2(2) of the Directive.

Outside the field of application of the Directive, Member States can take measures protecting other habitats. In addition, the Habitats Directive aims to contribute to ensuring biodiversity through the conservation of natural habitats (Article 2(1)). This means that habitats of Community interest are protected for conservation values. Member States can also take measures to protect habitats of Community interest for other reasons than nature conservation, such as for natural beauty.

In the United Kingdom and, at least until 2016, in the Netherlands, national law protected other nature reserve sites than those covered by the Natura 2000 Network. In the United Kingdom, national law regulates the so-called Sites of Special Scientific Interest (SSSIs) – or in Northern Ireland as Areas of Special Scientific Interest (ASSIs) – and Marine Nature Reserves (MNRs).⁴⁶ In the Netherlands, habitats not having a Community interest were protected by law until 2016. Further, until 2010, habitats of Community interest were protected for other purposes than nature conservation. Under the Nature Conservation Act 1967, nature reserves protected the ecological and cultural values of the designated area (Sections 1 and 12).⁴⁷ Ecological values include the conservation values protected by the Birds Directive and the Habitats Directive, but also the protection of conservation values not falling under these two Directives – at least not explicitly. The relevance of national values leads to the protection of habitats lacking a Community interest.⁴⁸ In addition, habitats of Community interest were also protected by national values that are not regulated by Union law.⁴⁹ When the proposal for the Nature Conservation Act 1998 was sent to the parliament in 1993, the legislator maintained the approach followed under the Nature Conservation Act 1967. Under the Nature Conservation Act 1998, nature reserves protected sites with cultural and ecological value, regardless of whether they were covered by Union law. In the context of a debate on the precautionary principle, the Dutch legislator explained the reasons

⁴⁶ Sections 28 to 33 of Part 2 of the Wildlife and Countryside Act detail the law regarding SSSIs. Sections 34 to 53 deal with other protected areas within Great Britain. For an overview of the sites see the government page at: <http://jncc.defra.gov.uk/page-4>

⁴⁷ The Dutch terms are *natuurwetenschappelijke waarden* and *natuurschoon*.

⁴⁸ It should be noted that in certain circumstances, protecting national habitats lacking a Community interest could be necessary to implement the obligations arising out Article 4(1) of the Bern Convention. This is not gold-plating. At the time of writing, the government intends to eliminate the regime of protection for nature reserves lacking a Community interest; Brief of the State Secretary H. Bleker of 14 September 2011, '*Aanpak Natura 2000*', reference number 230499, p. 10.

⁴⁹ Backes & Van den Broek (2005), p. 478; and Woldendorp (2006), p. 83.

behind this decision. According to him, once the Habitats Directive criteria were translated into Dutch law, they had to apply to all protected areas regardless of whether they implement the Directive: it was important to apply the same legal regime to all sites.⁵⁰

2.2.2 *Establishing Stricter Means than Required by the EU Legislator*

From a quantitative perspective the most common form of green-plating takes the form of national measures establishing stricter means/instruments to achieve an EU goal than required by a measure based on Article 192 TFUE. This is logical considering that each EU measure usually has only one article setting out the goals of the measure, while it has many provisions concerning the means for achieving such goals. There are simply more provisions in respect of which Member States can adopt green-plating. During my Ph.D. research, I was able to retrieve and analyse cases of green-plating pertaining to the means to achieve an EU goal in all fields of environmental law, especially as regards a) measures not keeping burdens to the minimum and b) more stringent protective measures. As regards spillovers and related measures, green-plating takes the form of measures establishing a higher goal than that required by the EU legislator. This is because this kind of green-plating falls outside the scope of application of the EU measure concerned. Hence, by definition, national law goes beyond the EU goal. I have not retrieved examples of spillovers and related measures aiming at achieving an EU goal as such.

a) Measures Not Keeping Burdens to the Minimum

As regards measures not keeping burdens to the minimum, in the field of waste law, Article 10 of the Waste Framework Directive covered installations or undertakings that recover waste. In both cases an exception could be granted under certain conditions (Article 11). Establishments or undertakings exempted from the permit requirements needed to be registered. In 1995–1997 the Flemish region of Belgium, Denmark, Germany, France, the Netherlands, Austria, Finland and Sweden did not exempt establishments and undertakings from any permit requirement.⁵¹ As for the Netherlands, when waste law was integrated into the Environmental Management Act, permit requirements were

⁵⁰ Proceedings of the Second Chamber of the States General, Kamerstukken II 1996/97, 23 580, nr. 11, p. 11.

⁵¹ COM(1999) 752 final, p. 17.

regulated in Chapter 8 of this Act, which applied to industrial establishments in general.⁵² The general rule was that any establishment had to be subjected to a permit to be established, changed and exploited, unless an order stated otherwise (Article 8.1). Establishments for the recovery of waste were explicitly mentioned as establishments for which a permit was required.⁵³ Waste producers discarding their own waste at the place of production were also not exempted from the permit requirement.⁵⁴

In the field of nature conservation, in the Commission's report on the period 1981–1991, the Commission noted that no Member State allowed the exploitation of all the species listed under Annex III/2 to the Directive.⁵⁵ For example, Greece, France and Spain reported that for the period 1981–1991, they did not allow the exploitation of any of the species listed under Annex III/2 to the Directive. As regards hunting, the Commission's report for the period 1981–1991 also shows that several Member States allowed hunting for fewer species than those listed in the Directive.⁵⁶ Similar findings can be made from the Commission's reports for other periods, albeit some changes were made as to which species can be exploited and/or hunted.⁵⁷ In the Netherlands, hunting is still banned, unless it serves nature conservation goals.⁵⁸ Section 3.20 of the Nature Protection Act allows hunting for only five species, three of which were covered by the Birds Directive. In the past, the government recognised that such a shortlist represents stricter standards.⁵⁹

⁵² It should be noted that the EMA did not integrate all existing systems, Gilhuis (1993), p. 87.

⁵³ Category 28 under Annex I of Stb. 1993, 50.

⁵⁴ The content of the permit could be influenced by whether an establishment discarded waste coming from inside the establishment concerned or from outside.

⁵⁵ COM(93) 592 final, p. 50.

⁵⁶ *Idem*, pp. 58–62. For example, Belgium reported that only eight of the thirty-one species listed in Annex II of the Directive can be hunted in Flanders or Wallonia.

⁵⁷ COM(2000) 180 final, pp. 15–17; COM(2002) 146 final, pp. 15–17; Report to the Commission on the implementation of Directive 79/409/EEC on the Conservation of Wild Birds, Part II. Summary of the national reports by the Member States, Update for 2002–2004, pp. 24–27 (Commission Report 2002–2004); and Report to the Commission on the implementation of Directive 79/409/EEC on the Conservation of Wild Birds, Part II. Summary of the national reports by the Member States, Update for 2005–2007.

⁵⁸ Dutch law allows hunting in the context of the prevention of damage. This is regulated under Sections 3.12 till 3.19 of the Nature Protection Act, implementing Article 9 of the Directive.

⁵⁹ Proceedings of the Second Chamber of the States General, Kamerstukken II 1995/96, 23 147, nr. 7, pp. 23 and 24.

Under air quality law, Articles 3(4) and 5(4) of the First Daughter Directive indicated that Union ambient air quality law also covers emissions of sulphur dioxide and particulate matters from natural sources. The approach of the First Daughter Directive was clarified and extended to all pollutants by the Air Quality Directive (Article 20). Similarly, Article 21 permits the subtraction of contributions from winter sanding or salting of roads.⁶⁰ If Member States refrain from using such options, they are not keeping burdens to a minimum. Under the Air Framework Directive and its First Daughter Directive, the Netherlands did not fully exempt contributions from natural sources. At the national level, Section 1 of the Air Protection Act defined 'polluting substances' as substances present in the air and capable of damaging or negatively affecting human health or capable of damaging plants, animals or goods.⁶¹ The Dutch legislator did not mention the difference between pollution from natural sources and that from anthropogenic sources. In the order on nitrogen dioxide,⁶² pollution from natural sources was explicitly covered.⁶³ This approach was maintained in the transposition of the Air Framework Directive. In general, the Dutch legislator considered the existing definitions as assuring the correct implementation of the Directive.⁶⁴ Accordingly, the term 'pollutant' was not translated into national law, suggesting that pollution from natural sources was still covered. From 2005, Union law and Dutch law have been progressively converging.⁶⁵ Under the Air Framework Directive, the Netherlands has not yet used the power to exempt contributions from winter sanding or salting. The government stated that it intends to implement this opt-out only if necessary.⁶⁶

⁶⁰ This option originates in a request from Finland during the negotiations of the First Daughter Directive, European Union, the Council, Interinstitutional file 97/0266, document number 5719/01/REV1, page 6, note 12.

⁶¹ Stb. 1986, 78.

⁶² Stb. 1987, 33.

⁶³ Stb. 1987, 33, explanatory memorandum, p. 6, where the government indicates that natural concentrations of nitrogen dioxide are low.

⁶⁴ Proceedings of the Second Chamber of the States General, Kamerstukken II 1997/98 25 686, nr. 3, especially p. 2 where the aspects needing transposition are also indicated.

⁶⁵ First with Section 5(1) of the Air Quality Order 2005, then with the Air Quality Act 2007. Finally, Section 5.19(4) EMA states that contribution from natural sources are subtracted if the limit values are not respected.

