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Green-Plating and Economic Development

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4 Green-Plating and Economic Development

4.1 Introductory Remarks

The previous chapter showed first the link between green-plating and legal certainty. Moreover, it proposed a model to improve clarity about the room for national standards going beyond EU requirements. Legal certainty is not only important for the achievement of the environmental goals of the EU and national legislators, it is also important for economic development.¹ Clarity about standards and their possible development facilitates the gathering of information, influencing the decisions of public and private parties to make economic investments. There is, therefore, a link between green-plating and economic development. The importance of this linkage is also evident in the definitions of gold-plating available at national and EU level. In Chapter 1, I indeed concluded that these definitions are business centric. National policies on gold-plating focus on the alleged negative impact that stricter national standards can have on economic development, in general, and specifically on the competitiveness of national industry on the internal market.

As the claims on the negative effects of green-plating are usually not further refined by those promoting a halt to this phenomenon, this chapter offers first an empirical overview of what specific economic reasons have been brought forward by national legislators in relation to green-plating. Section 4.2 also shows that there are cases in which economic reasons actually justified adopting or maintaining green-plating.

¹ On the linkage between legal certainty and economic theory, Tangea, Portuese and Gough (2014), pp. 1–26. More indirectly, Hinton (1997), pp. 1–28.

The presence of cases in which green-plating has been justified in light of economic considerations shows that the statement that green-plating is bad for economy should be further investigated. To this end, Section 4.3 discusses the so-called Porter Hypothesis, as it holds that environmental regulation can be positive for the competitiveness of national industry. Finally, Section 4.4 analyses how national legislators assess the costs and benefits of green-plating. To this extent, use is made of empirical material coming from the United Kingdom, in the form of statutory instruments implementing EU environmental directives in which green-plating is analysed in ad hoc costs/benefits models.

The picture arising from such research is that the cost/benefit models employed so far rely on a methodology that is short-term and short-view-biased and does not take sufficient account of the reach of literature and scientific insight on the relationship between environmental regulation and economic development.

4.2 Economic Considerations Justifying the Absence or Presence of Green-Plating

4.2.1 *Economic Considerations Justifying the Absence of Green-Plating*

Because national policies on gold-plating are business centric, it is only logical that the main reason for reverting existing cases of green-plating and avoiding introducing new such cases is usually linked to economic considerations. Four kinds of economic considerations can be distinguished based on Member States' practice. Despite being clearly linked with one another, these four kinds of economic considerations can be framed in two main categories. First, there are those cases focusing on *lowering regulatory burdens*, seen as a goal in itself. Within this category, we can further distinguish between cases in which green-plating was avoided to keep burdens for *industry* to a minimum and cases in which green-plating was avoided to keep burdens for *public administrations* to a minimum.

For example, Article 9(2) of the Old Waste Framework Directive states that permits may be granted for a fixed period.² Article 23(2) of the New Waste Framework Directive maintains this option.³ Arguably, Member

² Council Directive 75/442/EEC of 15 July 1975 on waste, [1975] OJ L 194/47, as amended by Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste, [1991] OJ L 78/32.

³ 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.

States employing this option establish more stringent measures. Dutch law did this until 2010. In the Netherlands, prior to the implementation of the Old Waste Framework Directive, permits were already being granted for a fixed period under the Dutch Waste Act. According to Section 41(2) of the Dutch Waste Act,⁴ permits had to be granted for a fixed time not exceeding ten years. This allowed a complete re-examination of all of the grounds for the permit when the undertakings requested renewal.⁵ More precisely, Section 41 of the Dutch Waste Act allowed provinces to link the expiration date of permits to the date of expiration of a provincial waste plan, which had to be redrafted every ten years. In addition to facilitating the application of the provincial waste plan, this provision also ensured that establishments kept up with new environmental standards and technological developments.⁶ In the 1990s, this case of green-plating was partially maintained. Section 8.17 of the Environmental Management Act established that permits for establishments disposing of waste from outside the establishment, or disposing of dangerous waste or landfill waste, had a maximum validity of ten years. This rule, which aimed at keeping permits current with the developments that have occurred in waste management,⁷ did not apply to establishments disposing of waste from inside the establishment. For these establishments, the general rule is that permits apply indefinitely unless the permit states otherwise.⁸ As can be seen, except for this latter kind of installation, the Dutch legislator employed the option provided for by Article 9(2) of the Old Waste Framework Directive. This can be connected to the desire to facilitate the application of provincial plans and with the aim of protecting the environment. After the entering into force of the Dutch policy on gold-plating, this case of green-plating was revised. In 2010, the General Act on Environmental Permits established that permits for establishments disposing of waste have an indefinite duration.⁹ According to the government, environmental protection is guaranteed by the duty to update permits if new techniques become

⁴ *Afvalstoffenwet*, Stb. 1977, 455.

⁵ Proceedings of the Second Chamber of the States General, *Kamerstukken II* 1976/77, 13 364, nr. 10, p. 10.

⁶ *Ibidem*.

⁷ Proceedings of the Second Chamber of the States General, *Kamerstukken II* 1988/89, 21 087, nr. 3, p. 80.

⁸ Section 8.16 of the Environmental Management Act.

⁹ Section 2.23 of the General Act on Environmental Permits and Section 5.4 BOR.

available.¹⁰ The main reason provided by the government to justify removing green-plating was the need to reduce administrative burdens.¹¹ This change derived from the wishes expressed by stakeholders during the evaluation of the First National Waste Management Plan (*Landelijk Afvalbeheerplan*).¹²

Similarly, when the United Kingdom transposed the Environmental Liability Directive,¹³ it looked at the burdens associated with the introduction of cases of green-plating about, among others, the exclusion of the permits and state-of-the-art defences previewed under Article 8(4) of the Directive. Apart from cases in which genetically modified organisms (GMOs) cause environmental damage in Wales, the burdens on business caused by the non-implementation of this option were estimated to be higher than the benefits.¹⁴ Accordingly, minimum implementation was pursued as regards this aspect of the Directive under The Environmental Damage (Prevention and Remediation) Regulations 2009.¹⁵

In other cases, the desire to keep burdens to a minimum focuses on the burdens of *public administrations*. For example, Articles 5(4) and 6(3) of the Environmental Liability Directive permits the adoption of measures in cases of so-called orphan damage, environmental damage for which an operator can neither adopt measures nor be identified.¹⁶ Articles 5(4) and 6(3) 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 Environmental Liability Directive – the so-called subsidiary State liability. In the proposed version of the Directive, Articles 4(4) and 5(2) included an obligation rather than an option in this regard. Not all parties agreed to the proposal.¹⁷ It was in the spirit of reaching a compromise with the

¹⁰ Proceedings of the Second Chamber of the States General, Kamerstukken II, 2008/09, 31 953, nr. 24, p. 39 and VROM, *Landelijk Afvalbeheerplan 2009–2021* (LAP2), p. 110.

¹¹ Stb. 2010, 143, explanatory memorandum, p. 72 and VROM, *Landelijk Afvalbeheerplan 2009–2021* (LAP2), p. 110.

¹² Ibidem.

¹³ 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.

¹⁴ Defra & WAG, Impact Assessment of the Environmental Damage Regulations (England) and the Environmental Damage Regulations (Wales) 2008, p. 1.

¹⁵ Statutory Instruments 2009, No. 153.

¹⁶ On 'orphan damage', see in particular, Wennerås (2005), pp. 147–148 and Krämer (2005a), p. 132.

¹⁷ COM(2002) 17 final.

Member States that disagreed with this proposal that the obligation was changed into an option in the final version.¹⁸ Despite the fact that the Netherlands was in favour of an obligation on this issue,¹⁹ when it had to transpose the Directive it decided not to make use of the options allowed by these provisions. The Dutch legislator decided that Article 5(4), second sentence, and Article 6(3), second sentence, of the Environmental Liability Directive did not need transposition.²⁰ The government explained this decision by referring to the wish to avoid imposing excessive economic burdens on competent authorities.²¹ Authorities have to fulfil other public functions in addition to that of protecting the environment. A system of compulsory liability would limit public authorities' freedom in setting priorities.

In addition to the desire to lower economic burdens, Member States justify not maintaining or introducing green-plating by referring to the wish to pursue *economic development*, in general, and in particular their desire to *preserve or increase the competitiveness* of national industry in the European internal market. Remaining within the context of the Environmental Liability Directive, the Netherlands made use of the latter ground to justify avoiding extending the strict liability regime of the Directive to operators other than those covered by it. The Environmental Liability Directive distinguishes between activities listed under Annex III and other operational activities. Annex III activities, due to their intrinsically more dangerous nature, are subjected to a strict liability regime under Article 3(1). Under Article 16 of the Directive, Member States are allowed to take more stringent protective measures. This includes extending the list of operators covered by the strict liability regime required by the Directive. The Dutch legislator does not use this option, at least for

¹⁸ COM(2002) 17 final, p. 29. Krämer (2005b), p. 83 notes that Member States considered an obligatory 'safety net' too burdensome. Indeed, the United Kingdom, France, Italy, Portugal and Germany preferred a voluntary system, Council of the European Union, Institutional File 2002/0021 (COD), nr. 14289/02, note 54.

¹⁹ 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.

²⁰ Proceedings of the Second Chamber of the States General, Kamerstukken II, 2006/07 30 920, nr. 3, p. 27. The government recognises that this obligation could arise on the basis of the other provisions, such as Article 6 of the Habitats Directive. However, if Article 6 of the Habitats Directive requires States to take measures, this cannot be green-plating because, as explained in Chapter 1, national law is doing nothing more than fulfilling Union obligations.

²¹ Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 920, nr. 3, p. 19.

the moment. 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. The use of a dynamic reference ensures that the strict liability of the Directive does not apply to operators other than those listed in Annex III. At the same time, Section 17.7(a), subparagraph 2, of the Environmental Management Act allows the Dutch government to pass an order specifying other operators subject to strict liability regimes. As discussed in Chapter 2, Section 2.3, this provision was at the heart of parliamentary debate for almost a year. To end the parliamentary debate, government proposed the compromise that can be seen in Section 17.7(a), subparagraph 2, of the Environmental Management Act.²² Activities other than those listed under Annex III of the Directive can be covered by the liability regime of Title 17.2 of the Environmental Management Act if this is established in a government 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.²³ Such an order has not been adopted yet.

