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Gold-Plating

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1 Gold-Plating: A Misleading Overarching Concept

1.1 Introductory Remarks

Gold-plating is a widely used concept, by both politicians and scholars. It is replacing the concept of *more stringent protective measures* in discussion referring to the use that Member States make of the possibility to go beyond the requirements of Union law, and the use that Member States make of their power to regulate matters not regulated by Union law. This chapter argues that the use of the ‘gold-plating’ concept as an overarching concept, hence covering more stringent protective measures, is misleading.

The main reason for such a statement is presented in this chapter, firstly, in Section 1.2, by analysing the concept of ‘gold-plating’. The word ‘gold-plating’ clearly derives from the United Kingdom, but a fascinating cross-fertilisation process taking place, in particular, between the United Kingdom and the Netherlands, has influenced this concept. The historical development of the concept of gold-plating and a comparison of the manner in which the United Kingdom, the Netherlands and the European Union approach gold-plating will bring this cross-fertilisation process to the foreground. The result of this process is a concept that focuses on economic burdens. It is business-centric, explaining the clear negative connotation that gold-plating has acquired in the societal discourse. Second, Section 3.1 analyses the concept of ‘more stringent protective measures’. Despite having been introduced into the Treaty of Rome in 1987, and used in several EU measures based on what nowadays is Article 192 of the Treaty on the Functioning of the European Union (TFEU), the meaning of this concept is still being discussed in the literature. Section 1.3 aims at ending this discussion conclusively by clarifying the constitutive requirements of the concept. The main finding that can be drawn

from the analysis performed in Section 1.3 is that the concept of ‘more stringent protective measures’ focuses on the level of environmental protection, without disregarding other values such as the economic interests related to the creation and functioning of the internal market.

Accordingly, the stigmatisation of the ‘more stringent protective measures’ concept occurring from the use of ‘gold-plating’ as an overarching concept is unjustified. If further perpetrated it could even endanger the functioning of the system envisaged by the Treaties for the protection of the environment, as it deprives it of one of its foundations, i.e. that Member States retain the main responsibility as regards environmental protection, explained in the introduction to this book. Besides, the use of the concept of ‘gold-plating’ deprives the Union legislature of a catalyst for the further development of EU environmental law, as explained in Chapter 2. In view of these reasons, this chapter concludes by proposing the introduction of a new overarching concept, that of ‘green-plating’.

1.2 Gold-Plating: Development and Definition of a Concept

The term ‘gold-plating’ was first used in the United Kingdom, where it is generally understood to mean that national law places burdens on business not required by a Union measure.¹ Weatherill refers to a speech in 2001 by the Director General of the Confederation of British Industry entitled ‘No more gold-plating!’² However, it is unclear when this term was used for the first time.³ I found references asserting that the discussion of gold-plating started directly after the accession of the United Kingdom to the European Economic Communities in 1973.⁴

¹ Ambler, Chittenden & Obodovski (2004), p. 6.

² Weatherill (2005), p. 539.

³ In Federation of Small Business, ‘Better Regulation. . . Is better for business?’ 2004, p. 20 states that the following publication should be consulted for complaints about gold-plating: Institute of Directors, *Your Business Matters* (Report from the Regional Conferences, URN 96/765) (1996) p. 9. This suggests that this term was already in use in the United Kingdom as early as in 1996.

⁴ Ambler, Chittenden & Obodovski (2004), p. 5. Gold-plating has been addressed by the Government in a series of studies: Department for Trade and Industry, *Review of the Implementation and Enforcement of EC Law* (London, DTI, 1993); Cabinet Office, *Improving the Way the UK Handles European Legislation: Pilot Quality Assurance and Transposition Conference* (London, Cabinet Office, 2002); Bellis (2003); National Audit Office, *Lost in Translation? Responding to the Challenges of European Law* (2005–06 HC 26); Davidson (2006). See also Thomas & Lynch-Wood (2008), p. 180.

The origin of the concept of ‘gold-plating’ is indeed linked to the deregulation programmes pursued in the United Kingdom during those years, as well as in the Netherlands. As discussed in this section, the deregulation programmes in these two countries have led to the development of specific policies on gold-plating. Cross-fertilisation between these national policies refined the meaning of gold-plating, to the extent known today. Indeed, although the Netherlands and the United Kingdom are not the only Member States in which gold-plating has been officially addressed,⁵ the Netherlands and the United Kingdom are the Member States in which these policies seem to be the most developed. Today, the European Union itself, via the route of the Better Regulation Agenda, has taken over the concept of gold-plating. So far, only the United Kingdom and the Netherlands define gold-plating explicitly. All other countries and the European Union simply seem to follow the lead taken by the Dutch and the UK governments.

1.2.1 *The United Kingdom and Gold-Plating*

1.2.1.1 The Development of the UK Policy on Gold-Plating

In the United Kingdom, the focus on administrative burdens (so-called *red tape*) dates back to the 1940s. However, attention to this phenomenon increased during the 1990s and the 2000s, when a series of reports – including the ‘Less is More’ report by the so-called Better Regulation Task Force (BRTF) and the report of the so-called Hampton Commission⁶ – highlighted the status of the situation and proposed solutions. The report ‘Less is More’ further developed the so-called principles of good regulation (Annex B).⁷ The first principle was proportionality and stated: ‘Regulators should only intervene when necessary. Remedies should be appropriate to the risk posed and costs identified and minimised.’ In ‘Less is More’ a corollary was added, stating: ‘EC Directives should be transposed without gold-plating’. As we can see, this report clearly linked better regulation to gold-plating.

⁵ Jans, Squintani et al. (2009), pp. 419–423. Krämer (2011), p. 440, with reference to Austria, Belgium and Germany.

⁶ Better Regulation Task Force: Regulation – Less is More. Reducing Burdens, Improving Outcomes. March 2005. Hampton (2005).