⁶⁶ Proceedings of the Second Chamber of the States General, Kamerstukken II 2007/08, 31 589, nr. 3, p. 35.

As regards emissions from industrial installations covered by the Industrial Emissions Directive,⁶⁷ several Member States, such as Austria, Belgium (except Wallonia), Germany and Italy, indicated that they do not fully use the opt-out clause in Article 9(3) of the Directive, allowing the Member States to exempt installations covered by the Union Emissions Trading Scheme from requirements on energy efficiency.⁶⁸ By not making use of this exception ground, these Member States did not keep burdens to the minimum. Besides, in the context of permit provisions regulating conditions other than normal operating conditions, which include accidents or incidents, Article 9(6), last sentence, of the IPPC Directive⁶⁹ allowed the Member States to authorise derogations from BAT for six months if a rehabilitation plan approved by a competent authority ensured that emissions limit values would be met and the project would lead to a reduction in pollution.⁷⁰ The Netherlands did not implement this exception.⁷¹

In the field of the Environmental Liability Directive,⁷² Article 8(4) of the Directive allows relieving operators from bearing the costs incurred to remedy environmental damage. In 2010 the Commission published

⁶⁷ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), [2010] OJ L334/17.

⁶⁸ Vito Report (2011), p. 35 and Vito Report (2011), Annex A, p. 14, 40, 140 and 334. This report was commissioned by the Commission concerning the implementation of Directive 2008/1/EC. VITO, Analysis of the reports submitted by the Member States on the implementation of Directive 2008/1/EC, Directive 2000/76/EC, Directive 1999/13/EC and further development of the web platform to publish the information. Report on subtask 3.2: Analysis report of Member States implementation of IPPC and WI Directives. Part I: Member States Reports on their implementation of Directive 2008/1/EC concerning integrated pollution prevention and control for the period 2006–2008 – Final Report, March 2011 (hereafter: 'Vito Report' [2011]).

⁶⁹ Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, [1996] OJ L 257/26. Codified by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version), [2008] OJ L 24/8.

⁷⁰ Jongma (2002), p. 84.

⁷¹ Neither Title 8 nor 17 of the Environmental Management Act mentions this possibility. See also Proceedings of the Second Chamber of the States General, Kamerstukken II 2003/04, 29 711, nr. 3, p. 46, where the transposition table shows the omission sign '(...)' where Article 9(6), second sentence, of the IPPC Directive should have been. See also Jongma (2002), p. 209.

⁷² Directive 2004/35/CE 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.

the first report on the implementation of the Environmental Liability Directive.⁷³ This report indicates that several Member States do not keep burdens to a minimum. As regards the permit and state-of-the-art defences, Austria, Belgium (at federal level), Bulgaria, Germany, Hungary, Ireland, Poland, Romania and Slovenia do not use them. The Netherlands subjects them to a reasonability test. Denmark, Finland and Lithuania allow the permit defence but not the state-of-the-art defence, while France allows the state-of-the-art defence but not the permit defence. According to the report, Sweden takes the middle ground and admits the permit and state-of-the-art defences as mitigating factors in the decision process. Besides, Article 3(1) of the Environmental Liability Directive applies a system of strict liability to activities listed under Annex III. Annex III allows the exemption from the application of Article 3(1) of the Directive for waste management operations that spread sewage sludge from urban waste water treatment plants for agricultural purposes. The Commission's report indicates that only some Member States use this opt-out clause.⁷⁴ Also, the Netherlands does not implement this option. Title 17.2 of the Environmental Management Act applies to activities mentioned in Annex III to the Directive, without exempting these kind of activities.

b) More Stringent Protective Measures

As regards more stringent protective measures within the meaning of Article 193 TFEU, a picture similar to that painted for measures not keeping burdens to the minimum emerges. In each field of environmental law covered in my Ph.D., multiple examples of green-plating could be retrieved.

In the field of waste management, for the period 2001–2003 some Member States, such as Austria and Belgium, indicated that they had developed producer-related obligations regarding the keeping of information as allowed, thus not required, by Article 14 of the Waste Framework Directive.⁷⁵ In 2009, the number of Member States covering producers of waste increased substantially. Only three Member States reported that they did not require keeping a register of certain waste

⁷³ COM(2010) 581 final.

⁷⁴ The Member States that used this option are: Bulgaria, France, Latvia, Malta, Portugal, Romania, Slovakia, Slovenia and the United Kingdom.

⁷⁵ SEC(2006) 972, p. 20.

producers.⁷⁶ In the Netherlands, another example of more stringent protective measures stems from the fact that the legal regime applicable to industrial waste and collected domestic waste has been equated to that applicable to dangerous waste, which is more stringent than the general regime.⁷⁷

Under nature conservation law, the Commission's report for the period 1981–1991 indicates that several Member States allowed the exploitation of fewer species than those listed under Annex III/1 to the Directive.⁷⁸ Moreover, the Commission's report for the period 1996–1998 indicates that Finland prohibited the use of devices producing noise to kill or attract birds.⁷⁹ Similarly, the Commission's report for the period 2002–2004 notes that the United Kingdom also took more stringent protective measures than those required under Article 8 of the Directive.⁸⁰ In particular, England, Scotland and Wales introduced a total ban on the use of lead shot in wetlands. In the context of the regulation of means for killing and capturing birds, the Netherlands goes beyond the minimum requirements, given that it uses a positive list rather than a negative list for cases falling under Article 7 of the Birds Directive. Section 3.21 of the Nature Protection Act prohibits using any other method or means than those listed in that provision.

Concerning air quality law, Article 6 of the Air Framework Directive allowed the Member States to use modelling and objective estimation techniques *in addition* to measurement techniques. Article 6(2–4) of the Air Quality Directive still allows the application of modelling techniques *in addition* to measurement techniques. In the early 1990s, the Dutch legislator had already indicated the importance of integrating measurement techniques.⁸¹ In the Air Quality Order 2001, the legislator explicitly stated that the Netherlands would introduce all the assessment stations required by the First Daughter Directive as though measurements were

⁷⁶ Institute for European Environmental Policy, A Report on the implementation of Directive 75/442/EEC on waste, May 2009, pp. 26–28. The quality of the information provided by the Member States was poor, making this data less reliable.

⁷⁷ Title 10.6 of the Environmental Management Act.

⁷⁸ COM(93) 592 final, p. 50.

⁷⁹ COM(2002) 146 final, p. 20.

⁸⁰ Commission Report 2002–2004, p. 30. That the United Kingdom was working on measures limiting the use of these means had already been in reported in the Commission report for 1996–1998.

⁸¹ Proceedings of the Second Chamber of the States General, Kamerstukken II 1988/89, 21 163, nr. 3, pp. 52 and 53.

the only assessment technique to be applied.⁸² In addition, the legislator stated that the Netherlands would also use modelling and calculations to offer a complete and precise picture of air quality in the country and mitigate for the shortcomings of measurement techniques.⁸³ As regards modelling, case law shows that the Netherlands applies the so-called street-level and point-by-point assessment method.⁸⁴ Like the Netherlands, Denmark, Sweden and the United Kingdom assess air quality at street level, while Germany, Greece and Portugal do not.⁸⁵ Modelling, in addition to measurements, allows for a more precise assessment of air quality and hence for a better implementation of the Directive's goals. This can thus be considered a case of more stringent protective measures.

With regard to emissions from installations covered by the IPPC Directive, seventeen Member States indicated that they subject permits for IPPC installations to a maximum time limit, something which the old IPPC Directive did not require.⁸⁶ For example, Malta has a time limit of a maximum of five years, Spain a maximum of eight years and Belgium (Flanders) a maximum of twenty years.⁸⁷ In addition, the report commissioned by the Commission under the old IPPC Directive provides some indication of the legal value that BREF (best available techniques REference) documents have in the various Member States.⁸⁸ The binding force of BREF documents under the old Directive is a question open for discussion. Officially, they do not have legal value.⁸⁹ They are not even mentioned in the Directive. However, the Commission created them from Article 16 of the Directive, establishing the Commission's reporting duties.⁹⁰ According to Annex IV, information published by the Commission pursuant to Article 16(2) or by international organisations have to be taken into consideration, bearing in mind the likely costs and benefits, among another eleven factors.⁹¹ In 2005, Lee stated that BREF

⁸² Stb. 2001, 269, explanatory memorandum, pp. 33–36.

⁸³ Ibidem. On the assessment methods see Van den Houd (2004).

⁸⁴ With regard to the point-by-point assessment method, see Van Rij & Annema (2010), pp. 209–210, with reference to ABRvS 21 May 2008, 200706306/1.

⁸⁵ Proceedings of the Second Chamber of the States General, Kamerstukken II 2005/06, 30 489, nr. 3, p. 11 with reference to Germany, Greece and Portugal.

⁸⁶ Vito Report (2011).

⁸⁷ Idem, p. 38.

⁸⁸ The methodology applied in the report allows only indicative findings, Idem, p. 106.

⁸⁹ COM(2003), 354 final, p. 16. Lee (2005), p. 168.

⁹⁰ Lee (2005), p. 168.