References to the former ground, i.e. that green-plating is detrimental for economic development, have been used in the Netherlands mostly in the fields of ambient air quality and nature conservation. For example, in the context of ambient air quality, the Air Framework Directive employed goal-oriented obligations.²⁴ Member States had to respect emissions limit values, but were free to choose the means for achieving these goals (Articles 7(1) and 9). Only in two cases did the Directive prescribe that Member States had to establish a plan or programme indicating how to meet the obligations stemming from the Directive (Article 8(1 and 3) and Article 7(3)). Annex IV to the Air Framework Directive lists the minimum information to be provided in a plan. However, as clarified by the Court of Justice, it is up to the Member States to give concrete form to the content of plans and programmes.²⁵ This

²² The government was anxious to avoid time consuming discussions, Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 920, HAN8159A08.

²³ Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 920, nr. 19.

²⁴ Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, [1996] OJ L 296/55.

²⁵ Case C-237/07, *Dieter Janecek v Freistaat Bayern*, [2008] ECR I-236. Jans (2008b), pp. 514–515. The Court of Justice has clarified that the plan and programmes in Article 7(3) must form

clarification is particularly important under the Air Quality Directive, since Chapter IV (Articles 23–25) of the Air Quality Directive requires Member States to make plans any time a limit value is actually or potentially exceeded.²⁶ Under the Air Framework Directive, it is possible to argue that applying the emissions limit values of the daughter directives directly to public authority decisions affecting ambient air quality is a more burdensome way to achieve the goals of the Air Framework Directive than if a plan-based approach were followed.²⁷ Generally, plans allow more flexibility in the application of the emissions limit values. Therefore, a Member State that applies the emissions limit values directly to public authority decisions, such as the Netherlands, does not keep burdens to a minimum.

When, in the 1980s, the EU directives on air pollution²⁸ were transposed into the Dutch Air Protection Act, the limit values had to be applied by all competent authorities taking decisions affecting air quality.²⁹ For example, permits for industrial installations were directly assessed in light of the limit values, even when such installations only marginally contributed to air pollution.³⁰ Notwithstanding the fact that in the late 1980s the Dutch legislator had indicated its intention to move towards a plan-based approach,³¹ in the 1990s, it continued to apply limit values directly to any decision of a competent authority affecting

a set of measures aiming at solving a concrete and specific situation; Case C-320/03, *Commission of the European Communities v Republic of Austria*, [2005] ECR I-9871 (Inntalautobahn No. 1).

²⁶ On this topic see, Squintani & Van Rijswijk (2016).

²⁷ On the plan-based approach see Squintani & Van Rijswijk (2016).

²⁸ 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.

²⁹ For example, Article 2 on sulphur dioxide in Stb. 1986, 78.

³⁰ Proceedings of the Second Chamber of the States General, Kamerstukken II1988/89 21 163, nr. 3, p. 49.

³¹ Proceedings of the Second Chamber of the States General, Kamerstukken II1988/89 21 163, nr. 3, pp. 49–51. This approach is in line with the structure of the Environmental Management Act in which Chapter 5 follows Chapter 4 regulating plans and programmes, Tonnaer (1994), pp. 521 and 522.

air quality,³² unless expressly not applied.³³ The 1998 transposition of the Air Framework Directive did not change this legal framework.³⁴ The Air Quality Order 2001 established that competent authorities should apply the limit values, unless otherwise provided.³⁵ The Air Quality Order 2001 clarified that limit values had to be respected by any decision affecting air quality.³⁶ In areas where limit values were exceeded, plans or projects could be allowed only if the competent authority ensured that such plans or projects ensured the best amelioration of air quality reasonably achievable.³⁷ As stated by Backes, a simple amelioration was not enough.³⁸ A comparative study performed by Backes highlighted that the Netherlands was one of the few Member States assessing planning decisions directly on limit values, including future limit values, and that, with the exception of Sweden, other Member States directly applied the limit values only for decisions having significant effect on air quality.³⁹ It is difficult to state whether the Netherlands went beyond the requirements of the Directive. However, the government and academics recognised this to be the case, at least to a certain extent.⁴⁰ I could not find a clear explanation for this potential case of green-plating. It seems that the Dutch legislator did not consider its original transposition as being more stringent than otherwise required.

Since 2005, the Dutch system has undergone a series of reforms to lower burdens.⁴¹ First, Section 7(3) of the Air Quality Order 2005 allowed derogation from applying the limit values if the activity improved, or at least did not worsen, air quality directly or *overall* (Dutch law refers to

³² Stb. 1993, 42, amending, *inter alia*, Stb. 1986, 78, Stb. 1987, 33 and Stb. 1987, 34.

³³ Stb. 1993, 42, Sections XXIII (B–C), XXIV (B–C) and XXV (B–C).

³⁴ However, it refined some elements. Article 5.2a was added to the Environmental Management Act. This provision required that the order establishing limit values transposing those in the Air Framework Directive had to establish rules concerning plans, programmes and action programmes.

³⁵ Stb. 2001, 269, for example, Sections 5 and 6 on sulphur dioxide.

³⁶ Stb. 2001, 269, explanatory memorandum, pp. 23–25. An indicative list was added to this effect.

³⁷ ABRvS of 15 September 2004, n. 200401178/1, ECLI:NL:GHSGR:2004:BM1321.

³⁸ Backes (2006b), pp. 88 ff., par. 3.2.

³⁹ Backes (2006c), pp. 11–13. This study focused only on certain Member States.

⁴⁰ Proceedings of the Second Chamber of the States General, Kamerstukken II 2005/06 30 489, nr. 3, pp. 37 and 38. Backes (2006b), pp. 88 ff, par 2.2.

⁴¹ A first element of the Dutch legislator's reform efforts had already been enacted in 2004 with the establishment of the national plan on air quality, VROM, *Nationale Luchtkwaliteitsplan 2004. Beleidsplan van het ministerie van VROM*, Ministerie van VROM, The Hague.

per saldo, which has been translated as *per balance* in academic writing).⁴² *Per balance* in this context means that a plan or project will be considered to have a positive effect even when it worsens air quality at a given location, as long as it improves air quality over a broader area.⁴³ Second, in 2007, the Air Quality Act amended the Environmental Management Act so that decisions have to be assessed in the light of a five-year plan indicating how limit values will be achieved, namely the National Cooperation Programme on Air Quality.⁴⁴ Section 5.16(1)(d) of the Environmental Management Act provides that public authorities exercising certain listed competences can exercise such competences only if the act to be taken is either indicated in, or not contrary to, the National Cooperation Programme on Air Quality.⁴⁵ Limit values are directly applied only in the context of a series of cases listed in Section 5.16(2) of the Environmental Management Act. This list is exhaustive,⁴⁶ as confirmed by case law.⁴⁷ Under Section 5.16 of the Environmental Management Act, no assessment needs to take place if decisions do not worsen air quality or have a marginal effect on air quality (in Dutch the so-called NIBM rule).⁴⁸ The NIBM rule follows the example of other Member States⁴⁹ and specifies a 3% parameter as the threshold below which decisions are not affected by limit values.⁵⁰ In addition, even if the assessment takes place, the *per balance* approach and the adoption of additional measures still permits the adoption of a decision affecting air quality.

In 2009 the National Cooperation Programme on Air Quality came into force. Between 2009 and 2015, the Netherlands has been following a

⁴² See for example, Boeve & Van den Broek (2012), p. 78.

⁴³ Stb. 2005, 316, explanatory memorandum, p. 19, offering the example of a ring road around a city. Such a ring worsens air quality around the ring but improves air quality in the city area. This rule is further regulated in Stcrt. 2007, 214.

⁴⁴ The limit values and the other air quality standards are now listed in Annex II to the Environmental Management Act. At a local level, Section 5.9 establishes that municipalities should make plans to achieve the limit values, and their margin of tolerance.

⁴⁵ Section 5.16(1) of the Environmental Management Act. Schippers & Besselink (2009), pp. 75 ff., par. 4.

⁴⁶ Proceedings of the Second Chamber of the States General, Kamerstukken II 2005/06, 30 489, nr. 3, pp. 36 and 75; Proceedings of the Second Chamber of the States General, Kamerstukken II 2005/06, 30 489, nr. 8, pp. 15 and 16.

⁴⁷ ABRvS of 15 July 2009, n. 200806111/1/H3, ECLI:NL:RVS:2009:BJ2650, and ABRvS of 12 August 2009, r. 200809302/1/H3, ECLI:NL:RVS:2009:BJ5109.

⁴⁸ Proceedings of the Second Chamber of the States General, Kamerstukken II 2005/06, 30 489, nr. 3, p. 4.

⁴⁹ Idem, p. 29 with reference to Germany.

⁵⁰ Stb. 2007, 440 and Stcrt. 2007, 218.

plan-based approach. All these measures were taken to allow socio-economic developments as already indicated in 2005/2006.⁵¹

4.2.2 *Economic Considerations Justifying the Presence of Green-Plating*

The previous section shows what can be rightly considered the general approach as regards green-plating in several EU countries. Green-plating is limited to boost economic development. Yet there are cases in which adopting green-plating was explicitly linked to economic considerations. Empirical evidence brings four different kinds of economic justifications to the surface. This is an open enumeration.