⁷ These principles were first set out in 1997 and then refined over time; see Federation of Small Business, Better Regulation... Is it better for business?, 2004, p. 10. (www.fsb.org.uk/docs/default-source/fsb-org-uk/policy/assets/0952-better-regulation.pdf?Status=Master&sfvrsn=1)

With the Better Regulation Action Plan in May 2005, later supported by the Legislative and Regulatory Reform Act 2006, the government carried over the advice of the BRTF and of the Hampton Commission, at least to a certain extent. In the context of gold-plating, in addition to developing a specific policy, the government established a series of advisory bodies. The Better Regulation Commission,⁸ the Better Regulation Executive and the Reducing Regulation Committee perform an ‘in-house’ check of statutory instruments, which are delegated acts, to avoid gold-plating. In Parliament, the House of Lords Merits of Statutory Instruments Committee (Merits Committee) was appointed in 2003 with the power to subject to the attention of the House of Lords proposed statutory instruments inappropriately implementing Union legislation, which includes cases where statutory instruments introduce gold-plating.⁹ These bodies have had impact on the gold-plating of environmental measures. For example, the Better Regulation Commission and the Merits Committee challenged the transposition of the Energy Performance of Buildings Directive.¹⁰ The Directive requires an energy label for buildings that has to be renewed every ten years. The 2007 Energy Performance of Buildings Regulations required renewing the label every time a property is marketed to be sold or rented.¹¹ Both advisory bodies considered this provision gold-plating and asked the government not to pass it.¹²

In 2010, with the Cameron government starting its mandate, the focus on gold-plating increased. The so-called One-In/One-Out method of law-making has been introduced in the context of better regulation, meaning that no new legislative act affecting businesses can be made if an old act imposing at least equivalent administrative burdens upon business is not eliminated.¹³ Moreover, extensive consultation started to establish

⁸ This Commission, which replaced the Better Regulation Task Force, no longer exists.

⁹ On the parliamentary control of the transposition of Union law, see Thomas & Lynch-Wood (2008), pp. 196–200.

¹⁰ Directive 2002/91/EC of the European Parliament and of the Council on the energy performance of buildings, [2003] OJ L 1/65. This directive is based on Article 175 EC.

¹¹ Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations (SI 2007/991), Regulation 11(4). Later deleted with the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2010 (SI 2010/1456) Regulation 2(6)(b).

¹² Better Regulation Commission, Energy Performance Certificates and Residential Properties, London BRC, 2007; and House of Lords Merits of Statutory Instruments Committee, 18th Report (2006–07 HC 92), para. 34.

¹³ This technique was recommended already in 2005 by the BRTF Report ‘Less is More’.

which provisions affect the life of UK citizens without being justified by the public interest. Consequently, UK environmental law underwent systematic scrutiny in 2011.¹⁴ Measures implementing European obligations are not touched by these instruments, but gold-plating is. In March 2012, the then Environment Secretary Caroline Spelman announced that

*Environmental regulations will be made simpler and more effective while remaining as strong as ever following a review of red tape.*¹⁵

As regards the specific policy on gold-plating, we can distinguish two main moments of development. A first document referring to gold-plating was the ‘Transposition Guide: How to Implement European Directives Effectively’ of the Regulatory Impact Unit.¹⁶ This document warned civil servants about gold-plating and defined this concept, as explained in the next section. Under this guide, any gold-plating should be justified against any costs or benefits that will arise from it.¹⁷

A year later, Tony Blair made a speech in which he evoked the need to end gold-plating.¹⁸ According to Blair, gold-plating was the result of a cultural attitude of civil servants. They were overzealous in transposing Union measures into national provisions. Blair stated: ‘We need to change that approach to end gold-plating of European regulations.’¹⁹ This speech, given to the Confederation of British Industry, symbolised the starting point of UK policy on gold-plating. As noted in the 2005 Cabinet Office Transposition Guidelines, government policy on transposition is to avoid gold-plating, unless there are exceptional circumstances justified by a *strong costs/benefits* analysis and *extensive consultation* with business.²⁰ Any gold-plating has to be explained in a so-called Impact Assessment and in the so-called Transposition notes and needs to

¹⁴ See www.redtapechallenge.cabinetoffice.gov.uk/home/index/ (last accessed March 2012).

¹⁵ Statement available at www.defra.gov.uk/news/2012/03/19/red-tape-challenge/ (last accessed March 2012).

¹⁶ Cabinet Office, Regulatory Impact Unit, *Transposition Guide: How to Implement European Directives Effectively*, 2003.

¹⁷ *Idem*, p. 17.

¹⁸ Thomas & Lynch-Wood (2008), p. 204, with reference to Tony Blair, Prime Minister’s Speech to the Confederation of British Industry, Birmingham, 18 October 2004.

¹⁹ Tony Blair, Prime Minister’s Speech to the Confederation of British Industry, Birmingham, 18 October 2004.

²⁰ Regulatory Impact Unit, *Transposition guide: how to implement European directives effectively*, Cabinet Office (2005), p. 5.

receive specific clearance from a Cabinet Committee.²¹ The 2005 Guidelines of the Regulatory Impact Unit of the Cabinet Office state:²²

From March 2005, Transposition Notes should contain an explicit comment on any over-implementation that has taken place during the transposition process. In the introduction to the Note, drafters should include one of the following statements: These regulations do what is necessary to implement the Directive, including making consequential changes to domestic legislation to ensure its coherence in the area to which they apply. [or, LS] These regulations do more than is necessary to implement the Directive in the following areas [...].

This shows that gold-plating has been proceduralised. The relevance of such a proceduralisation is clear when we consider that business has already challenged national legislation introducing gold-plating in the court, without previously consulting the relevant business categories.²³

Following the advice of the Davidson Review,²⁴ the UK policy was broadened also to cover existing domestic standards.²⁵ However, even under this second and ongoing phase, gold-plating is still allowed if justified by cost-benefit considerations and after extensive consultations with stakeholders. For example, in 2008, Thomas & Lynch-Wood reported that, during the transposition of the Energy Performance of Buildings Directive (around 2007), the government defended a case of gold-plating by stating that climate change is important enough to justify going further than European requirements.²⁶ The government called this case of gold-plating *green-plating*.

1.2.1.2 The Definition of Gold-Plating in the United Kingdom

Following the various developments of the UK policy on gold-plating, the government has been providing for an official definition of

²¹ *Idem*, p. 17.

²² *Idem*, Annex 1.

²³ Jans, Squintani et al. (2009), p. 430 with reference to the claim brought in 2007 by the Surveyors Professional Body against the Act transposing Directive 2002/91/EC of the European Parliament and of the Council on the energy performance of buildings (Energy Performance of Buildings Directive), [2003] OJ L 1/65. This directive is based on Article 175 EC (now Article 192 TFEU). The government suspended the entry into force of the provision in question in order to avoid the legal challenge.

²⁴ The Davidson Review (2006) makes reference to a Dutch report, showing the existence of some links between these two national policies. The report to which the Davidson Review refers is ECORYS, OpdenKamp Adviesgroep en Europa Instituut, Koppen op EG-regelgeving, Eindrapportage definitief, Rotterdam 2006.

²⁵ *Transposition Guide 2007*, Department for Business, Enterprise and Regulatory Reform, p. 28.