⁹¹ Van't Lam & Uylenburg (2005), pp. 56–57 underlines the vagueness of the clause 'take into consideration'.

documents carry considerable scientific, *if not legal*, authority.⁹² Other academics, however, underlined a series of limitations which prevent BREF documents from having legal value.⁹³ The Court of Justice also seems to deny the legal value of BREF documents.⁹⁴ In the Netherlands things were different. The Dutch government and Council of State agree that only in specific circumstances is it possible to deviate from a BAT indicated in a BREF document.⁹⁵ In 2011, almost all IPPC installations complied with the emissions limit values based on BREF documents.⁹⁶ Two case studies performed under the Vito report published in 2011 showed that the Netherlands is the only Member State in which all selected installations have emissions limit values within the range offered by the BREF documents applicable to the selected installations.⁹⁷

In the context of the Environmental Liability Directive, the first report on the implementation of the Directive published in 2010 indicates that fourteen Member States extend the scope of 'damage to protected species and habitats' to habitat or species not listed in Annex I to the Birds Directive and Annexes I, II and IV to the Habitats Directive, which the Member States designate for equivalent purposes as those laid down in these two Directives.⁹⁸ Under Article 2(1)(c) of the Environmental Liability Directive, this is just an option. In addition, eight Member States have introduced a system of mandatory financial security at national level, entering into force at various dates up to 2014.⁹⁹ Under

⁹² Lee (2005), p. 168.

⁹³ Kat (2005), p. 56; Robesin (2008), p. 57; Pallemmaerts (1996), pp. 175–176.

⁹⁴ Case C-473/07, *Association nationale pour la protection des eaux et rivières-TOS en Association OABA tegen Ministère de l'Ecologie, du Développement et de l'Aménagement durables*, [2009] ECR I-319, para 30.

⁹⁵ Stb. 2005, 527, explanatory memorandum, p. 10; ABRvS of 24 January 2007, n. 200602467/1 and ABRvS of 19 July 2006, n. 200509633/1. Cf. Bröring (2007), pp. 22–24.

⁹⁶ Sira Consulting, *Administratieve en bestuurlijke lasten Richtlijn Industriële Emissies – Onderzoek naar het Effect van de Richtlijn Industriële Emissies op de administratieve en bestuurlijke lasten*, June 2011, p. 17 (English summary) (hereafter: Sira Report [2011]), p. 35.

⁹⁷ Vito Report (2011), p. 147.

⁹⁸ COM(2010) 581 final. These Member States are: Austria, Belgium, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Portugal, Spain, Sweden and the United Kingdom.

⁹⁹ These Member States are: Bulgaria, Portugal, Spain, Greece, Hungary, Slovakia, the Czech Republic and Romania. These systems are subject to risk assessment of relevant sectors and operators, and dependent on various national implementing provisions providing for issues such as ceilings, exemptions, etc.

the Directive there is no obligation in this sense.¹⁰⁰ Moreover, Belgium, Denmark, Finland, Greece, Hungary, Latvia, Lithuania and Sweden include activities not mentioned in Annex III to the Directive in the scope of strict liability.

2.2.3 Reasons for Green-Plating

In 'Gold Plating' of European Environmental Measures (*Journal for European Environmental and Planning Law*, 2009), my co-authors and I provided an overview of some of the reasons used by the Member States to justify going beyond EU requirements.¹⁰¹ Three main categories were indicated: a) Environmental reasons, including the wish not to downgrade pre-existing standards, and cases of successful lobby during the implementation process; b) Unintended gold-plating, referring to cases in which the national legislator unknowingly or without any purpose went beyond EU requirements and c) Unavoidable gold-plating, referring to cases in which gold-plating was dictated by the need of internal coherence of the national legal order. These categories are retained here, but they are further refined. Further, a new category, d) Economic consideration, is added. This addition shows that the enumeration of categories mentioned in this section is not meant to be exhaustive. New categories can be added based on new empirical insight.

a) Environmental Protection

A reason expected to be used to justify green-plating is the need for environmental protection. Legal practice confirms this assumption. For example, the New Waste Framework Directive regulates the so-called extended producer responsibility (Article 8). In addition to establishing a general option, Article 8 of the Directive provides specific examples of how the extended producer responsibility could be pursued. The Directive describes these specific measures as options and not as obligations. Member States using these options would be establishing more stringent measures. The Netherlands used these options. The Netherlands had already introduced extended producer responsibility in the 1990s.¹⁰²

¹⁰⁰ Article 14 of the Environmental Liability Directive requires the Member States to encourage the development of financial security instruments and markets through the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under the Directive.

¹⁰¹ Jans and Squintani et al. (2009).

¹⁰² TK 1991/92, 21 246, nr. 5, pp. 7 and 8, which introduced Article 10.5a in the EMA.

Despite the presence of the Dutch policy on gold-plating, the act transposing the New Waste Framework Directive did not only maintain the provisions on extended producer responsibility.¹⁰³ Some provisions regulating the extended producer responsibility have been strengthened. For example, Section 10.15 of the Environmental Management Act now allows measures to be adopted during the development of products. Previously, it allowed measures to be adopted from the moment products were manufactured. Moreover, previously Section 10.15 could have been used only to prevent waste from occurring. Now, it can be used to encourage recovery and reuse.¹⁰⁴ The government explained that such measures have been taken to fully implement the principle of extended producer responsibility.¹⁰⁵

Similarly, in 1987 when Directive 82/884/EEC on lead was transposed into the Dutch legal order,¹⁰⁶ the limit value for lead was more stringent than required.¹⁰⁷ The legislator explained that a stricter limit value was necessary because the health of children is affected more than that of adults. The Directive did not take the health of children sufficiently into consideration, according to the Netherlands.¹⁰⁸

The *Balsamo* case shows that an Italian local authority, the municipality of Cinesello Balsamo, prohibited the supply of non-biodegradable plastic bags to consumers.¹⁰⁹ Later, the Italian legislator introduced a similar prohibition at the national level.¹¹⁰ Both bans aim at reducing the impact that plastic bags have on the environment when they are abandoned.

¹⁰³ Stb. 2011, 103 and Stb. 2011, 104.

¹⁰⁴ Since 2012, Sections 10.15–10.18 EMA have been replaced by Section 9.5.2 EMA without changing their content. Stb. 2011, 269. Proceedings of the Second Chamber of the States General, Kamerstukken II 2007/08, 31 501, p. 14. This act introduced a new Title 9.5 regulating general provisions regarding substances, preparations and products.

¹⁰⁵ Proceedings of the Second Chamber of the States General, Kamerstukken II 2009/10, 32 392, nr. 3, pp. 20 and 21.

¹⁰⁶ Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air, [1982] OJ L 378/15.

¹⁰⁷ Stb. 1987, 34. Instead of a maximum of 2 microgram/m³ as yearly average (Article 2(2) Directive), Article 3 of the order sets a maximum of 0.5 microgram/m³.

¹⁰⁸ Stb. 1987, 34, explanatory memorandum, p. 13. The legislator based this statement on several studies performed around the world until that time and in particular on the WHO's Guideline of 1987, World Health Organization, *Air Quality Guidelines for Europe*. WHO Regional Publications, European Series No. 23 (1987) Copenhagen.

¹⁰⁹ Case C-380/87, *Enichem Base and Others v Comune di Cinisello Balsamo*, [1989] ECR 2491.

¹¹⁰ Law of 26 December 2006, n. 296 which, with regard to plastic bags, introduced a ban as of 1 January 2011.

The pre-existence of a national high level of protection of the environment influences choices on green-plating. The desire to avoid downgrading the existing level of protection plays a role in practice. For example, as stated above, the Netherlands used the legal regime of the Habitats Directive to cover values other than those required by the Directive. The government explicitly stated that national values have the same rank as those deriving from the Directive.¹¹¹ It can be argued that the Dutch government tried to avoid downgrading the level of protection of the old natural reserves.¹¹² This is today no longer the case, as further discussed in the next section. Similarly, in Belgium the wish to avoid downgrading convinced the Flemish government to maintain its regulation on soil sanitation, despite this being more stringent than required by the Environmental Liability Directive.¹¹³

Sometimes, downgrading was avoided between the moment of transposition and the moment of entering into force of the Union requirement. For example, this was the case for the transposition of certain aspects of the Air Framework Directive and its First Daughter Directive into the Dutch legal order. When these directives were adopted, the Netherlands already had limit values in line with some of those prescribed by the directives. The government stated that transposing the deadlines indicated by the directives would have downgraded the existing level of ambient air quality. It can be argued that downgrading the level of protection for only a few years would have been unreasonable, although, in general, legally acceptable from a Union law perspective.¹¹⁴

b) Unintentional Green-Plating

There are cases where the national legislator does not seem to realise that it is maintaining or introducing green-plating. These cases of green-plating seems to derive from at least two different sources. First of all, legal practice in the Netherlands shows that when an EU measure is not clear about its meaning, Member States might interpret the EU measure differently than actually meant, potentially leading to green-plating. For

¹¹¹ Proceedings of the Second Chamber of the States General, Kamerstukken II 2001/02, 28 171, nr. 6, p. 6.

¹¹² Ibidem.

¹¹³ Jans and Squintani et al. (2009), pp. 424 and 425.