First, green-plating can be pursued when it leads to *societal economic net benefits*. This was the case in the United Kingdom in the context of the transposition of the Environmental Liability Directive. In the United Kingdom, the transposition of this Directive aimed at a one-on-one implementation. Still, green-plating occurred as regards certain points.⁵² In particular, the United Kingdom decided to apply the regime of the Directive to nature reserve areas other than those covered by the Directive. The Directive applies only to Natura 2000 sites; the United Kingdom also applies the regime of the Directive to Sites of Special Scientific Interest (SSSIs). The justification provided by the government for this case of green-plating was that, based on the impact assessment, the costs of avoiding green-plating were higher than those brought by green-plating. Indeed, when looking at the costs of this case of green-plating, the government focused on the costs of remediating damage or choosing to take anticipatory measures, and the costs of enforcement. It estimated that the total costs (present value) of minimal transposition (i.e. without extending to SSSIs) would have been few million pounds lower than when green-plating took place.⁵³ On the other hand, it estimated the benefit of this case of green-plating by looking at additional remediation of rivers, habitats and species and land contamination with benefits to society (80% of the estimate), and reduced damage and risks to the environment (20%). The government estimated that the total benefits (present value) of minimal transposition would have been lower than when green-plating was pursued.⁵⁴ When looking at the net benefit of

⁵¹ Proceedings of the Second Chamber of the States General, Kamerstukken II, 2005/06, 30 489, nr. 3, p. 3.

⁵² Jans & Squintani et al. (2009).

⁵³ This estimation also took into account not extending the permit defense to damage caused by GMOs in Wales.

⁵⁴ This estimation also took into account not extending the permit defense to damage caused by GMOs in Wales.

extending the regime of the Directive to SSSIs, the government concluded that these were higher than pursuing one-on-one transposition.

Secondly, there are cases in which green-plating is pursued, as it *improves the level playing field at national level*. This economic ground to justify green-plating was first highlighted during the transposition of BREF documents under the IPPC Directive,⁵⁵ now replaced by the Industrial Emissions Directive,⁵⁶ in the Netherlands. Article 1 of the IPPC Directive clearly stated that the Directive applied to the industrial activities listed in Annex I thereto. Article 2 of the Industrial Emissions Directive uses a similar formulation. Outside the scope of application of the directives, Member States are not precluded from passing national legislation regulating non-IPPC installations by means of an integrated approach based on Best Available Techniques (BAT). The Netherlands uses this possibility. When the Dutch Environmental Management Act was passed in 1993, one of the main concerns of the Dutch legislator was to create a uniform system. The same assessment framework applied to small, medium and large establishments alike.⁵⁷ Dutch law focused on establishments and not on installations.⁵⁸ When more industrial installations belong to the same establishment, they are regulated by the same permit.⁵⁹ In 2005, the Dutch legislator saw no reason to change the existing system and recognised that in certain cases the IPPC regime of the Directive would have been applied upon non-IPPC installations.⁶⁰ According to the Dutch government, such an enlargement of the field of application of the IPPC regime did not increase the regulatory burdens

⁵⁵ 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.

⁵⁶ 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.

⁵⁷ Teekens (2005), pp. 13 and 14.

⁵⁸ On the meaning of the concept of 'inrichting' see Van der Veen (2005), p. 143 and Bastmeijer & De Vries (2005), p. 139. On the relationship between the concepts of 'installation' and 'establishment' see Van't Lam, Jurgens & Michiels (2002), in particular chapters 2 and 3.

⁵⁹ Sections 1.1(1) and 1.1(4) of the Environmental Management Act, read in conjunction with Section 8.1 of the Environmental Management Act (today Section 2.1 of the General Act on Environmental Permits).

⁶⁰ Proceedings of the Second Chamber of the States General, Kamerstukken II 2003/04, 29 711, nr. 3, p. 13 and TK 2003/04, 29 711, nr. 6, p. 4.

of non-IPPC installations, since the existing status quo was maintained.⁶¹ In 2005, however, the Dutch legislator introduced the concept 'IPPC installation'.⁶² This allows differentiating between establishments including IPPC installations and establishments without IPPC installations. Indeed, BREF documents are usually analysed by a group of experts who elaborates a note (a so-called BREFs Dutch Note) intending to further explain a BREF document to Dutch industry and authorities. In this phase the industry representatives are audited and it is decided whether a BREF document is applicable to establishments without an IPPC installation.⁶³ BREF documents are applied to establishments without an IPPC installation if a level playing field within the Netherlands is needed, if the BREF document concerned is an acceptable specification of an existing Dutch guideline, or if the application of the BREF document concerned does not lead to extra administrative and management burdens.⁶⁴ After such an evaluation, BREF documents and the BREFs Dutch Note are consolidated in a so-called Dutch Emissions Directive and in the so-called LBOW recommendations (until 2004, Recommendation of the Dutch Commission for an Integrated Water Management).⁶⁵

Thirdly, green-plating can be economically sound if it reduces *administrative burdens*. This has been the case as regards the Dutch transposition of the provisions on accidents and incidents under the Industrial Emissions Directive. Following the example given by the Environmental Liability Directive, Article 7 of the Industrial Emissions Directive states that national law must require operators to take action in the event of any incident or accident significantly affecting the environment. Operators must inform the competent authority, take measures to limit the environmental consequences and to prevent further possible incidents or accidents. Competent authorities may require operators to take complementary measures. Article 7 only covers incidents or accidents having significant consequences for the environment. Under Article 193 TFEU,

⁶¹ Proceedings of the Second Chamber of the States General, Kamerstukken II 2003/04, 29 711, nr. 6, p. 4.

⁶² On this insertion, see Proceedings of the Second Chamber of the States General, Kamerstukken II 2004/05, 29 711, nr. 6, pp. 5 and 6.

⁶³ Taal (2005), pp. 70–71. Stb. 2005, 527, explanatory memorandum, p. 8.

⁶⁴ Stb. 2005, 527, explanatory memorandum, p. 9.

⁶⁵ Taal (2005), p. 71. On the incorporation of BREF documents, see also Proceedings of the Second Chamber of the States General, Kamerstukken II 2003/04, 29 711, nr. 3, pp. 9 and 10.

Member States are not prevented from also applying the legal regime of Article 7 of the Directive to incidents or accidents lacking significant consequences. The Netherlands uses this option. Title 17.1 of the Dutch Environmental Management Act regulates incidents in industrial establishments. It applies to any industrial establishments and it requires measures to be adopted regardless of whether the consequences for the environment are significant.⁶⁶ In the legislative proposal for the transposition of the Industrial Emissions Directive, the government proposed transposing Articles 7 and 8 of the Industrial Emissions Directive conjunctively.⁶⁷ In contrast to Article 7, but similar to the legislative practice followed under Article 17.1 of the Dutch Environmental Management Act, the application of Article 8, which regulates cases of non-compliance, is not conditional upon exceeding a threshold.⁶⁸ As noted by the Council of State, the conjunctive transposition of Articles 7 and 8 of the Directive implies the extension of the legal regime of Article 7 of the Directive to incidents or accidents *not* having significant consequences.⁶⁹ Given that the government maintained the proposed approach in the final version of the transposition act, the government cannot speak of a one-on-one implementation.⁷⁰ Although Article 17.2(4) of the Dutch Environmental Management Act allows competent authorities to exempt operators from the notification duty, this case of green-plating still occurs. On the one hand, Article 17.2(4) of the Dutch Environmental Management Act does not allow exempting operators from taking measures. On the other hand, competent authorities have to insert provisions into permits to exploit the option provided under Article 17(4). As regards the reasons for this case of green-plating, the government provided three. Among them, the government stated that transposition by means of two separate legal regimes would run counter to the reform of Title 17.1 of the Dutch Environmental Management Act introduced in 2011.⁷¹ This reform aimed at lowering administrative burdens by introducing the possibility to replace the duty to notify each

⁶⁶ Section 17.1 of the Environmental Management Act.

⁶⁷ Proceedings of the Second Chamber of the States General, Kamerstukken II 2011/12, 33 197, nr. 2, Article III.

⁶⁸ Article 8(1) of the Directive states: '*Member States shall take the necessary measures to ensure that the permit conditions are complied with.*'

⁶⁹ Proceedings of the Second Chamber of the States General, Kamerstukken II 2011/12, 33 197, nr. 4, pp. 3 and 4.

⁷⁰ Stb. 2013, 159, Article III.

⁷¹ Stb. 2011, 452.

individual incident or accident with a duty to report periodically on the incidents or accidents not having significant consequences for the environment.⁷² I understand from this reasoning that this case of green-plating is justified by economic considerations.

Finally, green-plating can be used to gain a competitive advantage on the internal market. My empirical study concerning green-plating in the Netherlands in the field of waste law shows an indirect link between existing cases of green-plating and the aspiration of Dutch industry to become the raw-material centre for Europe.⁷³ I did not retrieve documents in which the Dutch government justifies existing cases of green-plating in light of this wish. Yet, government officials stressed how Dutch expertise in the treatment of waste can be used to strengthen the economic position of the Netherlands on the internal market for waste.⁷⁴ As further discussed in Section 3 below, Dutch expertise is based, *inter alia*, on green-plating.

The above presented cases suggest that the relationship between green-plating, on the one hand, and economy on the other, cannot be considered to be bad at all times. Environmental standards, including green-plating, could even be considered to be beneficial for economy. This is exactly what the Porter Hypothesis, discussed in the next section, sustains.

4.3 Economic Benefits of Environmental Regulation: The Porter Hypothesis

As shown above, and as discussed in the literature, environmental standards, in particular green-plating, are often seen as sources of additional costs which drive up prices and thus lead to smaller market shares, relocation and/or cessation of production.⁷⁵ This is the main assumption driving the Dutch and UK policies, as seen in Chapter 1. The examples discussed in the previous section suggest that there could be cases where stricter environmental standards could be beneficial for the national

⁷² Proceedings of the Second Chamber of the States General, *Kamerstukken II* 2009/10, 32 445, nr. 3, p. 3. This reform did not apply to accident or incidents with significant effects on the environment. Such a limitation was in line with Article 14 of the IPPC Directive.

⁷³ Dutch Waste Management Association, *Annual Review 2010*, p. 1.

⁷⁴ Dutch Waste Management Association, Netherlands imports more waste, Waste Forum, September 2011, p. 2.