²⁶ Thomas & Lynch-Wood (2008), p. 199 with reference to Hansard HC Deb., vol. 460 col. 646 16 May 2007 (Yvette Cooper MP, Minister for Housing and Planning).

gold-plating in the Cabinet's transposition guidelines for Union legislative acts. This official document defines gold-plating as follows²⁷:

Gold-plating is when implementation goes beyond the minimum necessary to comply with a directive, by:

- *extending the scope, adding in some way to the substantive requirement, or substituting wider UK legal terms for those used in the directive; or*
- *not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or*
- *retaining pre-existing UK standards where they are higher than those required by the directive; or*
- *providing sanctions, enforcement mechanisms and matters such as burden of proof which are not aligned with the Macrory principles²⁸ (e.g. as a result of picking up the existing criminal sanctions in that area); or*
- *implementing early, before the date given in the directive. (N.B. Bringing implementation forward in the UK by a matter of weeks to coincide with a UK Common Commencement Date can be justified if it can be demonstrated that the benefit of early implementation outweighs the cost.)*

This shows that the constitutive elements of the concept of 'gold-plating' are:

- a) the presence of a Union directive, although the term 'beyond' does not limit gold-plating to the scope of application of the Union measure; and
- b) the presence of a more stringent regime than strictly required.

The latter requirement is not simply linked to the level of protection, but, in light of the background of this approach, it focuses also on the level of burdens.

1.2.2 The Netherlands and Gold-Plating

1.2.2.1 The Development of the Dutch Policy on Gold-Plating

Contemporarily to the UK government, the Dutch government started focusing on administrative burdens as early as 1975, when the Ministry of Economic Affairs established a working group collaborating with business associations to simplify the fiscal and social regulatory

²⁷ Department for Business, Enterprise and Regulatory Reform, *Transposition Guide 2007*, p. 28.

²⁸ R. Macrory, *Regulatory Justice: Making Sanctions Effective*, Final Report, November 2006, available at: www.berr.gov.uk/

framework affecting small and medium enterprises.²⁹ In 1998 the so-called Slechte Commission,³⁰ also called ‘Commission on Administrative Burdens’, was established to assess the extent of the administrative burdens phenomenon.³¹ The conclusions of the Slechte Commission were that administrative burdens had reached uncontrollable levels.³² Following the advice of the Slechte Commission,³³ the government increased its efforts to reduce administrative burdens.³⁴ As regards gold-plating, in addition to developing a specific policy, the government instituted the Advisory Board on Administrative Burdens’ (Actal) which,³⁵ since 2003, has been advising the government on cases of gold-plating.³⁶ It should be noted that Actal provides its advice only on an ad hoc basis since it has limited staff and budget.³⁷ Actal sets its own agenda.³⁸ A clear example of the influence of this body on gold-plating in the field of environmental law is provided by the case of the proposal in 2007 on a reporting duty on biomass for energy purposes, which never reached the Dutch Parliament due to the negative advice of Actal, and which explicitly stated that such a proposal was in contrast with the Dutch policy on gold-plating.³⁹

²⁹ Arendsen (2008), p. 134 with reference to Nijssen, *Dansen met de Octopus*, Een bestuurskundige visie op informatieverplichtingen van het bedrijfsleven in de sociale rechtsstaat, Uitgeverij Eburon, Delft, 2003.

³⁰ The chairman of the commission, J. Slechte, was a former senior executive at Shell: Voermans (2001), p. 225.

³¹ Arendsen (2008), p. 137.

³² Commissie Administratieve Lasten, *Regels zonder overlast*, Eindrapport van de Commissie Administratieve Lasten, The Hague, 25 November 1999.

³³ Arendsen (2008), pp. 139–140.

³⁴ Proceedings of the Second Chamber of the States General, Kamerstukken II 1999/2000 24 036, nr. 148.

³⁵ Initially established on the basis of Besluit van 30 maart 2000, houdende instelling van een Adviescollege toetsing administratieve lasten, Stb. 2000, 162, later amended, and not established on the basis of Besluit van 17 februari 2006 tot instelling van een Adviescollege toetsing administratieve lasten 2006, Stb. 2006, 138, finally amended by Stb. 2008, 259. This body will be further described in Section 1.2.4, below.

³⁶ For example, Advies van 10 januari 2002 concerning the incineration of waste, RL/ML/2002/009.

³⁷ Voermans (2001), p. 226.

³⁸ The *modus operandi* of Actal is described at www.actal.nl.

³⁹ Actal annual report 2007, p. 22. Actal considered that the legislative proposal introduced obligations not foreseen by Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, [2001] OJ L 283/33 and Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport, [2003] OJ

The Netherlands has indeed a specific policy on gold-plating. As regards this specific policy, (so far) we can distinguish four main moments of development. It was formulated in the Government Coalition Agreement of 2003.⁴⁰ The coalition agreement stated that the relationship between economic interests and environmental protection, which had been forgotten, needed to be re-established. On the one hand, green technologies and green taxes would be encouraged, while on the other hand, the Netherlands would be active at the Union level to increase the level of environmental protection. At the same time, the Netherlands would not introduce new rules going further than required, unless a specific Dutch problem required a specific Dutch solution.

As clearly indicated in the coalition agreement, the Dutch policy on gold-plating aims to take into account economic considerations when protecting the environment. However, only new cases of gold-plating were to be avoided. The *second* phase started around 2004–2005, when the policy was extended to any field of law and covered existing cases of gold-plating.⁴¹ Moreover, the policy was refined: gold-plating had to be avoided, unless a *specific* and *significant* Dutch interest required otherwise. In this second phase, the significance criterion has been added to the specificity criterion. These two formulations share reference to a ‘no gold-plating, unless’ regime. Therefore, gold-plating remains possible. The *third* phase started with the Government Coalition Agreement of October 2010. According to this agreement, gold-plating will be ‘tracked down and eliminated’.⁴² The jargon used by the government shows the increased aversion of the Dutch government to gold-plating. The ‘unless a specific and significant Dutch interest requires otherwise’ clause is no longer there. The coalition agreement seems to have changed the political regime applied to gold-plating from ‘no gold-plating, unless’ to ‘no gold-plating, regardless’. In 2011, the government even changed the Dutch Lawmaking Guidelines (in Dutch: *Aanwijzingen voor de regelgeving*)

L 123/42. Actal’s Opinion was not published due to the fact that the legislative proposal was not published either.

⁴⁰ See the Government Coalition Agreement of 2003, *Hoofdilijnenakkoord voor het kabinet CDA, VVD, D66*, 16 May 2003, p. 12.

⁴¹ Written Cabinet Statement to Industry 2004 (in the original Dutch: *Industriebrief hart voor de industrie*), Proceedings of the Second Chamber of the States General, Kamerstukken II, 2005/2006, 29 515, nr. 143 and 151. Later also Written Cabinet Statement to Parliament dd. 2 November 2007, reference number OI/O/7130085.