¹¹⁴ Naturally, national law must not endanger the achievement of future Union objectives, Case C-129/96, *Inter-Environnement Wallonie ASBL v Région wallonne*, [1997] ECR I-7411, para. 45.

example, the Air Framework Directive and its First Daughter Directive were unclear with respect to the places where limit values for the protection of human health had to be assessed.¹¹⁵ It was discussed whether the Directives required the assessment of air quality on the whole territory or only as regards locations in which the public might be exposed to air pollution.¹¹⁶ Dutch law decided to follow a criterion focusing on the quality of ambient air rather than following a criterion based on the exposure of human beings.¹¹⁷ Limit values had to be respected in the whole of the country irrespective of whether human health was at risk.¹¹⁸ This was confirmed by the case law of the Dutch Council of State and led to several decisions being annulled.¹¹⁹ Only after the clarification brought on this matter by the Air Quality Directive, the Dutch government decided to amend its national law and follow the exposure criterion.¹²⁰ The Netherlands was certain that it had interpreted the provisions appropriately. When implementing the Air Framework Directive and its First Daughter Directive, the Dutch legislator never realised that he potentially went beyond EU requirements.

Similarly, when the Dutch legislator implemented the IPPC Directive, it did not consider the binding force attributed to BREF documents as being a case of green-plating. As discussed above, under the IPPC Directive the legal value of these documents was debated.¹²¹ At the time of the implementation, the Netherlands already had a practice by which courts did not traditionally allow decisions of competent authorities to establish a lower level of protection than that based on a technical

¹¹⁵ Article 6(1) Air Framework Directive required the assessment of the ambient air quality throughout the territory of the Member States. At the same time, Annex VI(I) (b) First Daughter Directive stated that the limit values for the protection of ecosystems or vegetation do not need to be assessed in the whole of the territory of a Member State, but only in a part thereof.

¹¹⁶ Backes & Van Nieuwerburg (2005); Backes (2006c), pp. 14–17. See also TK 2004/05 29 667, nr. 12 and TK 2005/06 30 489, nr. 3, p. 11.

¹¹⁷ Stb. 2001, 269, explanatory memorandum, pp. 17 and 32.

¹¹⁸ Backes (2006c), p. 11.

¹¹⁹ Schippers & Besselink (2005), pp. 110 ff., par. 7, with reference to ABRvS of 15 September 2004, n. 200401178/1; ABRvS of 17 November 2004, n. 20030738/1; ABRvS of 1 December 2005, n. 200400084/1, ABRvS of 26 January 2005, n. 200400465/1; ABRvS of 16 February 2005, n. 200308882/1; ABRvS of 13 April 2005, n. 200407748/1; ABRvS of 20 April 2005, n. 200406300/1; ABRvS of 21 April 2005, n. 200501512/1; ABRvS of 22 June 2005, n. 200406192/1 and ABRvS of 22 June 2005, n. 200409619/1.

¹²⁰ Article 2(3) and Articles 65 and 22 Stcrt. 2007, 220 as amended by Stcrt. 2008, 245 (2040).

¹²¹ Chapter 2, section 2.2, above.

document.¹²² This could explain why the Netherlands interpreted the Directive as requiring taking BREF documents as basis for the granting of permits.¹²³ National law was not seen as being more stringent than required on this point.

A second kind of inadvertent green-plating concerns Union provisions which are rather clear, but that have been transposed in a way that green-plating still occurs. This can be the case when the national legislator re-elaborates the text of the EU measure at hand.¹²⁴ For example, Article 8(4) of the Environmental Liability Directive permits relieving operators from bearing the costs incurred to remedy environmental damage. Besides restricting the applicability of these provisions in light of a reasonability test, as discussed above, the Dutch legislator addressed Section 17.16(4) of the Environmental Management Act to the public authority. In contrast, the addressee of Article 8(4) of the Directive is the operator. This suggests that while under the Directive an operator could recover from the State the costs it incurred itself,¹²⁵ under Section 17.16 the operator cannot recover such costs. The Dutch Council of State noted the anomaly of the difference between the text of the Dutch provision and the text of the Directive as regards the addressee of Article 17.16 of the Environmental Management Act.¹²⁶ The government disagreed with Council of State's opinion and it did not change the formulation.¹²⁷ The Dutch government does not seem to have realised that through re-elaboration, stricter standards were introduced.

¹²² Bröring (1993), p. 357. More recently, Leemans (2007), pp. 50–52 with reference to case law: ABRvS of 8 February 2006, n. 200508181/1; ABRvS of 29 November 2006, n. 200604103/1, ABRvS of 21 February 2007, n. 200606952/1; and ABRvS of 29 November 2006, n. 200600905/1.

¹²³ Stb. 2005, 527, explanatory memorandum, p. 10; ABRvS of 24 January 2007, n. 200602467/1 and ABRvS of 19 July 2006, n. 200509633/1. Cf. Bröring (2007), pp. 22–24.

¹²⁴ On re-elaboration and gold-plating see, Anker et al. (2015).

¹²⁵ See by analogy Article 8(3), last sentence, Directive 2004/35/EC stating: '[...] Member States shall take the appropriate measures to enable the operator to recover the costs incurred.' Cf. Betlem (2005), pp. 171 ff.; Betlem argues that Article 8(3) of the Environmental Liability Directive only covers cases where a public authority acted. This is not found in the Directive. Article 8(1) also covers cases where operators take measures themselves. In addition, the last sentence of Article 8(3) is only fully meaningful if it is applied to cases where operators took measures themselves.

¹²⁶ Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 920, nr. 4, p. 6.

¹²⁷ Idem, p. 7 and Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/2007, 30 920, nr. 7, p. 8.

Also the use of copy-and-paste (also called copy-out principle),¹²⁸ including in what could be considered its most extreme form, i.e. dynamic reference,¹²⁹ can lead to inadvertent green-plating.¹³⁰ This is because by means of copy-and-paste, exception clauses are not exploited. Such clauses need an ad hoc transposition. I have already mentioned above that the Netherlands transposed Annex III to the Directive by means of a dynamic reference. This legislative technique did not allow activating the exception in Annex III concerning certain operators. This means that operations that spread sewage sludge from urban waste water treatment plants for agricultural purposes in the Netherlands do not benefit from the exemption under Article 3(1) of the Environmental Liability Directive. Also in this case, the Dutch legislator did not seem to be aware of the fact that the transposing act went beyond the EU standards.

c) Unavoidable Green-Plating

Environmental protection is not the only reason driving green-plating. Legal practice reveals examples of stricter national standards adopted to protect legal certainty, including the need to protect the internal coherence of the national legal order. For example, I indicated above that the Netherlands uses modelling and calculation techniques *in addition* to measurement to assess ambient air quality. The Dutch legislator stated that the Netherlands would also use modelling and calculations to offer a complete and precise picture of air quality in the country and mitigate for the shortcomings of measurement techniques.¹³¹ As we can see, the Dutch government aims to provide an evaluation of ambient air quality that is as precise as possible. This should prevent disputes over the assessment method and the quality of data. Other cases of national measures going beyond EU requirements aim at simplifying the enforcement of certain provisions. This was the reason justifying extending the scope of application of the protection regime stemming from the Birds Directive to hybrids in the Netherlands.¹³² The government justified

¹²⁸ Anker et al (2015), pp. 17–44.

¹²⁹ Dynamic reference means that national law refers to the provisions of a Directive as they evolve over time. This is part of the so-called referencing principle, *Ibidem*.

¹³⁰ On copy-and-paste and gold-plating, *Ibidem*.

¹³¹ Stb. 2001, 269, explanatory memorandum, pp. 33–36. On the assessment methods see Van den Houd (2004).

¹³² In 1993 the Dutch legislator changed Section 3 BA-36 to cover birds resulting from cross-breeding between one or more protected species listed by administrative order.

covering hybrids by the fact that, although cross-breeds do not usually occur in nature and are mostly the consequence of a breeding process, it is difficult to distinguish between hybrids and non-hybrids.¹³³ This approach was intended to avoid disputes over whether a bird occurs naturally on Dutch territory.

With respect to cases of green-plating resulting from the desire to protect the internal coherence of the national legal order, we have to consider that the transposition of Union law does not occur in a vacuum.¹³⁴ National law often predates Union law, though, sometimes, national law has a more general character. For example, measures of access to justice in environmental matters are a species of the broader genus of access to justice in administrative matters. The adoption of a specific regime only applicable to measures transposing Union law on access to justice in environmental matters could lead to fragmentation of the national rules on access to justice in administrative matters. To avoid fragmentation, national legislators may decide to maintain or introduce green-plating.

Legal practice shows at least two different approaches to ensuring the internal coherence of the national legal order. Firstly, fragmentation can be avoided by means of spillovers, through which a Member State extends a regime originating in Union law to the rest of a certain sector. The application of the legal regime of the Habitats Directive to cover values other than those protected by the Directive, discussed above,¹³⁵ represents an example of this kind of green-plating. A similar example was given as regards the transposition of the Environmental Liability Directive to the United Kingdom. The United Kingdom used the option allowing the application of the regime of the Directive to national nature reserves. Green-plating was justified *inter alia* because having two

This amendment was enacted by Stb. 1993, 586, Section I, letter C. These provisions were implemented by Section 1 of Stb. 1994, 625. Later Section 1 of the Fauna and Flora Act replaced this regime. It indicates that the concept 'species' includes sub-species, geographical population variations and hybrids. As we can see, the field of application of the Flora and Fauna Act covers all sorts of species of flora and fauna present in nature, including hybrids. At the same time, the Fauna and Flora Act imposes a specific protection regime only for certain species. The other species are protected by means of a general duty of care.