⁷⁵ Jenkins (1998), pp. 3 with further references. MacLeod et al. (2009), pp. 16–19.

economy. This possibility was formulated by the American economist Porter, who in 1991 stated that:

*Strict[er] environmental regulations do not inevitably hinder competitive advantage against foreign rivals.*⁷⁶

Later, Porter refined what became known as ‘the Porter hypothesis’ as follows:

*Properly designed environmental regulation can trigger innovation that may partially or more than fully offset the costs of complying with them.*⁷⁷

The Porter hypothesis, which focuses on substantive environmental provisions, rests on the idea that pollution is a form of economic waste, and involves unnecessary and incomplete utilisation of resources.⁷⁸ Therefore, pollution/waste reduction could improve the way firms use resources and thus lead to cost savings. Additionally, firms may also find ways to convert waste into saleable products and so increase revenues.⁷⁹ Stringent environmental regulation can also lead to a ‘first move advantage’ in the development and exploitation of new environmental techniques, technologies and applications.⁸⁰ In other words, *efficient* stricter environmental regulation can lead to win-win situations.⁸¹

The validity of such a hypothesis has long been discussed in the literature. While it has never been properly falsified,⁸² especially because every case where competitiveness was hindered could be blamed on inefficient regulation,⁸³ it has also never been generally accepted.⁸⁴ For example, in 2008 Lanoie, Patry & Lajeunesse concluded a study on the total factor productivity of the Quebec manufacturing sector suggesting

⁷⁶ Porter (1991), p. 96. Comparative added by me to adapt the formula to the European Union context. For a recent overview of the theoretical framework of the Porter’s Hypothesis see Wagner (2003).

⁷⁷ Porter & Van der Linde (1995a), p. 98. It should be noted that this hypothesis focuses on regulatory burdens and not specifically on administrative burdens. Moreover, this hypothesis refers to improvements in the performance of the firms affected by regulation and not to the overall benefits for a country. Therefore, the Porter Hypothesis is less broad than the costs/benefits analysis performed by the UK government.

⁷⁸ Porter & Van der Linde (1995b), p. 122.

⁷⁹ Porter & Van der Linde (1995b), p. 125.

⁸⁰ MacLeod et al. (2009), p. 20.

⁸¹ Wagner (2003), in particular pp. 20 and 21.

⁸² MacLeod et al. (2009), pp. 20 and 22, with references and assessment of empirical studies.

⁸³ Wagner (2003), p. 12, note 3, and 34.

⁸⁴ Lanoie, Patry & Lajeunesse (2008), pp. 121–122, with reference to the empirical studies performed to verify the Porter Hypothesis.

that, in the long run, stricter environmental regulation can lead to competitive advantages. However, they also stated that this does not appear true for highly polluting industries in highly competitive markets.⁸⁵ In 2009, Heyes underlined how competitive advantages linked to stricter environmental regulation are stronger for big firms, especially when they have a controlling position on the market.⁸⁶ He also underlined how stricter environmental regulation could lead to predatory behaviours or other anti-competition practices. In 2006, Oosterhuis showed examples in which command-and-control regulation to spur substitution of hazardous chemical substances led to comparative economic advantages on the EU internal market.⁸⁷

In 2013, I performed a study in which I looked at the relationship between economic development and green-plating in one of the fields which Porter indicated as prone to showing evidence of the validity of his hypothesis, waste management.⁸⁸ In that study, I highlighted the development of green-plating in the Netherlands under the Waste (Framework) Directive between 1975 and 2013. The findings were juxtaposed with economic data concerning the development of Dutch industry in this sector, the manner in which Dutch government and the Dutch Waste Management Association look at these data, as well as to the stringency of the regulatory framework. Highlights from the analysis of the development of green-plating in this sector are reported in Section 4.3.1. Its relevance for the economic development of the Dutch waste industry is presented in Section 4.3.2 and discussed in Section 4.3.3.

4.3.1 *Green-Plating in Dutch Waste Management*⁸⁹

Until the 1970s, dumping practices were a reality in the Netherlands.⁹⁰ To bring these practices to an end the Waste Act was passed in 1977.⁹¹ The Waste Act focused on an environmentally sound disposal of waste and on waste recovery.⁹² Over time, the legal framework on waste

⁸⁵ Lanoie, Patry & Lajeunesse (2008), especially p. 128.

⁸⁶ Heyes (2009).

⁸⁷ Oosterhuis (2006). See also Ekins & Venn (2009), pp. 215–217.

⁸⁸ Squintani (2013b).

⁸⁹ This section is based on Squintani (2013b).

⁹⁰ Proceedings of the Second Chamber of the States General, Kamerstukken II 1974/75, 13 364, no. 3, p. 34.

⁹¹ *Afvalstoffenwet*, Stb. 1977, 455.

⁹² Proceedings of the Second Chamber of the States General, Kamerstukken II 1976/77, 13 364, no. 5, p. 11 on the two pillars of the Waste Act.

management has been strengthened. Most notably, in the 1990s, when waste management was integrated with other sector-specific acts into the Environmental Management Act,⁹³ the functioning of the instruments introduced with the Waste Act was reinforced, and priority was given to waste prevention.⁹⁴

The New Waste Framework Directive was transposed in 2011 by means of an amendment to the Environmental Management Act.⁹⁵ From the point of view of green-plating, this Act is particularly interesting because it was prepared in accordance with Guideline 331 of the Dutch Lawmaking Guidelines.⁹⁶ Accordingly, a legislative proposal should not contain any rules beyond those necessary for the transposition of the Directive, other than for technical reasons.⁹⁷ Furthermore, the Dutch government stated that, although more stringent protective measures are allowed under the Directive, measures that could affect the level playing field among Member States should be avoided.⁹⁸ Clearly, this statement can be linked to the Dutch policy on gold-plating presented in Chapter 1.⁹⁹ However, the government also indicated that the transposition of this Directive had to take into consideration the existing status quo, which, as further discussed below, went further than required by Union law.¹⁰⁰ As can be seen, the Dutch government seemed ready to maintain green-plating, albeit implicitly.¹⁰¹

For example, Article 9 of the Old Waste Framework Directive applied the permit requirement to establishments or undertakings disposing of their waste at the place of production. In addition, Article 10 covered

⁹³ Environmental Management Act (*Wet milieubeheer*), Stb. 1979, 442, as amended.

⁹⁴ Proceedings of the Second Chamber of the States General, *Kamerstukken II* 1988/89, 21 246, no. 3, p. 8.

⁹⁵ Stb. 2011, 103 and Stb. 2011, 104.

⁹⁶ Prime Minister's Circular of 18 November 1992, last amended by Prime Minister's Order, Minister of the Interior, 1 April 2011, nr. 310225, houdende vaststelling van de negende wijziging van de Aanwijzingen voor de regelgeving, *Stcrt.* 2001, nr. 6602.

⁹⁷ Proceedings of the Second Chamber of the States General, *Kamerstukken II* 2009/10, 32 392, no. 3, p. 2.

⁹⁸ Proceedings of the Second Chamber of the States General, *Kamerstukken II* 2009/10, 32 392, no. 7, p. 4.

⁹⁹ Chapter 1, Section 1.2.2.

¹⁰⁰ Proceedings of the Second Chamber of the States General, *Kamerstukken II* 2009/10, 32 392, no. 3, p. 14.

¹⁰¹ I will only focus on the provisions of Directive 2008/98/EC which have replaced the provisions of the Directive 2006/12/EC. Due to the general nature of these provisions, there is a greater chance that a discussion on the application of Dutch policy on gold-plating took place within the parliament.

installations or undertakings that recover waste. In both cases, an exception could be granted under certain conditions (Article 11). Today, the New Waste Framework Directive maintains this approach (Articles 23–26). Member States that do not exempt operators from the permit requirement do not keep burdens to a minimum. Dutch law does not keep burdens to a minimum. In the 1990s, permit requirements were regulated in Chapter 8 of the Environmental Management Act, which applied to industrial establishments in general. 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.¹⁰² Waste producers discarding their own waste at the place of production were also not exempted from the permit requirement.¹⁰³ In 2009, two years before the transposition of the New Waste Framework Directive, the General Act on Environmental Permits replaced the provisions of Chapter 8 of the Environmental Management Act. Under the new Act, only establishments with an IPPC installation or establishments listed in a specific order are subject to a permit requirement.¹⁰⁴ With regard to the management facilities of waste, Annex I sub C to the Environmental Permits Order states that establishments for the disposal or recovery of waste must have a permit, unless they fall under one of the thirty-three categories explicitly mentioned therein (Section 2.1(2)) and Category 28.10 in Annex I, sub C.¹⁰⁵ The 2011 transposition act did not touch upon this system.¹⁰⁶ As can be seen, the Netherlands partly enforced the opt-out clause available under the New Waste Framework Directive in 2009. The use of this clause was part of a more general reform of the Dutch permitting system that aimed at lowering administrative burdens.¹⁰⁷ This was done in accordance with the Dutch policy on gold-plating. However, it should be noted that only certain activities are exempted under the General Act on

¹⁰² Category 28 under Annex I to Stb. 1993, 50.

¹⁰³ The content of the permit could be influenced by whether an establishment discarded waste coming from inside the establishment concerned or from outside.

¹⁰⁴ Stb. 2008, 496, *Wet algemene bepalingen omgevingsrecht*.

¹⁰⁵ Stb. 2010, 143, *Besluit omgevingsrecht* (BOR) as amended by, in particular, Article II, letter J, point 11 of Stb. 2010, 781. Activities involving non-separate collection were not exempted, nor were activities with mixed waste. New categories were exempted with Article II, letter G, point 13 of Stb. 2012, 558 amending Category 28.10 in Annex I, sub C to the BOR.

¹⁰⁶ Proceedings of the Second Chamber of the States General, *Kamerstukken II* 2009/10, 32 392, no. 3, p. 13.

¹⁰⁷ Stb. 2010, 781, explanatory memorandum, p. 30.