⁴² See Government Coalition Agreement of 30 September 2010, Freedom and Responsibility (*Vrijheid en verantwoordelijkheid*), pp. 13 and 14.

to explicitly refer to the Dutch policy on gold-plating.⁴³ Guideline 331 states that transposition should be limited to what is strictly necessary. Until 2011, this guideline was only concerned with avoiding delays. It was inserted after a series of major delays in the transposition of directives. These cases originated in the tendency to link the transposition of directives to reform of the subject covered by the relevant Union measures.⁴⁴ Today, this provision serves also to avoid affecting the competitive position of Dutch industry, as indicated in the explanatory note to Guideline 331. In 2012, during the preliminary phase of agreeing a proposal for an act regulating environmental and spatial matters conjunctively, the government stated that gold-plating in legal terms is now rare in the field of environmental and spatial law.⁴⁵ With the so-called Rutte II government, the fourth and current phase of Dutch policy on gold-plating started in autumn of 2012. This phase is characterised by uncertainty about the government attitude towards gold-plating. Indeed, there is no reference to gold-plating in the government agreement.⁴⁶ At the same time, the section of the agreement concerning nature conservation reports that Dutch nature conservation law will, where relevant, be brought into line with the level of protection required by the Birds Directive⁴⁷ and the Habitats Directive⁴⁸ and other regulations.⁴⁹ This duly occurred in 2016 with the introduction of the new Nature Protection Act (*Wet Natuurbescherming*) in January 2016.⁵⁰ This act eliminated almost all cases of gold-plating which still existed in this field of environmental protection after the many reforms that had already taken place following the introduction of the Dutch policy on gold-plating.⁵¹ The

⁴³ Prime Minister 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.

⁴⁴ For a discussion on the timely implementation of Union directives, see Polak (1990), p. 194.

⁴⁵ Letter from the Minister for the Environment and Infrastructure, Schultz van Haegen, of 9 March 2012 'Stelselwijziging Omgevingsrecht', reference number IENM/BSK-2012/21699, p. 21.

⁴⁶ Government Coalition Agreement of 29 October 2012, VVD–PvdA, 'Bruggen slaan'.

⁴⁷ Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, [1979] OJ L 103/1. Now recast by Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, [2010] OJ L 20/7.

⁴⁸ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, [1992] OJ L 206/7.

⁴⁹ Government Coalition Agreement of 29 October 2012, VVD–PvdA, 'Bruggen slaan', p. 38.

⁵⁰ Staatsblad 2016, nr. 34.

⁵¹ Squintani & Zijlmans (2013).

government agreement for the so-called Rutte III government, started in autumn 2017, follows this less defined approach. It simply states that gold-plating will be kept to a minimum.⁵²

1.2.2.2 The Definition of Gold-Plating in the Netherlands

In the Netherlands, gold-plating is referred to by the terms ‘*nationale koppen*’ or ‘*lastenluwe implementatie*’, which can be translated as *national toppings* and *burden neutral implementation*, respectively.⁵³ The Dutch government has not defined the term ‘national topping’ itself, but has adopted the definition provided in three studies: the so-called ECORYS report⁵⁴ and the Europa Instituut en Asser Instituut report⁵⁵ first, and the Deloitte Study⁵⁶ later. These reports were commissioned to determine whether Dutch law imposed obligations upon individuals that were not required by Union law.⁵⁷ The ECORYS report defined a national topping as:

*A measure which, in the presence of a Union directive which has been correctly implemented in the Netherlands, goes further than the minimum requirement if the directive pursued minimum harmonisation or, if the directive pursued total harmonisation, a measure that aims at the top of the space left by the directive or that introduces stricter standards than other Member States do where the directive allowed discretion as regards certain aspects of its implementation.*⁵⁸

⁵² Government Coalition Agreement of 10 October 2017, VVD–CDA–D66–CristenUnie, ‘Vertrouwen in de Toekomst’, p. 44.

⁵³ ECORYS, OpdenKamp Adviesgroep en Europa Instituut, *Koppen op EG-regelgeving. Eindrapportage definitief*, Rotterdam 2006; see also Europa Instituut en Asser Instituut, *National Koppen op EG-regelgeving. Tweede ronde van meldingen van het bedrijfsleven over ‘koppen’ in de Nederlandse wet- en regelgeving, juridisch bekeken*, Leiden 2007. For ‘burden neutral implementation’ see Deloitte Consulting BV, *Onderzoek naar lastenluwe implementatie van Europese regelgeving*, Augustus 2013, available as attachment to Proceedings of the Second Chamber of the States General, Kamerstukken II 2012/13 29 362, nr. 224.

⁵⁴ ECORYS, OpdenKamp Adviesgroep en Europa Instituut, *Koppen op EG-regelgeving. Eindrapportage definitief*, Rotterdam 2006.

⁵⁵ Europa Instituut en Asser Instituut, *National Koppen op EG-regelgeving. Tweede ronde van meldingen van het bedrijfsleven over ‘koppen’ in de Nederlandse wet- en regelgeving, juridisch bekeken*, Leiden 2007. This definition is also followed in the literature, for example Vogelesang-Stoute et al. (2009), pp. 34–35 and Dijkman, De Jonge & Post (2011), pp. 3–4.

⁵⁶ Deloitte Consulting BV, *Onderzoek naar lastenluwe implementatie van Europese regelgeving*, Augustus 2013, available as attachment to Proceedings of the Second Chamber of the States General, Kamerstukken II 2012/13 29 362, nr. 224 (Deloitte Study).

⁵⁷ Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 29 515 and 29 826, nr. 222, pp. 2 and 3.

⁵⁸ ECORYS report, p. 15. This is a liberal translation. The original text states: ‘In dit onderzoek wordt het begrip nationale kop als volgt gedefinieerd: Er sprake is van een

A passage from the Europa Instituut en Asser Instituut report indicates that the definition of national toppings provided in the ECORYS report was overly linked to the concepts of minimum and total harmonisation.⁵⁹ Accordingly, the Europa Instituut en Asser Instituut report tried to make the definition more functional by defining national toppings as:⁶⁰

*Cases where the Netherlands, through the correct implementation of Union directives, and in some case regulations, goes further than what is strictly necessary to implement the relevant Union directives.*⁶¹

The most important innovation of this definition is that it also covers cases where the Netherlands did not use a derogation clause. Although this classification provides for a better understanding of the concept of 'national topping', there is some incongruence among the various categories.⁶² In August 2013, Deloitte published a study on whether the Netherlands has implemented certain Union measures in a burden-neutral manner. In this study, the concept of 'burden-neutral implementation' is defined as:

*Dutch law implements Union measures with as few burdens as possible for the business addressed by the Union measure at hand. This means that the Dutch legislator makes use of the room allowed under the EU measure concerned to reduce burdens for business and avoids adopting additional measures leading to extra burdens for business. Burdens are defined as administrative costs, compliance costs, enforcement costs, restrictions and the costs deriving from long procedures.*⁶³

EG-richtlijn; Nederland deze heeft geïmplementeerd; Dit een correcte implementatie betreft; Deze implementatie a) bij minimumharmonisatie boven de minimumnorm van de richtlijn uitgaat; b) bij totale harmonisatie aan de bovenkant van de bandbreedte zit of bij gebruik van de beoordelingsvrijheid die de richtlijn biedt, stelt strengere normen dan andere lidstaten.'