¹³³ Stb. 1994, 625, explanatory memorandum, p. 12. See also Proceedings of the Second Chamber of the States General, Kamerstukken II 1991/92, 22 201, nr. 5, p. 23.

¹³⁴ Jans and Squintani et al. (2009), p. 426.

¹³⁵ Chapter 2, section 2.2.1, above.

systems of liability for protected sites would have been inefficient and it would have led to uncertainty for operators.¹³⁶

Another way to avoid fragmentation is to extend a rule already present in national law to the provisions transposing Union law. In 2001, for example, the Dutch transposition of the permit and state-of-the-art defences under the Environmental Liability Directives was modelled on the rules of general Dutch administrative law. Article 8(4) of the Environmental Liability Directive permits relieving operators from bearing the costs incurred to remedy environmental damage. The transposition of this provision was highly debated in the Dutch parliament. Part of the conservative faction in the Dutch parliament wanted a strict implementation of the permit and state-of-the-art defences.¹³⁷ The PvdA, the Dutch Labour Party, instead pushed to refrain from transposing these defences. The government successfully proposed a third option. Section 17.16(4) of the Environmental Management Act adds a reasonability test:¹³⁸ the State can refrain from recovering the costs of a remedial action from an operator if these costs cannot be *reasonably* imposed upon the operator. To justify this choice, the government referred to general administrative law.¹³⁹ The government made clear reference to the defences foreseen for cases where a public authority takes action in place of the infringer in order to restore legality (Section 5:25 of the Dutch General Administrative Law Act [GALA]).¹⁴⁰ Section 5.25 GALA states that the infringer is a debtor for the costs related to the enforcement of an administrative coercion sanction, except if he can prove that these costs cannot be reasonably attributed to him, entirely or partially.

A similar justification pattern was employed by the Dutch legislator to justify the duty to keep information in the context of waste management. Article 35(2) of the New Waste Framework Directive requires establishments or undertakings covered by a permit or registration regime to keep a chronological record of, inter alia, the quantity, nature

¹³⁶ Jans and Squintani et al. (2009), p. 426.

¹³⁷ Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 920, nr. 8 (so-called Amendment Madlener).

¹³⁸ Winter et al. (2008), pp. 178 and 179 state that Dutch law goes beyond merely meeting the minimum required by the Directive.

¹³⁹ Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 920, nr. 7, p. 8. Under civil law, the fulfilment of the requirements of a permit does not exclude liability; see Bergkamp (2005a), p. 392.

¹⁴⁰ In the Dutch legal order, this public authority power is seen as an administrative sanction called administrative coercion (*bestuursdwang*). On this sanction see Damen et al. (2009), pp. 653 ff.

and origin of the waste, and they have to make that information available, on request, to the competent authorities. For hazardous waste, the records must be preserved for at least three years. Member States can require the producers of non-hazardous waste to comply with paragraphs 1 and 2. The Netherlands uses this option, at least to some extent. With respect to the possibility of applying a registration duty upon waste producers, Article 10.38 of the Environmental Management Act requires any person discarding industrial waste or hazardous waste, including the producer of the waste, to keep a record of certain information concerning the waste. Information must be kept for at least five years. As we can see, the Netherlands uses the option indicated in the Directive. Members of Parliament pointed this out to the government,¹⁴¹ which replied that the requirement may go further than what is required by the Directive, but it is in line with similar duties in other fields of Dutch administrative law.¹⁴²

Another form of unavoidable green-plating stems from the need to fully comply with international obligations, other than those deriving from the European Union. For example, the use of a positive rather than a negative list of animal hunting means and methods in the Netherlands serves to fulfil obligations deriving from the Benelux Agreements of 1970 and 1984.¹⁴³ In 1977, the Agreement was enlarged also to cover the regulation of certain methods of hunting.¹⁴⁴ Under Decisions M(83) 27,¹⁴⁵ M(96) 8¹⁴⁶ and M(98) 4,¹⁴⁷ implementing the provisions of the Agreement, hunting is allowed only by listed means and methods. In other words, Benelux countries must establish a *positive* list of hunting means and methods. A connection with the need to fulfil international obligations was also present in the context of ambient air quality. The

¹⁴¹ Proceedings of the Second Chamber of the States General, Kamerstukken II 2009/10, 32 392, nr. 6, p. 5.

¹⁴² Proceedings of the Second Chamber of the States General, Kamerstukken II 2009/10, 32 392, nr. 7, p. 2, with reference to provisions such as Article 5.8 of the Environmental Permits Order, *Besluit omgevingsrecht* Stb. 2010, 143, as amended by Article II, letter J, punt 11 Stb. 2010, 781.

¹⁴³ Article 3.21 of the Nature Protection Act. See also Title 3.3 of the Nature Protection Order, *Besluit natuurbescherming* Stb. 2016, 383. For the Benelux Agreement see 847 UNTS 255.

¹⁴⁴ 1317 UNTS 320.

¹⁴⁵ Trb. 1997, 252.

¹⁴⁶ Ibidem.

¹⁴⁷ Trb. 2002, 11.

Dutch government used an international obligation to justify establishing more assessment stations for lead than required by Union law.¹⁴⁸

d) Economic Considerations

Despite the generalised idea that stricter environmental standards are negative for economic development, green-plating can also be justified in light of economic considerations. Indeed, legal practice shows different justifications linked to economic considerations to maintain or introduce green-plating. For example, green-plating was justified in the Netherlands by the need of establishing and preserving a level playing field on the national market. This rationale was used by the Dutch legislator to justify the application of best available techniques (BAT) specified in BREF documents to non-IPPC installations. Another example of an economic justification for green-plating is that of lowering administrative burdens. This was the case as regards the proposed Dutch transposition of Article 7 of the Industrial Emissions Directive, on accidents and incidents, and Article 8 of the same Directive, on non-compliance. These cases and other ones are fully analysed in Chapter 4, Section 4.2.2.

2.3 National No-Gold-Plating Policies' Influence on Green-Plating

In Chapter 1, I discussed the development of no-gold-plating policies in several Member States. There, I concluded that the most advanced policies exist in the United Kingdom and the Netherlands. The comparison performed in Chapter 1 about these two no-gold-plating policies revealed several similarities, but also some differences. Most notably, the United Kingdom applies cost/benefit analyses to assess the possibility of green-plating, while the Netherlands does not do so. Moreover, the Netherlands seems to have a slightly more stringent formulation of its policy, at least under the third phase of development of such a policy under which any case of green-plating should have been avoided or eliminated in all cases, than the United Kingdom does. In the Netherlands the room for allowing green-plating seems, on paper, more restricted than in the United Kingdom. In this section, I show how the Dutch policy has been applied in practice so far.

The influence of such policy can be seen in basically all fields of environmental law. Since 2005, Dutch environmental law has been

¹⁴⁸ Stcrt. 2001, nr. 135, explanatory memorandum, p. 4.

systematically reformed so as to remove green-plating. Yet differences emerge among the various fields of environmental law taken into consideration in my Ph.D. Probably in response to the many articles published in specialised and popular papers, the Dutch no-gold-plating policy has been applied quite strictly in the field of nature conservation, in which today the implementation is almost one-on-one. This result was reached by a series of reforms.¹⁴⁹ For example, initially, the specific prohibitions in the Flora and Fauna Act diverged from the Birds Directive in many ways. Section 9 of the Flora and Fauna Act prohibited deliberate and non-deliberate actions and it prohibited injuring or tracking down birds. Section 10 prohibited disturbing birds, regardless of whether this affected the conservation status of the species. Section 11 prohibited disturbing nests, holes, resting places, places of residence and places of reproduction, even when the disturbance was not intentional. Section 12 prohibited searching for the eggs of protected birds. Finally, Section 13 prohibited keeping bird nests. A quick comparison with Article 5 of the Birds Directive shows that Sections 9–13 of the Flora and Fauna Act were stricter than required by the Directive. After several stakeholders started complaining that the law was too stringent, the government stated that it was possible to reduce the impact of the prohibitions that do not originate in the Birds Directive and the Habitats Directive by extending the power to derogate from the various prohibitions.¹⁵⁰ In 2004, the government enlarged the grounds for establishing exceptions and granting exemptions.¹⁵¹ For example, activities disturbing birds could have been exempted from Article 10 of the Flora and Fauna Act if the disturbance did not significantly affect the species concerned.¹⁵² The Nature Protection Act 2016 eliminates all these cases of stricter national standards.¹⁵³

A similar pattern can be recognised in the context of habitats protection. When we compare the Nature Conservation Act 1998 as amended in 2005 with the Habitats Directive, we notice some differences. First, Dutch law applied the legal framework of Article 6(3) of the Habitats Directive to all activities and not only to projects and plans. In addition, Dutch law applied *regardless* of whether a project or activity significantly

¹⁴⁹ Squintani and Zijlmans (2013).

¹⁵⁰ Stb. 2004, 501, explanatory memorandum, pp. 15 and 16.

¹⁵¹ Stb. 2000, 525, later amended by Stb. 2004, 501 and Stb. 2007, 253.

¹⁵² Stb. 2000, 525, as amended by Stb. 2004, 501.