Environmental Permits and the Environmental Permits Order system. In particular, the reform covered installations for the recovery of homogeneous flows of 'material unpackaged goods' (*vaste bulkgoederen*).¹⁰⁸ For example, activities for the recovery of ink cartridges for printers are covered by this reform. Activities were selected using generally applicable criteria, such as the homogeneity of the activities covered, and three specific waste-related criteria: a) activities must focus on the recovery of waste, in particular the recovery of raw materials; b) activities can be easily controlled without the need for complex analysis or studies¹⁰⁹ and c) activities facilitate extended producer responsibility systems.¹¹⁰ The transposition of Article 24 of the New Waste Framework Directive represents a perfect example of the 'no-gold-plating, unless' regime which characterised the Dutch policy on gold-plating until the 2010 coalition agreement. Certain kinds of human activities concerning waste can, due to their very nature, be regulated by means of an ex post control mechanism, i.e. inspections. Others require complex assessments. Accordingly, they should be subjected to an ex ante control mechanism as well, i.e. the permit. More generally, environmental concerns only partially seem to have driven the decision to use the opt-out clause in Article 24 of the New Waste Framework Directive. Instead, they justify the green-plating.

Another case of green-plating occurs in the field of the targets for reuse or recycling. Article 11 of the New Waste Framework Directive establishes explicit *minimum* targets for the preparing for reuse and the recycling of at least paper, metal, plastic and glass from households (increase of an overall 50% by weight by 2020) and of non-hazardous construction and demolition waste (increase of an overall 70% by weight by 2020). The clause 'to a minimum of' used in these provisions specifies that Member States can establish stricter targets. The Netherlands uses this option. As recognised by the Dutch government, the National Waste Management Plan 2009–2021 sets stricter binding standards than the Directive requires.¹¹¹ The amount of waste being recycled in the Netherlands has increased steadily,¹¹² and by 2015, the preparation for reuse

¹⁰⁸ *Idem*, p. 36.

¹⁰⁹ *Ibidem*.

¹¹⁰ *Idem*, p. 37.

¹¹¹ VROM, *Landelijk Afvalbeheerplan 2009–2021 (LAP2)*, pp. 91 and 92.

¹¹² CBS, PBL, Wageningen UR (2010), *Afvalproductie en wijze van verwerking, 1985–2008 (indicator 0204, version 09, 22 September 2010)*. www.compendiumvoordeleefomgeving.nl. CBS, The Hague; Planbureau voor de Leefomgeving, The Hague/Bilthoven and Wageningen UR, Wageningen. See also Dutch Waste Management Association, *Annual Review 2010*, *Afvalforum*, p. 6.

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. In addition, by 2021, the preparation for reuse and recovery of other materials shall be increased to 95% in weight. As can be seen, by setting binding targets that are more stringent than those required by the New Waste Framework Directive, the Netherlands has adopted more stringent measures. Curiously, the government gave no attention to this fact during the transposition of the New Waste Framework Directive.¹¹³ The Dutch policy on green-plating did not apply.

Further, in line with the principle that the polluter should pay, Article 14 of the New Waste Framework Directive states that the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders. In addition, the Member States *may* decide that the costs of waste management are to be borne partly or wholly by the producer of the product from which the waste came, and that the distributors of such products may share these costs. As can be seen, Article 14 provides an option with respect to the liability for the costs of waste management of the producers of the product from which the waste came. Member States using this option may be establishing more stringent measures. The Netherlands uses this option. From 1993, Dutch law has had two instruments that follow the principle of extended producer responsibility. Section 15.32 of the Environmental Management Act introduced the possibility of establishing a return deposit and a return premium. In addition, Title 15.10 of the Environmental Management Act allows the introduction of a system of so-called Waste Management Contributions, if an industrial association so requires. Waste Management Contributions are based on private funds that cover the cost for establishing the infrastructure required to recover products. Title 15.10 of the Environmental Management Act allows such contributions to be made compulsory for all producers or importers of the goods concerned on the Dutch market.¹¹⁴ According to the Dutch government, the system described above increases waste prevention and recycling.¹¹⁵

¹¹³ In particular, Proceedings of the Second Chamber of the States General, Kamerstukken II 2009/10, 32 392, no. 3, pp. 6 and 7 and Proceedings of the Second Chamber of the States General, Kamerstukken II 2009/10, 32 392, no. 7.

¹¹⁴ Such a measure serves to ensure the functioning of the infrastructures, which are developed by industry itself, Proceedings of the Second Chamber of the States General, Kamerstukken II 1992/93, 23 256, no. 3.

¹¹⁵ Proceedings of the Second Chamber of the States General, Kamerstukken II 1993/94, 23 256, no. 5, pp. 2 and 3.

Therefore, this case of green-plating seems to be linked to environmental concerns. The government also stated that Union law leaves space for such rules.¹¹⁶ This suggests that the Dutch legislator was aware of exceeding the minimum requirements imposed by the Directive.

In 2011, the government indicated its intention to redress this case of green-plating, albeit partially. In the legislative proposal for the transposition of the New Waste Framework Directive, a provision allowed the recovery of only *a part* of the costs from the producers of the products from which the waste came.¹¹⁷ This change was in line with the minimum requirements established by the Directive. However, several members of Parliament questioned the meaning and the effects of the change. Some of them feared that the polluter pays principle and the principle of extended producer responsibility would have been negatively affected, along with legal certainty.¹¹⁸ Others wanted the government to go even further. The People's Party for Freedom and Democracy called for the abolition of all provisions following extended producer responsibility.¹¹⁹ The government replied that legal certainty should be guaranteed and therefore that it would have refrained from downgrading the status quo.¹²⁰ Unfortunately, due to an error of correlation with a parallel legislative proposal,¹²¹ the current Section 9.5.2(3), letter b, of the Environmental Management Act allows the recovery of only a part of the costs from the producers of the products from which the waste came.¹²² However, the parliamentary history of Section 10.17 of the Environmental Management Act casts doubt on the validity of Section 9.5.2(3), letter b, of the Environmental Management Act. The Dutch legislator did not want to downgrade the status quo. The transposition of Article 14 of the New Waste Framework Directive shows that legal certainty is considered a sufficient reason to justify green-plating. Interestingly, the claim of legal certainty made by certain exponents of

¹¹⁶ Proceedings of the Second Chamber of the States General, Kamerstukken II 1992/93, 23 256, no. 3, p. 7.

¹¹⁷ Proceedings of the Second Chamber of the States General, Kamerstukken II 2009/10, 32 392, no. 2.

¹¹⁸ Proceedings of the Second Chamber of the States General, Kamerstukken II 2009/10, 32 392, no. 6, pp. 5–8.

¹¹⁹ *Idem*, p. 4.

¹²⁰ Proceedings of the Second Chamber of the States General, Kamerstukken II 2009/10, 32 392, no. 7, p. 10.

¹²¹ Proceedings of the Second Chamber of the States General, Kamerstukken II 2007/08, 31 501, no. 2 adopted with Stb. 2011, 269.

¹²² Section V, letter B1, Stb. 2011, 103 and Section I, letter D, Stb. 2011, 269.

Figure 4.1 Waste trends in the Netherlands 1985–2010¹²³

Parliament did not rely on studies or empirical data. It was formulated on an abstract level. The decision to maintain green-plating was not supported by a substantiated cost/benefit analysis. Only due to a mistake was this case of green-plating partially redressed.

4.3.2 Green-Plating in Dutch Waste Management and the Development of Dutch Waste Industry

The effects of the Dutch regulatory framework for waste management, including the cases of green-plating described above, seem to have beneficial effects. Figure 4.1 shows that the amount of waste recovered in the Netherlands has been increasing steadily.

Both in 2010 and in 2014, the Dutch Ministry responsible for environmental protection underlined that environmental protection in the field of waste management does not seem to affect the economic growth of the sector.¹²⁴ If we compare the figures concerning the turnover of Dutch waste management industry in 2010/2011 with those concerning

¹²³ Adapted from Figure 2.1 in *Landelijk Afvalbeheerplan 2009–2021 - Naar een materiaalketenbeleid*, 3 December 2014, p. 20.

¹²⁴ VROM, *Landelijk Afvalbeheerplan 2009–2021 - Naar een materiaalketenbeleid*, 16 February 2010, pp. 24 and 25 and IenM, *Landelijk Afvalbeheerplan 2009–2021 - Naar een materiaalketenbeleid*, 3 December 2014, pp. 19 and 20.

2012/2013, we can see an increase from 5.7 billion euros per year to 7 billion euros per year.¹²⁵ Actually, the decrease in the amount of waste being landfilled, which can be partially linked to the increased amount of waste being recovered, could explain why the Netherlands could become a raw-material centre for Europe.¹²⁶ The Dutch Waste Management Association, in close dialogue with the political worlds, highlights the potentials of good functioning waste management policy, which, as seen in the previous section, includes green-plating, for the economic growth of the sector in two different manners.

First, waste management services can be exported to fulfil the needs of other Member States. For example, in September 2011, the Netherlands started disposing of 248,000 tons of waste from Naples, for 12 million euros. The importance of this economic opportunity and its linkage to the quality of waste management systems in the Netherlands is well represented by the following quotes from a Dutch Waste Management Association publication on waste imports published in 2011:¹²⁷

The signposts at the border are going to change for good. With its considerable expertise in recycling waste streams, the Netherlands is promoting itself as a materials roundabout. Moreover, most Dutch waste-to-energy plants now have recovery (R1) status. Facilities that meet the European standards for high thermal efficiency are permitted to import combustible waste for treatment. According to statistics provided by NL Agency, more waste will be imported this year, especially from Germany and the UK in particular. Over the first five months of this year imports amounted to about 20,000 tonnes per month. This is 240,000 tonnes on an annual basis, compared with 144,000 tonnes in 2010. In May alone, import permits were issued for almost 500,000 tonnes of waste, bringing the total for this year to almost a million tonnes.

...

Hester Klein Lankhorst, head of the waste and material chains department at the Ministry of Infrastructure and the Environment, is delighted by the waste imports. 'It is a laudable development. It is much better for Dutch companies to incinerate waste with energy recovery than for it to end up in a landfill elsewhere in Europe. It is consistent with the philosophy of treating waste as a source of materials and energy. I repeatedly remind my British colleagues of the possibilities for exporting waste to the Netherlands, most recently at a meeting in Brussels.' Klein Lankhorst says the ministry is very keen to create a 'materials roundabout' in the Netherlands.