⁵⁹ Europa Instituut en Asser Instituut report, p. 7.

⁶⁰ Idem, p. 8.

⁶¹ This is a liberal translation. The original text states: 'Er is sprake van een nationale kop indien: er sprake is van een EG-richtlijn (of een EG-Verordening die nog nadere uitvoering van de lidstaten vereist; Nederland deze heeft omgezet in nationaal recht; dit een correcte omzetting betreft; de Nederlandse regelgeving verder gaat dan gezien de Europese Richtlijn strikt genomen noodzakelijk is.'

⁶² Stoop (2012), p. 233.

⁶³ This is a liberal translation. The original text states: 'De Nederlandse wetgever implementeert EU-regelgeving met zo min mogelijk lasten voor de, door de richtlijn geadresseerde, bedrijven. Dit betekent dat de wetgever daarbij gebruikmaakt van beleidsruimte die het mogelijk maakt de lasten voor bedrijven te beperken en nalaat om aanvullende verplichtingen op te leggen die leiden tot extra lasten voor bedrijven. Lasten

The Deloitte Study also defined the concept of ‘burdens’ as:

- Costs deriving from the obligation to deliver information to public authorities (‘administrative costs’);
- Costs deriving from substantive obligations (‘compliance costs’);
- Costs suffered by business to comply with the information and substantive obligation deriving from the enforcement of legal provisions (‘enforcement costs’);
- Extra requirements by service providers or enforcement authorities, differences in national regulations which place Dutch businesses at a competitive disadvantage with businesses from other Member States, complex division of power between and within public authorities, etc. (so-called restrictions).⁶⁴

The main innovation of this definition is the strict link between the concept of ‘burden-neutral implementation’ and the personal scope of application of the Union measure concerned. The new definition seems to exclude cases in which the Netherlands regulates natural and legal persons not covered by the Union measure at hand. More generally, ‘burden-neutral implementation’ underlines that when more options are available to comply with Union law, the least burdensome one should be chosen.

In September 2013, the Dutch government seemed to have accepted this definition of ‘burden-neutral implementation’.⁶⁵ However, in November 2013, a written answer by the Ministry of Infrastructure and Environment to questions posed by the Dutch Parliament, in which the cases of gold-plating existing in the Netherlands in the fields of agriculture, nature conservation and fishery were discussed, made use of the definition introduced by the Europa Instituut en Asser Instituut report.⁶⁶ Neither the explanatory note to the proposal for the reform of nature

worden gedefinieerd als administratieve lasten, nalevingskosten, toezichtlasten, belemmeringen kosten verbonden met lange procedures.’

⁶⁴ Deloitte Study, p. 4.

⁶⁵ Proceedings of the Second Chamber of the States General, Kamerstukken II 2012/13 29 362, nr. 224, pp. 16 and 17

⁶⁶ Here, reference is made to the answer as such and to the memo attached to it, see Proceedings of the Second Chamber of the States General, Kamerstukken II 2013/14, *Aanhangsel van de handelingen* 442. The Dutch government had accepted the definition introduced by the Europa Instituut en Asser Instituut report in 2007, Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 29 515 and 29 826, nr. 222, pp. 2 and 3.

conservation law,⁶⁷ nor the explanatory note to the proposal for the reform of the whole of Dutch environmental legislation (the Environment and Planning Act)⁶⁸ make an explicit reference to the concepts of ‘national topping’ or ‘burden-neutral implementation’. In the latter document, it is only referred to the policy of not going beyond what is required by Union measures.⁶⁹ Yet, the reform of nature conservation law, culminated in the emanation of the Nature Conservation Act in 2016, treated all national measures, going beyond the Birds Directive and Habitats Directive in the same manner, regardless of whether they fell within or outside the scope of application of such EU acts. In the government agreement of 2017, the term ‘national topping’ is used explicitly.⁷⁰ At the moment of writing this chapter, it is unclear which definition the Dutch government follows. Looking at the approach followed under the Nature Conservation Act in 2016 and under the Environment and Planning Act, there seems to be little practical difference in the manner in which the Dutch government looks at the concept of ‘national topping’ and that of ‘burden-neutral implementation’. On the basis of these reports and of parliamentary documents referring to ‘national toppings’, the concept of ‘national topping’ covers cases where:

- Dutch law establishes stricter standards than those established by a Union measure
- The Netherlands does not take advantage of derogation clauses in a Union measure
- The goals of the Union measure are implemented earlier than required and this creates more burdens for industry
- The enforcement of the level of protection is stricter than that required by a Union measure explicitly regulating the enforcement regime

⁶⁷ Here reference is made to the explanatory memorandum of the amended proposal, published in June 2014, Proceedings of the Second Chamber of the States General, Kamerstukken II 2013/14, 33 348, nr. 5.

⁶⁸ Proceedings of the Second Chamber of the States General, Kamerstukken II 2013/14, 33 962, nr. 3. The expression ‘more burden neutral’ (*lastenluwer*) is used once without further specification. The Environment and Planning Act was adopted on 23 March 2016, *Wet van 23 maart 2016, houdende regels over het beschermen en benutten van de fysieke leefomgeving (Omgevingswet)* Stb 2016 nr. 156.

⁶⁹ Proceedings of the Second Chamber of the States General, Kamerstukken II 2013/14, 33 962, nr. 3, p. 36.

⁷⁰ Government Coalition Agreement of 10 October 2017, VVD–CDA–D66–CristenUnie, ‘*Vertrouwen in de Toekomst*’, p. 44.

- The Netherlands expands the field of application beyond the scope of a Union measure
- Dutch law interprets concepts left vague by the Union more stringently than required, or
- Dutch law adopts more stringent means or instruments to achieve a Union goal than is strictly necessary.⁷¹

An additional aspect of a national topping is that the measure concerned must affect the competitive position of Dutch companies. This requirement is based on economic considerations that, however, the two reports mentioned above did not consider as being a constitutive requirement of national toppings.⁷² The concept of ‘burden-neutral implementation’ covers these same measures with the uncertainty concerning cases in which the Netherlands regulates natural and legal persons not covered by the Union measure at hand. Given the great similarities between these two concepts it possible to conclude that in order to qualify as a ‘national topping’ or ‘burden-neutral implementation’ in the Dutch context, the following aspects are relevant:

- a) the presence of a Union directive;
- b) a correct implementation thereof; and
- c) the presence of a regime which is more stringent than strictly necessary.