¹⁵³ Wet van 16 december 2015, houdende regels ter bescherming van de natuur (Wet natuurbescherming), Stb. 2016, 34, Section 3.1.

disturbed the species present in the protected area. Besides, the concept of 'conservation value' used in Sections 19d-19j of the Nature Conservation Act 1998 included cultural and ecological characteristics of the protected area that are not covered by the Directives. Further, national nature reserves, which were areas not falling under the legal regimes of the Directives, were still legally protected.¹⁵⁴ When the legal regime of the Nature Conservation Act 1998 as reformed in 2005 provoked criticism from civil society,¹⁵⁵ the government responded to these complaints by means of a reform in 2009.¹⁵⁶ This reform redressed the cases of green-plating mentioned above. First, it added the adjective 'significant' to Section 19d of the Nature Conservation Act 1998. As a consequence, activities not significantly affecting the achievement of the conservation values protected in a Natura 2000 area were assessed but no longer subjected to a permit requirement.¹⁵⁷ Moreover, the term 'other activities' was deleted from Sections 19f-19h and 19k. Hence, only projects and plans were covered by these provisions. In both cases, the government explained that these reforms aimed to follow the Directive more closely.¹⁵⁸ In general, the government stated that the reform sought to eliminate cases where Dutch law went further than required in order to meet the concerns of industry, agriculture and other sectors of Dutch civil society.¹⁵⁹ In 2010, a further reform was passed to fight the economic crisis.¹⁶⁰ This reform changed Article 19d of the Nature Conservation Act 1998 in such a way that it did not now apply anymore to human activities affecting other values than those prescribed by the Birds Directive and the Habitats Directive. This means, *inter alia*, that the protection of Article 19g of the Nature Conservation Act 1998 enshrining the precautionary principle did not cover damage to other values than those regulated under the Birds Directive and the

¹⁵⁴ Squintani and Zijlmans (2013).

¹⁵⁵ Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 31 038, nr. 3, p. 1.

¹⁵⁶ Stb. 2009, 18.

¹⁵⁷ Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 31 038, nr. 3, p. 14.

¹⁵⁸ *Idem*, pp. 13-15.

¹⁵⁹ *Idem*, p. 1.

¹⁶⁰ Stb. 2010, 135. It should be noted that this Act regulates certain projects and it has temporary effect. However, as regards nature conservation, it applies to all projects and it has definitive effect, see Proceedings of the Second Chamber of the States General, Kamerstukken II 2009/10, 32 127, nr.3, p. 4.

Habitats Directive.¹⁶¹ Consequently, one of the instances of green-plating indicated above was removed. The government explained that this deletion was performed because the Habitats Directive does not require its regime to be applied to values other than those covered by the Directive.¹⁶² Further, it was explicitly indicated that the existence of this case of green-plating caused practical problems. The government concluded that although these values were still important, the regime established for nature reserves lacking a Community interest was sufficient to guarantee their protection.¹⁶³ In 2017, even this legal regime was eliminated by the Nature Protection Act.¹⁶⁴

The application of the Dutch no-gold-plating policy seems to occur in a rather dogmatic manner. In none of the cases in which stricter national standards were eliminated in the field of nature conservation were costs/benefits analyses performed. Also in the field covered by the Environmental Liability Directive, as regards the possibility to extend the field of application of the strict liability regime of the Environmental Liability Directive to other operators than those listed under Annex III to the Directive, Section 17.7 of the Environmental Management Act transposes Article 3 of the Environmental Liability Directive by means of a dynamic reference to the Directive. Strict liability is applied to the activities listed in Annex III to the Directive. Besides, Section 17.7(a), subparagraph 2, of the Environmental Management Act permits orders specifying other operators subject to other strict liability regimes. This provision was at the heart of parliamentary debate for almost a year. The original government proposal did not include such a provision because of the policy restricting gold-plating.¹⁶⁵ The government even rejected the opinion of the Council of State that other activities should also be covered.¹⁶⁶ However, a member of the Dutch Labour Party proposed adding this provision also to cover the activities listed in the Industrial Activities

¹⁶¹ Backes, Poortinga & Woldendorp, (2010), p. 35.

¹⁶² Proceedings of the Second Chamber of the States General, Kamerstukken II 2009/10, 32 127, nr. 3, p. 73.

¹⁶³ *Idem*, p. 74.

¹⁶⁴ Stb. 2016, 34. Article 2.11 of the Act makes it possible to designate and protect national nature reserves, but this possibility has not been used yet.

¹⁶⁵ Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 920, nr. 2, proposed Article 17.7 and Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 92,0 nr. 3, p. 4.

¹⁶⁶ Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 920, nr. 4, pp. 5 and 7. The Council of State did not provide many arguments to support its position.

Order.¹⁶⁷ The amendment, which implied an extension of the field of application of Title 17.2 of the Environmental Management Act, aimed at fulfilling the polluter pays principle. According to the Dutch Labour Party, limiting the strict liability regime to Annex III activities was unjustifiable since, in the past, other activities proved capable of causing environmental damage.¹⁶⁸ Initially, the government followed the position of the Labour Party. In addition to environmental concerns, the government argued for the insertion of this provision on grounds of equality.¹⁶⁹ However, following criticism within the Dutch Senate,¹⁷⁰ the government proposed the compromise that can be seen in Section 17.7(a), subparagraph 2, of the Environmental Management Act.¹⁷¹ Activities other than those listed under Annex III to the Directive can be covered by the liability regime of Title 17.2 of the Environmental Management Act if this is established in a governmental order. In other words, Article 17.7 only offers the option of extending the field of application of Title 17.2 of the Environmental Management Act, but it does not actually require its extension.¹⁷² Such an order has not been adopted yet. As we can see, despite the advice of the Dutch Council of State and the explicit request stemming from the lower chamber of the Dutch parliament, stricter standards were avoided by means of simple reference to the Dutch no-gold-plating policy made by a member of the Dutch Senate.

The above does not mean that green-plating does not exist in the Netherlands. Actually, even in the third phase of development of the Dutch no-gold-plating policy, under which any case of green-plating should have been avoided or eliminated in all cases, new cases of national measures going beyond EU requirements were introduced. For example, in Section 2.2.3 I mentioned that during the transposition of the New

¹⁶⁷ Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 920, nr. 12. The amendment used the formula 'to be indicated by governmental order'. Approximately 218,000 activities were regulated at that time under the Industrial Activities Order. There are approximately 2,500 IPPC installations.

¹⁶⁸ Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 920, nr. 13, p. 1.

¹⁶⁹ Minister Cramer used the expression 'sauce for the goose is sauce for the gander', TK 2006/07, 30 920, HAN8159A08.

¹⁷⁰ Proceedings of the First Chamber of the States General, Kamerstukken I 2007/08, 30920, B, pp. 2 and 3.

¹⁷¹ The government was anxious to avoid time consuming discussions, TK 2006/07, 30 920, HAN8159A08.

¹⁷² Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 920, nr. 19.

Waste Framework Directive, the field of application of the provisions on waste prevention and recovery was extended. This strengthening occurred exactly during the third phase of development of the Dutch no-gold-plating policy. Similarly, the enlargement of the responsibility of operators of IPPC installations in case of accidents or incidents, discussed above, was proposed under the third phase of development of the Dutch no-gold-plating policy. It seems that environmental concerns, legal certainty, economic considerations and inadvertent decisions with unforeseen consequences can all lead to green-plating, despite the presence of the Dutch policies constraining it.

2.4 Green-Plating and the Development of EU Environmental Law

Clauses in secondary law based on Article 192 TFEU showing the room for green-plating do not fall from the sky. They derive from the compromises reached between EU institutions and Member States during the decision-making process. In this section, I first provide an account of the tendencies towards environmental protection in the three main EU institutions involved in the legislative process (Section 2.4.1). This includes an analysis of how national law is uploaded into EU environmental law. Then, I show how green-plating contributed to the development of the Industrial Emission Directive, the Waste Framework Directive and the Air Quality Directive (Section 2.4.2).

2.4.1 *Green and Non-Green Actors and the Upload of Green National Standards*

Political scientists have been analysing the positions taken by the Union institutions towards environmental protection for years. The *Commission* has a specific role: that of principal initiator of Union environmental provisions. As stated by Lenschow, the Commission balances its role as ‘motor of integration’ with the need to be responsive to the requests of the Member States.¹⁷³ In the 1970s and 1980s, a balance was achieved by using policy programmes which went further than the status quo in the Member States to gain a supranational role in proposing legislation. On the other hand, the Commission also took on board the requests of *green* Member States that wished to raise their national standards to the

¹⁷³ Lenschow (2010), p. 313.

supranational level to avoid competitive disadvantages.¹⁷⁴ The Commission itself is sensitive to frontrunners in environmental matters, to avoid distortion of the European internal market.¹⁷⁵ For example, Lee notes that Directive 94/62/EC on packaging waste was the Union's response to national schemes, in particular those in Germany and France.¹⁷⁶

The latter aspect is strengthened by the fact that the Commission has a limited staff which relies on the expertise of national experts working for the environmental ministries in the various Member States to develop its proposals.¹⁷⁷ From 1993, the Commission considered the Member States as partners in the environmental policymaking scene.¹⁷⁸ Today, the Commission's tendency to design environmental policy jointly with the Member States seems to be reinforced by the need to ensure its smooth implementation.¹⁷⁹

The *European Parliament* has had a positive attitude towards environmental protection since the 1970s. Traditionally, it is described as the greenest institution.¹⁸⁰ However, as indicated by Lenschow, it is not clear whether the acquisition of a co-legislative power has affected the 'pro-environment' attitude of the European Parliament.¹⁸¹ Legislative competence means accountability and this could lead to milder positions on environmental protection.¹⁸² Furthermore, the working relationships with the other institutions, and the political representation of the European Green Party, which in 2004 dropped to 5% after the enlargements of the Union, can moderate the European Parliament's positions towards environmental protection.¹⁸³ In addition, the personality of the chairman of the Committee on the Environment, Public Health and Food Safety (ENVI) and intra-committee discussions can influence the

¹⁷⁴ Ibidem.