¹²⁵ Dutch Waste Management Association, Annual Review 2011, Afvalforum, May 2012, p.17 and Dutch Waste Management Association, Afval in Cijfers, May 2015, available at www.verenigingafvalbedrijven.nl/publicaties/poster-afval-in-cijfers.html (accessed June 2017).

¹²⁶ Dutch Waste Management Association, Annual Review 2010, Afvalforum, p. 1.

¹²⁷ Dutch Waste Management Association, Netherlands imports more waste, Afvalforum, September 2011, p. 2.

The closing sentence in the second quote links waste imports with the second source for potential economic growth. Indeed, with the concept of a ‘*materials roundabout*’ Dutch politicians and waste operators also mean the recovery of valuable raw materials.¹²⁸ Predicting a growing scarcity of raw materials for the production of consumer goods, Dutch politicians and waste management operators invest in waste recovery to transform the Netherlands into a raw-material centre for Europe.¹²⁹ This also has implications for the labour market, which is predicted to benefit from such developments.¹³⁰

4.3.3 *Green-Plating in Dutch Waste Management and the Development of Dutch Waste Industry: A Verification of the Porter Hypothesis?*

It is for colleagues from the economic sciences to establish whether the manner in which the Dutch government regulates waste management represents a confirmation of the validity of the Porter hypothesis. From a legal perspective, it is possible to state that green-plating occurred in the past and still occurs today in the Netherlands in the context of waste management, as shown in Section 4.3.1, above. Equally certain is that the turnover of Dutch waste management industry is growing. The Netherlands is exporting waste management services and fostering its position on the internal market for the recovery of valuable raw materials. It can be concluded that environmental protection and economic growth are both fostered, as predicted by specific studies on this topic,¹³¹ and actually they seem to be mutually reinforcing.

Dutch industry and government seems to be aware of the competitive advantages that the relatively favourable status of waste management in the Netherlands comports in the context of an internal market for circular economy. The attention for circular economy, which at EU level made its official entry in 2014/2015,¹³² started in the Netherlands in 2010/2011,¹³³ and took concrete form in Dutch government plan

¹²⁸ Dutch Waste Management Association, *Grondstoffenschaarste scherp op het netvlies*, Afvalforum, May 2012, p. 5 with references to both governmental and parliamentary sources. See also the estimations in Ton Bastein et al., *Kansen voor de circulaire economie in Nederland*, TNO-rapport, 11 juni 2013, TNO 2013 R10864.

¹²⁹ Dutch Waste Management Association, *Annual Review 2010*, p. 1.

¹³⁰ Bastein (2013).

¹³¹ Ibidem.

¹³² European Commission, *Towards a circular economy: A zero waste programme for Europe*, COM (2014) 398 final.

¹³³ The Dutch policy on circular economy was influenced by the European Policy on Resource efficiency, in particular the European Commission, *Roadmap to a Resource*

presented in 2016.¹³⁴ References to the role that Dutch successes in the context of domestic waste management could play in the context of an international circular economy are visible in documents from the Dutch government and industry concerning circular economy.¹³⁵ Such documents do not speak of green-plating in this regard. Yet as demonstrated in Section 4.3.1 above, green-plating plays a crucial role in the achievement of the high level of waste recovery, higher than required under EU law, forming part of the Dutch successes in the context of domestic waste management. Unconsciously, the Dutch government and industry seems to accept that green-plating is good for the competitiveness of the Dutch economy in the field of waste management.

This result was not achieved in the short term. As shown in Section 4.3.1, some cases of green-plating were implemented many years before their effects seemingly started to benefit Dutch economy in the field of waste management. This consideration suggests the need for long-term thinking when considering the costs/benefits of green-plating.¹³⁶ Time is indeed an essential component for the success or failure of innovation dynamics and eco-innovation.¹³⁷ Yet long-term thinking is something that, as highlighted in the literature,¹³⁸ and confirmed in the next section, regulatory impact assessments rarely do.

4.4 Green-Plating in Regulatory Impact Assessments

No-gold-plating policies have been developed by several Member States, as discussed in Chapter 1.¹³⁹ As written by my co-authors and me in

Efficient Europe, COM (2011) 571 final, see Proceedings of the Second Chamber of the States General, Kamerstukken II 2012/2013, 33 043, nr. 15, p. 1.

¹³⁴ Proceedings of the Second Chamber of the States General, Kamerstukken II 2015/16, 32 852 and 33 043, Nr. 33, and the Annex to the document, Ministerie van Infrastructuur en Milieu en het ministerie van Economische Zaken, mede namens het ministerie van Buitenlandse Zaken en het ministerie van Binnenlandse Zaken en Koninkrijksrelaties, *Nederland circulair in 2050*, September 2016, available at www.rijksoverheid.nl/circulaire-economie (accessed July 2017).

¹³⁵ Eg. Dutch Waste Management Association, *Grondstoffschaarste scherp op het netvlies*, Afvalforum, May 2012; Bastein et al. (2013); Proceedings of the Second Chamber of the States General, Kamerstukken II 2012/13, 33 043, nr. 15. Proceedings of the Second Chamber of the States General, Kamerstukken II 2015/16, 32 852 and 33 043, Nr. 33.

¹³⁶ Ekins & Venn (2009), p. 198, based on two Dutch studies: TME, *Technische vooruitgang en milieukosten, aanzet tot methodiekontwikkeling*, The Hague: TME; and RIVM, *Techno 2000; Modelling van de doling van eenheidskosten van technologieën in de tijd*, Reportnummer 773008009, April. Bilthoven: RIVM.

¹³⁷ Ekins & Venn (2009), p. 197 with further references.

¹³⁸ Ekins & MacLeod (2009), pp. 233 and 234. See also Oosterhuis et al. (2006).

¹³⁹ Chapter 1, Section 1.2.

2015, some Member States are increasingly professionalising the transposition process, which can be shown by initiatives at national level in terms of transposition principles and practices.¹⁴⁰ Regulatory impact assessments can be used as instruments in this regard,¹⁴¹ an activity that is also stimulated by the Commission.¹⁴² With regulatory impact assessments is commonly understood the official appraisal made or coordinated by government officials of the effects of specific policy instruments on several public policy areas such as competitiveness, administrative burdens, health and environment.¹⁴³ Yet the manner in which such assessments are performed varies from country to country.¹⁴⁴ This occurs also as regards those countries with an explicit gold-plating policy. In the Netherlands, the discussion on the costs/benefits of green-plating is much more loosely formulated and based on rhetoric rather than concrete data. In the Netherlands the so-called BNC-fiches¹⁴⁵ do not provide detailed information.¹⁴⁶ Rather, they mainly provide qualitative assessments, based on general assumptions.¹⁴⁷ Additional Impact Assessments are sometimes carried out in different phases of the formal transposition process, but only on an ad hoc basis.¹⁴⁸ A much more detailed approach is followed in the United Kingdom.¹⁴⁹ The UK Regulatory Impact Assessment Toolkit identifies the need to ensure early

¹⁴⁰ Anker et al. (2015), p. 42.

¹⁴¹ Idem, p. 39.

¹⁴² European Commission, 'Smart Regulation in the European Union, COM (2010) 543 final.

¹⁴³ Hertin et al. (2009b), p. 413.

¹⁴⁴ See e.g. Jacob et al. (2008). See also Farmer, Ten Brink & Kettunen (2006), p. 395 and Hertin et al. (2009).

¹⁴⁵ BNC stands for *Beoordeling Nieuwe Commissievoorstellen* (in English: Assessment of New Commission's Proposals). These documents are prepared by the Workgroup for the Assessment of New Commission Proposals. They provide a short summary of the Commission's proposal, an assessment of the impact of the Commission's Proposal on the NL, the EU information about the legal basis, the principles of subsidiarity and proportionality, and the point of view of the Dutch government.

¹⁴⁶ See also Hertin, Jacob and Volkery (2008).

¹⁴⁷ Anker et al. (2015), p. 39.

¹⁴⁸ As regards the Industrial Emissions Directive (n. 356) the Dutch government commissioned a series of impact assessments to an external consultant, see Sira Consulting, *Administratieve en bestuurlijke lasten Richtlijn Industriële Emissies Eerste tranche: Politiek Akkoord – Onderzoek naar de administratieve en bestuurlijke lasteneffecten van het Politiek Akkoord voor de Richtlijn Industriële Emissies* (February 2010); 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) 17 (English summary).

¹⁴⁹ See also Hertin, Jacob and Volkery (2008).

engagement and analysis before any EU proposal is adopted, as well as continued elaboration during the negotiation and transposition phases.¹⁵⁰ Of course, the exactness of the data in regulatory impact assessments should not be overestimated.¹⁵¹ Such studies are indeed based on assumptions, and assumptions can be wrong or even misleading. Moreover, as written in 2015 with my co-authors, the UK regulatory impact assessments appear to have a fairly narrow focus on regulatory burdens on businesses, the public sector and consumers.¹⁵² This section, accordingly, does not look at whether the regulatory impact assessments performed in the United Kingdom as regards the costs/benefits of green-plating are correct or not. I only look at ‘how’ the costs/benefits of green-plating are assessed.

A close look at the regulatory impact assessments performed in the United Kingdom in relation to statutory instruments transposing environmental directives shows that such documents take account of certain potential cases of green-plating. This is mostly the case for explicit minimum clauses or opt-in and opt-out clauses in EU environmental law.¹⁵³ Still, it is remarkable that not all possible options are discussed. I could not trace a pattern in the selection of which potential case of green-plating to discuss. There seems to be a political bias concerning the content of such regulatory impact assessments.¹⁵⁴ When options are discussed, costs and benefits are calculated for those options that the Government considers leading to changes in the status quo. If the status quo is maintained, costs/benefits are not assessed.

An analysis of regulatory impact assessments for the transposition of the Air Quality Directive, the Environmental Liability Directive and the Waste Directive is used here to provide insight into the manner in which the costs and benefits of green-plating are assessed in the United Kingdom. Attention is mainly given to the regulatory impact assessments of the British Government, given its leading role in the development of the UK policy on gold-plating. Welsh, Scottish and Northern Ireland governments’ regulatory impact assessments are considered when they are necessary for providing

¹⁵⁰ HM Government, *IA Toolkit. How to do an Impact Assessment* (Department for Business, Innovation and Skills August 2011), more times updated.