The latter requirement is not simply linked to the level of protection, but, in light of the background of this approach, it focuses also on the levels of burden.

1.2.3 *The European Union and Gold-Plating: The Union Better Regulation Policy*

As opposed to the United Kingdom and the Netherlands, the European Union does not have a definition of gold-plating. However, it does have a policy stemming from Member States’ actions, which also concerns gold-

⁷¹ The Europa Instituut en Asser Instituut report does not classify this case as a case of national topping, Europa Instituut en Asser Instituut report, p. 14. However, the parliamentary discussions in the context of air quality law and nature conservation show that this aspect also falls within the concept of ‘national topping’; for example, Letter of the Secretary of State for Economic Affairs, Agriculture and Innovation, Henk Bleker, to the Dutch House of Representatives of 14 September 2011. See further, *infra*, in this section.

⁷² For example, ECORYS report, p. 14.

plating. Member States' actions aiming at reducing regulatory burdens did not only focus on national legislation. At the Union level, several Member States, including the United Kingdom and the Netherlands, expressed their concerns about the burdens flowing from Union law.⁷³ In response to these concerns, the European Union has launched a comprehensive better regulation strategy, following the Interinstitutional Agreement on Better Law-Making in 2003,⁷⁴ in the context of the Lisbon Strategy. This policy aims to simplify and improve existing regulation, to better design new regulation and to reinforce the respect and the effectiveness of the rules. Two important aspects of the Better Regulation policy are the simplification of the regulatory framework on the one hand and the reduction of administrative costs on the other.⁷⁵ In the context of simplification, the Commission has stated that:

*[...] layers of 'gold-plating' erode the simplifying effect of EU rules.*⁷⁶

Gold-plating plays a role in the better regulation policy. According to the Commission, gold-plating affects both transposition and implementation of Union law, and the quality of national and regional regulation. In the context of reducing the administrative costs, the Commission developed a model, the so-called European Standard Cost Model (EU SCM), which is based on the Dutch SCM, but which specifically takes account of gold-plating.⁷⁷ According to the Commission, it is important to establish who is responsible for administrative costs. It should be noted that the Commission did not consider a specific field of Union law. The positions expressed above do not concern environmental regulation in particular.

In its activities the Commission is assisted by an advisory body, the 'High Level Group of Independent Stakeholders on Administrative

⁷³ Haythornthwaite (2007), p. 21.

⁷⁴ Published in [2003] OJ C 321.

⁷⁵ Administrative costs are the sum of 'business costs', which are those costs not linked to regulations, and 'administrative burdens', which are a specific kind of regulatory burden representing the costs that business incurs to provide information to public authorities and which would not otherwise be incurred. See Commission Working Document, Measuring administrative costs and reducing administrative burdens in the European Union, COM(2006) 691 final, in particular Section 1.2. Administrative costs are categorised into: *Category A*, burdens from International and European law; *Category B*, burdens from International and European Law as implemented in a national legal order; *Category C* burdens from national law.

⁷⁶ Commission Working Document – Second progress report on the strategy for simplifying the regulatory environment, COM(2008) 33 final, 30 January 2008, p. 10.

⁷⁷ COM(2006) 691 final, pp. 6 and 7.

Burdens' (HLG).⁷⁸ This group delivered an opinion on gold-plating in the context of environment law in April 2009.⁷⁹ This opinion focused attention on the administrative burdens created by five environmental legislative acts⁸⁰ and concluded that 8% of the administrative burdens from the acts analysed was due to gold-plating.⁸¹ Although the HLG recognised that this figure is considerably lower than expected and that shared responsibilities means that Member States are allowed to maintain or introduce gold-plating,⁸² it concluded that 8% is a substantial amount and that therefore the Commission should request the Member States to investigate to what extent these additional obligations are creating an unnecessary burden and can be reduced or removed without affecting the effectiveness of national implementation of the Union legislation.⁸³

The position of the Commission brought gold-plating to the attention of the European Parliament and the Council. In a resolution dated 4 September 2007, the European Parliament stated that it:

*[...] deplores Member States' practice of 'gold-plating', and calls upon the Commission to investigate what further measures might be taken to prevent it, including the introduction of a right of direct action for citizens.*⁸⁴

As we can see, in this document, the European Parliament did not just make a simple statement; it also indicated specific measures to prevent

⁷⁸ Established by Commission Decision C(2007) 4063.

⁷⁹ This opinion is available at: http://ec.europa.eu/enterprise/policies/better-regulation/administrative-burdens/high-level-group/index_en.htm (last accessed March 2012).

⁸⁰ These five measures are: 1) Directive 2003/105/EC of the European Parliament and of the Council of 16 December 2003 amending Council Directive 96/82/EC on the control of major accident hazards involving dangerous substances, [2003] OJ L 345/97 (Seveso II); 2) Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, [2006] OJ L 190/1; 3) Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, [1996] OJ L 257/26; 4) Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (WEEE), [2003] OJ L 37/24; 5) Directive 2000/53/EC of the European Parliament and of the Council of 18 September 2000 on end-of life vehicles, [2000] OJ L 269/34.

⁸¹ HLG April 2009 Opinion, pp. 2 and 6. The burdens from gold-plating were estimated to cost EUR 58 million.

⁸² *Idem*, pp. 2–4. The HLG Opinion shows that the gold-plating of environmental measures counts for not more than 0.048% of the total burdens deriving from Union law.

⁸³ *Idem*, pp. 6 and 7.

⁸⁴ European Parliament resolution of 4 September 2007 on Better Regulation in the European Union (2007/2095(INI)).

gold-plating.⁸⁵ Finally, the Council stated in a resolution of 4 December 2007 that it:

*[...] invites the Member States to keep under review the options and discretions implemented in their legislation, limit their use (wherever possible) and report to the Commission on these findings.*⁸⁶

The position of the Council is more nuanced than that of the Commission and of the European Parliament. However, it is remarkable that these three Union institutions have expressed a negative opinion on gold-plating. In 2009 the Commission reported that, in the field covered by a selection of environmental measures, there were 135 national obligations to provide information not required by Union law against the 1178 obligations to provide information required by the Union environmental measures analysed.⁸⁷ Remarkably, the Commission did not recommend actions to limit gold-plating. In addition, in the 2010 Commission Communication ‘Smart Regulation in the European Union’, the Commission simply stated that it will investigate further the issue of gold-plating.⁸⁸ This seems a milder position than that previously expressed.