¹⁷⁵ Börzel (2002), p. 200.

¹⁷⁶ Lee (2005), pp. 215 and 216.

¹⁷⁷ Lenschow (2010), p. 313.

¹⁷⁸ Ibidem with reference to Commission, *Towards Sustainability: A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development*, Office for Official Publications of the European Communities, 1993, pp. 113–116.

¹⁷⁹ Lenschow (2010), p. 313.

¹⁸⁰ Idem, p. 315.

¹⁸¹ Idem, p. 316.

¹⁸² Ibidem with reference to Holzinger, K., *Politik des kleinsten gemeinsamen Nenners? Umweltpolitische Entscheidungsprozesse in der EG am Beispiel des Katalysatorautos*, Edition Sigma, 1994.

¹⁸³ Rasmussen (2007) as interpreted by Lenschow (2010), p. 316.

positions expressed by ENVI and thus moderate the attitude of the European Parliament as a whole.¹⁸⁴

As distinct from the European Parliament, the *Council* has never been considered a 'green institution'. Although it is considered as a Union institution, its composition clearly indicates that it is made up of national actors, namely a representative from each Member State at ministerial level, authorised to commit the government of that Member State.¹⁸⁵ Representatives of national governments put forward national interests, making the Council a forum for negotiation.¹⁸⁶ As indicated in 2002 by Börzel, some Member States act as *pace-setters* in the environmental field within the Council.¹⁸⁷ Pace-setters are Member States actively pushing – or 'uploading' – their *green* national policies at the Union level.¹⁸⁸ For example, Andersen & Liefferink note that Denmark uploaded its national plan for aquatic environment into the urban and waste water and nitrate directives.¹⁸⁹ Similarly, Axelrod & Vig point out that the Netherlands uploaded its standards for small car and truck emissions.¹⁹⁰ It should be noted that Member States wishing to upload their environmental policies also try to influence the Commission's initial proposal.¹⁹¹ For example, Emmott reports that the United Kingdom seconded an official from the Department of the Environment to DG XI of the Commission to 'kick-start' the drafting of the IPPC Directive.¹⁹²

A particular kind of pace-setter is called a *forerunner*. Forerunners undertake unilateral actions without waiting for European cooperation. A particular kind of forerunner is the so-called *pusher-by-example*, such

¹⁸⁴ Lenschow (2010), pp. 316–317. Especially in the period 2004–2009, ENVI seemed to have distanced itself from its previously strong proactive role.

¹⁸⁵ Article 16 TEU. A representative of the Commission also participates.

¹⁸⁶ Takács (2009), p. 74.

¹⁸⁷ Börzel (2002), pp. 193–214.

¹⁸⁸ Idem, p. 197 indicates that, in the pre-2004 enlargement phase, this group included Austria, Denmark, Finland, Germany, the Netherlands and Sweden. Jordan (2001) explained that, since the 1990s, the United Kingdom has also been pushing environmental legislation, albeit on a case-by-case basis. Liefferink & Andersen (1998a), p. 71 note that Denmark, Germany and the Netherlands were renowned as the 'green troika'. In 2010 Lenschow (2010), p. 314 still describes countries such as Germany, the Netherlands and Denmark as leaders in the context of environmental protection within the Council.

¹⁸⁹ Börzel (2002), p. 199 and Andersen and Liefferink (1997), p. 14.

¹⁹⁰ Börzel (2002), p. 199 and Axelrod & Vig (1998).

¹⁹¹ Sbragia (2000), p. 298.

¹⁹² Emmott (1999), p. 28.

as Sweden, which not only takes unilateral actions before the Union, but also lobbies the Union to take the same measures.¹⁹³ Distinct from forerunners, the so-called *pushers* only argue for higher environmental standards at Union level, while applying the minimum level at their own national level and waiting for Union action.¹⁹⁴ For example, Articles 5(4) and 6(3) of the Environmental Liability Directive state that competent authorities *may* take preventive and reparatory measures themselves, if an operator fails to comply with its obligations, cannot be identified or is not required to bear the costs under the Directive, a so-called subsidiary State liability. The provisions on subsidiary State liability were compulsory in the original Commission proposal.¹⁹⁵ In the Council, Belgium, Greece, the Netherlands and Spain argued for a system obliging the competent authority to take measures itself or to ensure that such measures were taken, limiting the Member States' freedom to choose between two obligations.¹⁹⁶ However, the United Kingdom, France, Italy, Portugal and Germany preferred a voluntary system.¹⁹⁷ The Rapporteur for the European Parliament explicitly stated that a voluntary subsidiary State responsibility could have endangered the effectiveness of the Environmental Liability Directive.¹⁹⁸ Nonetheless, the European Parliament did not uphold the Rapporteur's recommendation on this point and hence accepted the position of the Council. In conclusion, in order to lower the burdens on the Member States,¹⁹⁹ the subsidiary State liability is only optional. This option has not been implemented by the Dutch legislator. The government stated that it decided not to use the option provided by the Directive to avoid imposing excessive economic burdens on competent authorities.²⁰⁰ Authorities have to fulfil other public functions in addition to that of protecting the environment.

¹⁹³ Liefferink & Andersen (1998a) and (1998b); see also Andersen & Liefferink (1997).

¹⁹⁴ Liefferink & Andersen (1998a) and (1998b) referring to Germany and the Netherlands.

¹⁹⁵ COM(2002) 17 final, proposed Articles 4(4) and 5(2).

¹⁹⁶ Council of the European Union, Institutional File 2002/0021 (COD), nr. 7771/02, p. 10, footnote 38 and p. 11, footnote 39 and nr. 9600/02, pp. 7–10.

¹⁹⁷ Council of the European Union, Institutional File 2002/0021 (COD), nr. 14289/02, note 54.

¹⁹⁸ European Parliament A5–0461/2003 Recommendation for Second Reading, Amendment 11 juncto 28. See also Krämer (2005a), p. 132.

¹⁹⁹ COM(2002) 17 final, p. 29. Krämer (2005b), p. 83 notes that Member States considered an obligatory 'safety net' too burdensome.

²⁰⁰ Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 920, nr. 3, p. 19.

The pro-environment attitude of pace-setters is opposed by so-called *foot-draggers*.²⁰¹ Foot-draggers are those Member States that try to block or delay Union policies from entering into force or obtain compensation for their implementation. For example, Börzel notes that southern Member States opposed the Large Combustion (Plants) Directive and gained the option of not applying certain aspects of it.²⁰²

Finally, some Member States act as *fence-sitters*. They build tactical coalitions with pace-setters or foot-draggers on a case-by-case basis. This group was, at least in 2002, formed by Belgium, France, Ireland, Italy, Luxembourg and, to certain extent, the United Kingdom.²⁰³ Their attitude is explained in terms of economic incentives – only in certain cases will their national industries benefit from strong European environmental standards – and an inability to systematically upload their points of view.²⁰⁴ Clashes between pace-setters and foot-draggers can lead to compromises which, in turn, can lead to space for green-plating.

2.4.2 *The Recast Process as Means for Green-Plating to Shape the Development of EU Environmental Law*

Many EU measures based on Article 192 TFEU have been recast, replaced or amended over time. In some fields, such as air quality law and waste management, amendments and renegotiation rounds have occurred more than once. At any such moment, Member States have another chance to upload their national standards. This means that what was green-plating can become the minimum EU high level of protection later. A close look at the development of waste management law, air quality law and the regulation of industrial emissions shows how cases of green-plating under the original directives were transformed in the minimum EU high level of protection by the recasting, replacing or amending of directives.

For example, in the 1980s, the Dutch government established stricter limit values for lead than those required under Directive 82/884/EEC

²⁰¹ In 2002 Börzel listed Portugal, Greece and Spain as foot-draggers to which, for a certain period, she added Ireland, Italy and the United Kingdom. Lenschow (2010), p. 314 points out that the central and eastern European countries which accessed in 2004 and 2007 do not seem to form a systematic anti-environment block. However, there are cases where they fought together to gain benefits in exchange for passing environmental legislation.

²⁰² Börzel (2002), p. 205.

²⁰³ Idem, p. 206.