¹⁵¹ Ekins & MacLeod (2009), show that UK regulatory impact assessments tend to over-estimate costs. See also MacLeod et al. (2009), p. 24–29.

¹⁵² Anker et al. (2015), p. 39. See also Nao (2006) and Hertin et al. (2009b).

¹⁵³ About legislative techniques to show the room for green-plating see Chapter 3, Section 3.3.

¹⁵⁴ Hertin et al. (2009a) and Hertin et al. (2009b).

a complete picture of the ongoing practice, keeping in mind that it is not the purpose of this section to provide an exhaustive picture of such practice.

For example, the 2010 Regulatory Impact Assessment attached to the statutory instrument transposing the Air Quality Directive,¹⁵⁵ discussed the cost/benefit of (not) taking advantage of the opt-out clause in Article 20 of the Directive. This provision states:

Member States shall transmit to the Commission, for a given year, lists of zones and agglomerations where exceedances of limit values for a given pollutant are attributable to natural sources. Member States shall provide information on concentrations and sources and the evidence demonstrating that the exceedances are attributable to natural sources.

If they succeed, Article 20(2) continues: ‘that exceedance shall not be considered as an exceedance for the purposes of this Directive.’ Despite the prescriptive tone of this provision, the preamble introducing it shows that Member States have the possibility and not the obligation to implement this provision. At the request of the Member States,¹⁵⁶ Recital 15 states:

Contributions from natural sources can be assessed but cannot be controlled. Therefore, where natural contributions to pollutants in ambient air can be determined with sufficient certainty, and where exceedances are due in whole or in part to these natural contributions, these *may*, under the conditions laid down in this Directive, be subtracted when assessing compliance with air quality limit values [author emphasis].

The use of the auxiliary verb ‘may’ suggests that this provision does not impose an obligation. Similarly, Article 21 Air Quality Directive allows the subtraction of the effects of winter-sanding or salting of roads.¹⁵⁷ Member States could decide not to take advantage of these options. In both cases, they would be refraining from exploiting all options to keep burdens to a minimum.

The United Kingdom did not discuss the possibility to exploit Article 21, and focused on Article 20.¹⁵⁸ In assessing the costs and benefits

¹⁵⁵ Department for Environment, Food and Rural Affairs, Transposition of the Air Quality Directive (2008/50/EC), 2010 version 2, attached to The Air Quality Standards Regulations 2010, SI 2010 No. 1001.

¹⁵⁶ The Council of the European Union, Interinstitutional file 2005/0183(COD), document number 10453/06, ADD 1, p. 18.

¹⁵⁷ This possibility derives from 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.

¹⁵⁸ Department for Environment, Food and Rural Affairs, Transposition of the Air Quality Directive (2008/50/EC), 2010 version 2.

associated to the (non) transposition of this option, the following sources of costs were taken into account. As regards the costs for making use of this option, the government looked at the health costs associated with *not* delivering additional improvement in air quality. These were estimated, after a long series of disclaimers, to be £684m. The benefits of using this option took into account the saving in mitigation costs including technology costs, resources costs and cleaning costs. These benefits were estimated to be £1559m. In short, polluting was estimated to be cheaper than non-polluting. In light of the abundant net benefits of making use of the option in Article 20 of the Directive, the UK Government decided to exploit the option. Besides the disputable accuracy of the analysis, and the possible ethical reservations concerning the algebraic manner in which human life was treated, it strikes me that this regulatory impact assessment did not take any account of potential costs coming from not exploiting the technological investments which would have been necessary to meet the stricter environmental standards associated with the non-implementation of Article 20 of the Directive. Technological investments, and developments to meet environmental standards have no potential economic benefit under this regulatory impact assessment. This seems to be in contrast with the conclusions reached in the previous section.

A more nuanced conclusion can be reached by looking at the 2008 Regulatory Impact Assessment concerning the transposition of the Environmental Liability Directive.¹⁵⁹ This document considered, in particular, options concerning extending the scope of application of the Directive to nature reserves other than those covered by the Natura 2000 Network and the availability of the permit and state-of-art defences.

As regards the first option, the Directive also introduces opt-in clauses clearly indicating room for specific kinds of more stringent measures. Indeed, the Directive clearly states that Member States may extend the definition of protected species and natural habitats to any habitat or species not listed in the Birds and Habitats Directives, which the Member State designates for equivalent purposes to those laid down in these two Directives (Article 2(1)).¹⁶⁰ The Directive's legal regime is then also

¹⁵⁹ Department for Environment, Food and Rural Affairs & WAG, Impact Assessment of the Environmental Damage Regulations (England) and the Environmental Damage Regulations (Wales) 2008, December 2008.

¹⁶⁰ On the optional nature of this clause, see also Lee (2005), p. 205.

applied to these sites. The original Commission proposal included habitats and species not covered by the Birds and Habitats Directives, for which areas of protection or conservation have been designated pursuant to the relevant national legislation on nature conservation.¹⁶¹ This provision aimed to allow the use of common criteria, and a uniform application in Europe of the 'environmental damage' concept, while retaining consideration of the fact that the aforementioned Directives allow for certain derogations about the level of protection offered to the environment.¹⁶² In the Council, France and the United Kingdom were explicitly against the reference to areas and species protected under national law.¹⁶³ Other Member States feared a lack of harmonisation as a result of the applicability of national law.¹⁶⁴ At the same time, Sweden and Spain seemed to wish also to cover national nature reserves.¹⁶⁵ The final version leaves this aspect to the discretion of the Member States.

As regards the second option discussed in the 2008 Regulatory Impact Assessment, the Directive allows Member States to opt-out of the operators' obligation to bear the costs of preventive and reparatory measures. Article 8(4) states:

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

The two clauses above are called 'permit defence' and 'state-of-the-art defence', respectively. Originally, the Commission proposed to make these defences compulsory for the Member States, and they restricted

¹⁶¹ COM (2002), 17 final, Proposed Article 2(2).

¹⁶² COM (2002), 17 final, p. 18.

¹⁶³ Council of the European Union, Institutional File 2002/0021 (COD), nr. 5581/03, note 11.

¹⁶⁴ Those Member States were Germany, Denmark, France and Finland, see Council of the European Union, Institutional File 2002/0021 (COD), nr. 7771/02, note 7.

¹⁶⁵ Council of the European Union, Institutional File 2002/0021 (COD), nr. 5581/03, note 11 where is reported that these two Member States requested the deletion of 'where a Member States so decides'.

the field of application of the Directive as a whole.¹⁶⁶ Hence, they exempted the operators from the obligation to take measures and from the obligation to bear the costs of such measures altogether. A majority in the Council suggested the deletion of the permit defence and expressed reservations about the state-of-the-art defence.¹⁶⁷ Following a proposal of the Greek presidency, Member States agreed to insert an option for the introduction of these two defences at the national level, which, however, is limited to the obligation to bear the costs of preventive and reparatory measures.¹⁶⁸ It is clear that if a Member State does not take full advantage of the opportunity to reduce burdens upon operators, green-plating occurs.

When calculating the costs and benefits of the possibility of applying the regime of the Directive to national nature reserve sites and of not applying the permit and state-of-the-art defences to GMO cases in Wales, the Government looked first at the costs and benefits of a transposition which does not go beyond the EU minimum, i.e. without extending to SSSIs and retaining permit and state-of-the-art defences for GMOs in Wales. As to the costs, the government looked at costs deriving from remedial or anticipatory actions and those related to enforcement actions. It estimated these costs to be £92m. As for the benefits, it looked at additional remediation of rivers, habitats and species and land contamination with benefits to society (80% of the estimate). It also looked at the benefits related to reduced damage and risks to the environment (20%). The total benefits of minimal transposition were hence estimated at £116m. Then the Government indicated that had both options been used, the costs would have been £2m higher, and the benefits £5m lower. It concluded that the net benefits would have been £3m. The government continued to explain the relationship between these benefits and business. The following quote from the 2008 Regulatory Impact Assessment is pivotal for understanding the manner in which government looks at the relationship between green-plating and economic development:

47 A large proportion of the costs identified in this assessment will in turn be revenue for the environmental industry. Where companies choose to undertake increased risk assessment and reduction or where they are required to undertake increased remedial measures, a

¹⁶⁶ COM (2002) 17 final.

¹⁶⁷ Council of the European Union, Interinstitutional File 2002/0021 (COD), document number 7771/02 note 32.

¹⁶⁸ Council of the European Union, Interinstitutional File 2002/0021 (COD), document number 5581/03 note 64.

high proportion of the cost will relate to staff time but they may need to buy software or equipment or may seek professional help. To the extent that companies take out insurance products there will also be increased revenue to the insurance industry.

48 There is unlikely to be a net gain to the economy associated with these new revenue streams as they would displace expenditure elsewhere in the economy. These expenditures are transfer payments from one sector to another. If there are external benefits in terms of technological development, then these could be considered as economic benefits of the Regulations but to the extent that this effect exists it is not quantified in this assessment.

This quote shows two things. First, it shows that the government is aware that the costs associated with environmental protection encountered by a part of industry are intrinsically linked to the revenues of another part of industry. The net benefits of this relationship are not really analysed and are dealt with by means of an assumption: '*There is unlikely to be a net gain*'. Second, the government is aware that environmental regulation can lead to technological development and therefore to extra benefits. These extra benefits have been called 'external benefits'.¹⁶⁹ Despite recognising their potential existence, the government dismisses them by stating that they are difficult to quantify. In the end, they are not taken into consideration. Once again, we have a stark contrast with what emerged from the analysis performed in Section 4.3 of this chapter.

A comparison between the British government and the Welsh government approach to the assessment of the costs and benefits related to the transposition of the Waste Directive shows how important it is to estimate all benefits deriving from green-plating.