1.2.4 Cross-Fertilisation of Gold-Plating Policies and Definitions

The description in Sections 1.2.1, 1.2.2 and 1.2.3 reveals a certain degree of convergence in the content and temporal development of the Dutch, UK and Union policies. This is of course not a coincidence. At the Union level, the Dutch Presidency in 2004 characterised its mandate by focusing on better regulation. I argue that the Commission’s attention to gold-plating could be seen as a reaction to Member States’ allegations that Union law creates excessive burdens. The EU SCM refined the Dutch SCM to tackle gold-plating in order to establish who is responsible for the

⁸⁵ A similar position was stated by the European Parliament in: European Parliament resolution on the implementation, consequences and impact of the internal market legislation in force (2004/2224(INI)); and European Parliament resolution of 21 October 2008 on ‘better law-making 2006’ pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (2008/2045(INI)).

⁸⁶ 2836th Economic and Financial Affairs Council meeting – Brussels, 4 December 2007, Press Release.

⁸⁷ Commission working document, Reducing administrative burdens in the European Union – 2008 progress report and 2009 outlook, COM(2009) 16, Annex II. This statement is based on the HLG opinion presented above.

⁸⁸ COM(2010) 543.

administrative burdens.⁸⁹ It is therefore understandable that the Commission's attention to gold-plating appears diminished in its 2010 Communication, given that the HLG highlighted that gold-plating accounts for only 8% of the total burdens linked to Union legislation. The Commission had probably hoped for a higher figure in order to be able to reciprocate the allegation of increasing administrative burdens to the Member States.

In the United Kingdom, the Netherlands was adopted as a model for the United Kingdom to refine its policy on better regulation, especially as regards its focus, *inter alia*, on gold-plating. At the request of the UK government, the 'Less is More' report reviewed the main characteristics of the Dutch system and suggested following the Dutch example.⁹⁰ As regards gold-plating, the report states:

European legislation makes it harder to meet any national burden reduction target than would be the case were all laws to be created nationally, but the Dutch believe that they can achieve their target despite European legislation. [...] By reforming the domestic application of Directives, including removing any domestic additions to the core EU requirements, we could unilaterally reduce some aspects of the Administrative Burden, without the need for renegotiation at a European level. [...]

Moreover, Actal served as an inspiration for the Better Regulation Committee and the Better Regulation Executive.⁹¹

The comparison with the Netherlands in the 'Less is More' report is a symbol of the comparative approach adopted by these two countries with respect to better regulation in general and gold-plating in particular. Such a comparative approach explains the many similarities between these two countries in their policies on the reduction of administrative burdens and as regards the specific policies on gold-plating. Hence, it should not come to a surprise that also the official definitions of gold-plating in these two countries coincide.

To a large extent, the concepts used in the Netherlands and the United Kingdom are synonyms. Compared to the Dutch definition of national topping or burden neutral implementation, the only element lacking in the UK definition of gold-plating is that national law must correctly

⁸⁹ COM(2006) 691 final, pp. 6 and 7.

⁹⁰ Better Regulation Task Force: Regulation – Less is More. Reducing Burdens, Improving Outcomes. March 2005, pp. 4–6 and Annex C.

⁹¹ The BRTF based its advice to set up advisory bodies to serve the better regulation agenda on Actal, Better Regulation Task Force: Regulation – Less is More. Reducing Burdens, Improving Outcomes. March 2005, Annex C.

implement a directive. However, as regards the concept of ‘gold-plating’ this aspect can be inferred from the fact that the definition of gold-plating is located in the Government’s transposition guidelines. These guidelines aim at the correct implementation of Union law.⁹² Moreover, even if the UK Government’s transposition guidelines only focus on the transposition phase, it can be argued that the concept of ‘gold-plating’ also covers administrative and judicial measures, since from the point of view of industry, it does not matter what the legal nature of the act generating extra burdens is. Even from a temporal development of the definitions, there are similarities. In both countries, gold-plating initially focused on new cases. Around 2004 to 2005 in the Netherlands and in 2006 in the United Kingdom, the definitions were extended to cover existing standards. Finally, both countries followed ‘not unless’ regimes until 2010.

However, there are differences. Most importantly, the United Kingdom proceduralises gold-plating by requiring a costs/benefits analysis to be inserted in the Impact Assessments and by requiring extensive consultations with stakeholders. In the Netherlands, Actal provides advices on an ad hoc basis and consultations with stakeholder are held in some cases. However, there is no clear and systematic procedure to discuss gold-plating as exists in the United Kingdom. With the 2010 elections and the respective installations of the Cameron government in the United Kingdom and the Rutte government in the Netherlands, the differences increased. The Netherlands introduced a strong *political* ban on gold-plating where no exception seemed politically acceptable, at least officially. The United Kingdom, on the other hand, still allows gold-plating. Today, such differences seem to have been reduced once again.

As regards the differences between the national policies on gold-plating and the Union policy on gold-plating, the main difference is surely, that at Union level, gold-plating is still anchored in the Better Regulation policy. Gold-plating is taken into consideration due to its alleged effects on simplification and administrative burdens. This could explain why DG XI does not mention gold-plating in any of its documents. At a national level, gold-plating is mostly considered for its alleged negative effects on economic development and competitiveness. Today, the administrative burden dimension is only of secondary importance; in other words, gold-plating is rejected as such at the national level.

⁹² See also the first sentence of the definition referring to ‘what is necessary to comply with a directive’.

Despite this difference between national and Union policies on gold-plating, it is striking to see that the concept of ‘gold-plating’ has an overwhelming negative connotation at both national and Union level. This finding can only be understood by considering, as shown above, the strict linkage between gold-plating policies and better regulation agendas at national and EU level. These agendas have been developed by politicians in order to give attention to views expressed by one part of society, and one alone: business. Gold-plating is a business-centric concept, as reflected in the constitutive elements of this concept here presented.

1.2.5 *Refinement and Further Developments of the Concept of ‘Gold-Plating’*

In the period 2003–2006, a series of refinements of this concept appeared in the literature. A first distinction was made between *absolute* and *relative* gold-plating. The former means that national law goes further than required by Union law, while the latter means that national law transposes Union law more stringently than other Member States do.⁹³ In the Netherlands, another distinction was made between *ex-ante* and *ex-post* national toppings.⁹⁴ *Ex-ante* national toppings are where the national legislator maintains a measure which goes beyond what is required. On the other hand, *ex-post* national toppings are cases where the legislator introduces a new measure. As discussed above, in the United Kingdom, the concept of gold-plating covered pre-existing standards from 2006/2007.⁹⁵ Furthermore, UK authors distinguish between *justified* and *unjustified* or *unnecessary* gold-plating.⁹⁶ To this extent, gold-plating is justified only if the net benefits for the UK economy are higher than the costs.⁹⁷ Another refinement is that between *voluntary* and *inadvertent* gold-plating. Inadvertent gold-plating means that the gold-plating was not motivated or justified in consultation and through costs/benefits analyses, or that past justifications no longer suffice.⁹⁸ Finally, a particular kind of gold-plating created in the United Kingdom concerns an alleged tendency to force the Union legislator to pass legislation that would

⁹³ Ambler, Chittenden & Obodovski (2004), p. 6.