²⁰⁴ Idem, p. 207.

on lead.²⁰⁵ When it was transposed into the Dutch legal order, the limit value for lead was more stringent than required. The legislator explained that a stricter limit value was necessary because the health of children is affected more than that of adults and the Directive did not take the health of children sufficiently into consideration.²⁰⁶ With the First Daughter Directive, the minimum EU high level of protection became the same as the Dutch standard.²⁰⁷

Similarly, in the context of waste management, Dutch law in the 1990s introduced a unified system requiring the best available techniques from all installations, including waste management installations. The most important characteristic of the permit regime regulated under Chapter 8 of the Environmental Management Act previously and the General Act on Environmental Permits today is that establishments disposing of or recovering waste must employ the best available techniques.²⁰⁸ Only with the introduction of the IPPC Directive first, and the Industrial Emissions Directive later, did the application of the best available techniques to installations for waste disposal under the Waste Framework Directive become the minimum EU high level of protection.²⁰⁹ Today the New Waste Framework Directive clearly mandates the taking into

²⁰⁵ Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air, [1982] OJ L 378/15. For the Dutch implementing act, Stb. 1987, 34. Instead of a maximum of 2 microgram/m³ as yearly average (Article 2(2) Directive), Article 3 of the order sets a maximum of 0.5 microgram/m³.

²⁰⁶ Stb. 1987, 34, explanatory memorandum, p. 13. The legislator based this statement on several studies performed around the world until that time and in particular on the WHO's Guideline of 1987, World Health Organization, *Air Quality Guidelines for Europe*. WHO Regional Publications, European Series No. 23 (1987) Copenhagen.

²⁰⁷ Article 6 of and Annex IV to Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, [1999] OJ L 163/41.

²⁰⁸ Section 8.13 of the Environmental Management Act, today Section 2.14(1)(c) of the General Act on Environmental Permits.

²⁰⁹ Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, [1996] OJ L 257/26, later codified by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version), [2008] OJ L 24/8, and now recast by Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), [2010] OJ L334/17. The Industrial Emissions Directive has extended this duty to a greater number of installations for the disposal or recovery of waste, Annex I, paragraph 5 of the Industrial Emissions Directive. However, even the Industrial Emissions Directive does not cover all installations for the disposal or recovery of waste covered by Dutch law. Dutch law still goes further than required.

account of best available techniques for waste management installations covered by the permit regime of the New Waste Framework Directive.²¹⁰

This example is strictly linked to the manner in which the legal value of BREF documents has developed over time. As discussed above,²¹¹ the Netherlands recognised binding force to best available techniques indicated under BREF documents since the very beginning, despite the fact that under the IPPC Directive, their binding force was denied even by the Court of Justice.²¹² Today, the Industrial Emissions Directive clearly establishes that best available techniques, indicated under the executive part of BREF documents, as soon as they are published in a Commission decision,²¹³ constitute the minimum EU high level of protection.

It would be counter-intuitive to consider these examples just coincidences. As showed in the previous section, over time Member States have continuously tried to upload their national standards into EU environmental law either directly, during the negotiations taking place within the Council, or indirectly by means of lobby towards the Commission. Even when the strengthening of EU environmental standards followed a request of the EU Parliament, such as in the case of the introduction of binding targets for the recovery of certain streams of waste from households,²¹⁴ it cannot be discounted that existing cases of green-plating did play a role, at least in the form of a source of inspiration. Therefore, considering national measures as a mere source of administrative burdens means misconceiving reality.²¹⁵

Actually, negative experiences with green-plating can serve to reduce regulatory burdens coming from unclear Union provisions. I mentioned above that the uncertainty existing under the Air Framework Directive and its First Daughter Directive as regards where to assess air quality. The

²¹⁰ Article 27 of the New Waste Framework Directive.

²¹¹ Chapter 2, Section 2.2.2.

²¹² Case C-473/07, *Association nationale pour la protection des eaux et rivières-TOS en Association OABA tegen Ministère de l'Ecologie, du Développement et de l'Aménagement durables*, [2009] ECR I-319.

²¹³ Article 13(5) in conjunction with Articles 14(3) and 15(3) of the Industrial Emissions Directive.

²¹⁴ European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on waste (COM(2005) 0667 – C6–0009/2006 – 2005/0281(COD)), Codicision procedure: first reading, Article 8, and the indirect reference to the position of the European Parliament in second reading, available in COM(2008) 559 final. For the rejection of such binding targets in the past, Van Calster (2000), p. 170, and Amended Commission proposal, OJ 1989 C 326/6.

²¹⁵ Similarly, Anker et al. (2015).

Netherlands interpreted and thus implemented the Directive in such a manner that the regulatory regime became too cumbersome for Dutch society. Reforms at national level seemed impossible under the regime of the Air Framework Directive, due to negative opinions of both the Council of State and the European Commission.²¹⁶ Changes had to take place at EU level first. Today, Annex III to the Air Quality Directive clarifies that compliance with the limit values shall not be assessed at locations in which, basically speaking, human beings are not exposed to air pollution. Such a clarification followed the advice of an expert group, the so-called CAFE group, working on the review of the First Daughter Directive.²¹⁷ Moreover, within the Council, the Netherlands, along with other delegations including Germany, France and the United Kingdom, pushed for linking the assessment of the limit values to the concept of exposure.²¹⁸ As we can see, the negative experience gained by the Netherlands under the Air Framework Directive due to the unclear formulation of the provisions of the Directive played a role in the reshaping of EU air quality law.

The examples discussed in this section clearly show the manner in which the system of environmental protection envisaged under the Treaties works. When Member States retain the main responsibility for environmental protection and make use of the power to adopt green-plating, national experiences are built, which can then be uploaded at EU level during (re)negotiation procedures so as to set a minimum standard for the whole Union or to correct imbalances in existing EU systems. Green-plating thus plays a central role in the development of EU environmental law, something which policies on gold-plating, and to a certain extent also scholarly writing, tend to forget.

2.5 Conclusions: Environmental Protection in the European Union as a Chain Made of Union and National Standards, Including Green-Plating

In this chapter, I showed that green-plating is not a chimera. Actually, I would be surprised to read that, as regards a specific EU environmental

²¹⁶ Proceedings of the Second Chamber of the States General, Kamerstukken II 1991/92, 22486, 3, p. 2. Proceedings of the Second Chamber of the States General, Kamerstukken II 2004/05 29 667, nr. 12 and Proceedings of the Second Chamber of the States General, Kamerstukken II 2005/06 30 489, nr. 3, p. 11.

²¹⁷ CAFE working group on implementation, recommendation on the review of Council Directive 1999/30/EC, June 2004, p. 8.

²¹⁸ Council of the European Union, Interinstitutional File 2005/0183, doc. numb. 8494/06.

measure based on Article 192 TFEU, no Member State adopted a single provision going further than required. Green-plating is a real-life phenomenon which, at least until the 2010s, occurred much more systematically and widely than at times argued in the literature. This phenomenon impacts the development of EU environmental law. It served, and can still serve, as a stepping stone for increasing the minimum EU high level of protection of the environment, through the recasting, replacement or amendment of EU measures based on Article 192 TFEU. Accordingly, I argue 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 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 means that, as anticipated in Chapter 1, the demonisation of green-plating taking place at national and EU level is completely misplaced. I do not argue here that stricter national standards never affect economic development, an argument further discussed in Chapter 4. My point is that green-plating also has positive features and it plays a central role, under the system envisaged by the Treaties, for the protection of the environment. I therefore agree with those authors that concluded that a ‘no-gold-plating’ principle makes little sense as a dominating transposition principle in environmental legislation,²¹⁹ and that the decision not to adopt national environmental legislation going beyond the relevant EU measure frustrates the functioning of Article 5 TEU and of Article 193 TFEU.²²⁰ I agree also with those authors that consider that ‘the absence of gold-plating can reverse the whole system of environmental protection under [the Treaties]’.²²¹ In particular, national policies on green-plating can deprive the European Union of a source of development of its legislation in the field of the environment.

It should be clear that I am not arguing that green-plating must be pursued. Green-plating is not an obligation. Besides, the presence of no-gold-plating policies are not a negative development per se. There can be cases of stricter national standards with little added value from the perspective of environmental protection, but clear negative effects for economic development. No-gold-plating policies can improve the quality

²¹⁹ Anker et al. (2015).

²²⁰ Krämer (2011), p. 440.

²²¹ Jans, Squintani et al. (2009), p. 435.

of the debate on green-plating and help revert those cases in which the costs of stricter standards are higher than the benefits. It is the blind application of a policy to avoid green-plating, such as it seems to have occurred in certain cases in the Netherlands, which should be deplored. By assuming that green-plating is bad, the discussion on stricter standards is polarised in the Netherlands. As a result, green-plating was in many cases rejected, without an objective evaluation of its costs and benefits. This deprives Union institutions of a source of information that facilitates the development of Union environmental measures.

In contrast, an application of no-gold-plating policies based on transparent cost/benefit analyses, such as in the United Kingdom at least to a certain extent,²²² does not prevent useful data from emerging. This proceduralisation of the decision about whether to maintain or introduce green-plating surely represents a better manner to sincerely cooperate with Union institutions than the one seen in the Netherlands.²²³ Accordingly, in Chapter 4, I will further discuss how costs/benefits analysis should take form in the context of the discussion on green-plating. In the conclusions to this book, I will analyse the role that law can play in the context of this proceduralisation.

²²² Chapter 1, Section 1.2.1. See also Chapter 4, Section 4.4, in which I also show the shortcomings of such instruments.

²²³ This reasoning can be placed within the realm of the so-called proceduralisation doctrine, see in particular Lee (2005), pp. 163–180.