In 2010, the British Government presented the 2010 Regulatory Impact Assessment concerning the transposition of the Waste Directive.¹⁷⁰ In this document, the British Government assessed the costs and benefits of (not) transposing several provisions of the Waste Directive, including Article 11 of the Directive, as well as clauses allowing the establishment of more stringent protective measures. The third sentence of Article 11(1) states that, where necessary to ensure that waste undergoes recovery operations, in accordance with the hierarchy of waste under Article 4 and in respect of human health and the environment

¹⁶⁹ This concept is therefore linked to those of 'innovation dynamics' and 'eco-innovation' discussed in Section 4.3.3 of this chapter.

¹⁷⁰ Department for Environment, Food and Rural Affairs, Impact Assessment of the Transposition of the Revised Waste Framework Directive (Directive 2008/98/EC), 2010 Defra 1012.

as provided in Article 13, Member States must establish separate collections for at least the following materials by 2015: paper, metal, plastic and glass. This obligation is subject to the technical, environmental and economic practicability of such systems. As indicated by the clauses ‘at least’ and ‘by 2015’, Member States can establish separate collection systems earlier than required and for more materials than those indicated in Article 11(1), therefore establishing room for more stringent measures.¹⁷¹

Finally, thanks to its acquired co-legislative power, the European Parliament could reinsert quantitative targets for reduction,¹⁷² which were rejected during the Waste Framework Directive negotiations.¹⁷³ Current Article 11(2) states:

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.

The use of the term ‘to a minimum’ in these provisions makes clear that, if a Member State aimed for more ambitious targets than those indicated in this article, it would establish more stringent measures.

¹⁷¹ It could be argued that such measures would not be more stringent because they are required by the second sentence of Article 11(1), which states: ‘Member States shall take measures to promote high quality recycling and, to this end, shall set up separate collection of waste where technically, environmentally and economically practicable and appropriate to meet the necessary quality standards for the relevant recycling sectors.’ However, this provision subjects the establishment of separate collection systems to an appropriateness assessment by the Member States that lowers the binding nature of such requirements. Accordingly, the third sentence of Article 11(1) indicates what the minimum level of protection is.

¹⁷² European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on waste (COM (2005) 667 – C6–0009/2006 – 2005/0281(COD)), Co-decision 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.

¹⁷³ Van Calster (2000), p. 170, and Amended Commission Proposal, [1989] OJ C 326/6.

When we look at how the British government assessed the costs and benefits associated with the (non) transposition of the options in Article 11 of the Waste Directive, it can be noticed that only the option in section 2 played a role in the regulatory impact assessment. The British government assessed whether adding an extra separate collection service for mixed plastic, i.e. plastic other than plastic bottles composed of rigid plastic and plastic films, by 2015. In assessing the costs of such measures, the government took account of many factors, including contract costs, vehicle efficiencies, mix of housing stock, and infrastructure and gate fees for recyclables. Three types of separate collection systems, i.e. co-mingled collection,¹⁷⁴ two-stream collection,¹⁷⁵ and (weekly or fortnightly) kerbside sort collection,¹⁷⁶ were also taken into account. Based on these parameters, the government estimated costs to be between £26.3m and £80.6m per year.¹⁷⁷ As for the benefits, despite recognising that there could be benefits in introducing an extra stream of separate collection for mixed plastic, the government underlined that extra information was necessary to quantify these benefits.¹⁷⁸ The Government added that these benefits can be assumed to be lower than the costs, and therefore decided not to introduce a requirement on separate collection of mixed plastic.

A different approach, with a diametrically opposed outcome to the one just presented, can be found in the context of the Welsh transposition of the targets for the preparing for reuse and the recycling of waste materials under Article 11(2) of the Waste Directive. While the British government did not look at the option of setting a target going beyond the Directive, the Welsh government commissioned a separate study on this issue.¹⁷⁹ Following the outcomes of this study, Wales introduced a statutory target of 64% by 2020, which is higher than the minimum target indicated under the Directive.¹⁸⁰ Among the reasons given by the Welsh government to justify introducing this example of green-plating, we can see reference to the reduction of greenhouse gas emissions, the reduction of Wales's ecological footprint, the saving of valuable and increasingly scarce resources

¹⁷⁴ In which all recyclables are collected together and separated out for recycling later.

¹⁷⁵ In which recyclables are separated into two broad streams by the householder, and fully separated for recycling later.

¹⁷⁶ In which recyclables are separated by collection operatives before transportation.

¹⁷⁷ Department for Environment, Food and Rural Affairs, *Impact Assessment of the Transposition of the Revised Waste Framework Directive (Directive 2008/98/EC)*, 2010 Defra 1012, p. 23.

¹⁷⁸ *Ibidem*.

¹⁷⁹ *Scoping New Municipal Waste Targets for Wales*, Eunomia, 2007; *Wales Targets Impact Assessment*, Eunomia, 2010.

¹⁸⁰ *Waste (Wales) Measure 2010*, 2010 nawm 8, section 3.

and the reduction of the costs for the management of waste from the perspective of local authorities (and, hence, taxpayers) through avoiding the rising costs for treatment/disposal of waste.¹⁸¹ While the former two reasons are based on environmental protection, the latter two grounds are based on economic benefits. The Welsh government based the cost/benefit analysis on two studies from an external consultant firm.¹⁸² A quote from the explanatory memorandum to the Waste (Wales) Measure 2010 reveals the importance of taking into account economic benefits of green-plating. At paragraph 8.2.9, the Welsh government states:

The report concluded that the cost of recycling at both a 40% rate (the current recycling rate) and a 50% rate (close to the 52% rate at which recycling will peak and plateau under current interventions) is higher than at a 70% rate. By 2024/25, the 40% recycling cost will be over £92m per annum whereas the cost of recycling at a 70% rate will be approximately £89m. Working towards and achieving a 70% rate by 2024/25, from a 2009/2010 baseline, will result in £78m savings compared with recycling at the current rate of 40%, and £59m savings compared with recycling at a rate of 50%. There are a number of reasons for this. Waste which is recycled will provide additional income which would not be the case if waste was landfilled or incinerated. Furthermore, financial savings can be made by local authorities if waste is recycled rather than landfilled as they will not have to make landfill tax payments and gate fees.

The quoted passage shows clear parallels with the discussion points highlighted in Section 4.3 of this chapter as regards Dutch waste management. The Welsh government concludes that green-plating in the field of waste management will lead to lower costs than polluting. This estimate takes into consideration the added value of new business opportunities made available by environmental regulation. The Welsh government quantified what the UK Government had called ‘external benefits’ in the context of the regulatory impact assessment of the Environmental Liability Directive. The ability to estimate ‘external benefits’ plays a pivotal role in the decision-making process.

4.5 Conclusions: Green-Plating as a Motor for Economic Development

The study of national policies on gold-plating shows that policies are based on the assumption that green-plating negatively affects economic

¹⁸¹ Department for Environment, Sustainability and Housing of the Welsh Assembly Government, Explanatory Memorandum to the Waste (Wales) Measure 2010, p. 50.

¹⁸² Eunomia, Scoping New Municipal Waste Targets for Wales, 2007; and Eunomia, Wales Targets Impact Assessment, 2010.

development. Despite this assumption, we have seen examples in which green-plating seems to encourage economic development, at least potentially. In Section 4.3 of this chapter, I referred to the so-called Porter Hypothesis, which states that strict environmental regulation can result in competitive advantage for national industry. As indicated during the case study on waste management in the Netherlands, the steady increase of waste being prevented and recovered (above Union requirements) does not seem to have led to economic stagnation. In fact, there are indications suggesting that green-plating in the context of waste prevention and recovery contributes to the Dutch export of services in the field of waste management and circular economy. This suggests that green-plating has positively influenced the growth of the Dutch economy in this field. In addition, the case study of industrial emissions showed that the Dutch economy could benefit from green-plating. Dutch industry already complied with the stricter requirements of the Industrial Emissions Directive thanks to green-plating under the IPPC Directive. Dutch industry could benefit from the fact that industry in other Member States will have to make investments to meet the new standards, while Dutch industry does not. Oosterhuis's study from 2006 provided a similar conclusion after comparing the effects of environmental regulation in Sweden, Denmark and Germany in the context of the substitution of hazardous chemicals. Without pretending to validate the Porter Hypothesis, I postulate that it is time to perform in-depth, widespread studies of the consequences that green-plating has on economic development in Europe.

Cost/benefit analyses performed in the United Kingdom as regards green-plating in environmental matters show that although there is awareness about the potential benefits of stricter environmental regulation on economic growth, the long-term benefits associated with the creation of new market opportunities are rarely properly taken into consideration. As a result, regulatory impact assessments do not offer a proper basis to assess the effects of green-plating on national economies. This finding is in line with the picture available in law and economic literature,¹⁸³ which was also presented during the proceedings of this chapter.

In Chapter 2, it was argued that green-plating can play an important role in the development of EU environmental law. National policies dogmatically refuting going beyond EU minimum environmental

¹⁸³ In particular Ekins & MacLeod (2009), who at page 240 indicate another eight shortcomings of regulatory impact assessments.

standards deprive the EU legislator of important information for developing EU environmental law. National policies restricting green-plating based on costs/benefits analyses can provide guidance to the EU legislator. For this to be the case, however, the actual manner in which costs/benefits analyses estimates the effects of stricter environmental regulation on national economy must be fundamentally improved. Refusing to assess the (long-term) economic benefits of green-plating because they are difficult to assess, as the United Kingdom did in the context of the transposition of the Air Quality Directive, cannot be accepted as justification. The approach followed by Wales as regards the transposition of the New Waste Framework Directive shows that when ‘external benefits’ are taken into account, it is possible to conclude that green-plating favours economic development. This approach deserves more attention in academic writings. The Welsh government seems to have been able to take into account the (long-term) economic benefits of stricter environmental regulation. If the exactness of this approach were confirmed, it would provide a suitable basis to bring forward the discussion on the balance that needs to be struck between economic development and environmental protection. In turn, it would provide a basis for helping to develop EU environmental law. It is, hence, important to discuss whether EU law can stimulate an approach to green-plating that is based on costs/benefits analyses that take into consideration the long-term effects of going beyond EU standards. This discussion forms the basis of the conclusions to this book.