⁹⁴ Jans, Squintani et al. (2009).

⁹⁵ This was recommended in the Davidson (2006), p. 77, Recommendation No. 11. This recommendation was carried over in the Department for Business, Enterprise & Regulatory Reform, Transposition Guide 2007.

⁹⁶ Davidson (2006), p. 12.

⁹⁷ Ibidem.

⁹⁸ Ibidem.

otherwise have not been passed,⁹⁹ especially in cases where UK legislation had been passed shortly before the enactment of the offending Union measure.¹⁰⁰ Such a Member State is called *prime* or *first mover* and the results of its action are considered gold-plating.¹⁰¹

In addition to the concept of ‘gold-plating’, the concepts of *over-implementation* and *over-elaboration* are discussed in the United Kingdom. Over-elaboration was a term frequently used in the period 2003–2006.¹⁰² It means that the terminology used in a Union measure is adapted to the terminology used in a national legal system.¹⁰³ If a UK transposition act requires more words than the Union act in question, UK writers complain of over-elaboration or gold-plating.¹⁰⁴ These two terms are used as synonyms. Although the debate on over-elaboration has not yet ended, today, this term is no longer regarded as a synonym. Over-implementation is also often referred to as a synonym of gold-plating.¹⁰⁵ However, this concept is broader. It covers gold-plating, *double banking* – i.e. failing to streamline the overlap between legislation in force at national and Union level – and *regulatory creep* – i.e. uncertainty concerning regulation and guidelines and over-enforcement.¹⁰⁶

Among scholars, the term ‘gold-plating’ reached Union-wide attention thanks to the works of academics such as Weatherill, who in 2005 wrote an article on the factors broadening or limiting the impact of the Europeanisation of laws through harmonisation, referring to national legislative *spillovers* as gold-plating.¹⁰⁷ For Weatherill, when a national legislator applies a Union measure to a field falling outside the Union measure’s material or personal reach, it creates gold-plating.¹⁰⁸ Today, Union institutions use this term as well.¹⁰⁹ However, they do not specify

⁹⁹ Ambler, Chittenden & Obodovski (2004), p. 6.

¹⁰⁰ Davidson (2006), p. 78.

¹⁰¹ The UK approach in the context of the IPPC Directive and the ETS Directive has been referred to as an example of this tendency, Davidson (2006), p. 78.

¹⁰² Stephen (2004), p. 10 with reference to Bellis (2003) See also TPA Review of October 2008, Brussels or Whitehall: Locating the source of the UK’s regulatory burden.

¹⁰³ Ambler, Chittenden & Obodovski (2004).

¹⁰⁴ Stephen (2004), p. 10.

¹⁰⁵ Cabinet Office Transposition Guide 2003, p. 12.

¹⁰⁶ Davidson (2006), p. 12.

¹⁰⁷ Weatherill (2005), pp. 538–541.

¹⁰⁸ Idem, p. 539. This practice is also called ‘voluntary harmonisation’.

¹⁰⁹ For example, Commission Working Document – Second progress report on the strategy for simplifying the regulatory environment, COM(2008) 33 final, 30 January 2008, p. 10; and European Parliament resolution of 4 September 2007 on Better Regulation in the European Union (2007/2095(INI)). The Union policy on gold-plating is further discussed in Chapter 3.

what they mean by gold-plating. Recently, we can also encounter the concept of ‘gold-plating’ in other Member States. For example, in 2009 Burmeister & Staebe published an article on the limits of gold-plating during the transposition of Union directives in Germany.¹¹⁰ In this article they distinguish between *real* gold-plating and *false* gold-plating. The former refers to cases where national law establishes stricter requirements than those required by a Union directive, while the latter refers to cases where national law applies the regime established by a Union directive to a field falling outside that covered by the directive itself.¹¹¹

Further Developments: Spillovers and ‘Related’ Measures

In both the Netherlands and the United Kingdom, there seems to be a tendency to extend the discussion on gold-plating to the whole of the national law regulating matters not regulated by Union law. In 2011, the Cameron government started reviewing the whole of UK environmental law in the light of the so-called Red Tape Challenge.¹¹² In this context, all measures not required by Union law had to be justified in order to be maintained.¹¹³ Although from a terminological perspective the Government still distinguishes between *red taping* and ‘gold-plating’, the approach applied is comparable. As regards the Netherlands, between 2010 and 2013 it seemed that the Dutch government even considered measures falling outside the scope of application of Union law, but which were related to a topic regulated by the Union legislator, as ‘gold-plating’.¹¹⁴ Despite the fact that today this does no longer seem to be the case,¹¹⁵ it is clear that there is a tendency in the Netherlands and the United Kingdom to place a growing number of national measures not required by Union law at the same level. Whether in the UK this trend will continue is unclear at the moment, due to Brexit.

¹¹⁰ Burmeister & Staebe (2009). For Belgium (Wallonia), see Misonne (2011).

¹¹¹ Burmeister & Staebe (2009), pp. 445–446.

¹¹² Red tape means regulatory burden. See the dedicated website: www.redtapechallenge.cabinetoffice.gov.uk/home/index/ (accessed November 2011).

¹¹³ The *Red Tape Challenge* website distinguishes legislation not required by Union law with a Union Jack flag. Those required by Union law are indicated by an EU flag.

¹¹⁴ Brief Henk Bleker, Staatssecretaris EL&I aan de Tweede Kamer, *Aanpak Natura 2000*, (2011), no. 230499, 10. Squintani & Zijlmans (2013) 161.

¹¹⁵ This statement is based on the definition of burden neutral implementation discussed above and on the overview of existing cases of national toppings in the field of nature conservation available in Proceedings of the Second Chamber of the States General, Kamerstukken II 2013/14, *Aanhangsel van de handelingen* 442.

Within the context of this book, I will consider two kinds of national measures falling outside the scope of Union environmental measures, as falling within the concept of 'gold-plating'. First, so-called national *spillovers*, which concern measures where the legal regime of a Union environmental measure is applied to cases falling outside the scope of the Union measure concerned.¹¹⁶ For example, the IPPC Directive covered only certain big industrial installations.¹¹⁷ National measures applying the regime required by the IPPC Directive to small and medium industrial installations are *spillovers* and will be considered as 'gold-plating' in this book.

Second, cases where national law regulates matters which, although falling outside the scope of application of Union environmental law, are *related* to a Union environmental measure, will also be considered as 'gold-plating'. For example, the Habitats Directive applies only to habitats with a Community interest.¹¹⁸ National measures protecting nature reserves without Community interest can be considered to be measures related to the subject matter of the Habitats Directive, but not covered by such a directive.

1.3 More Stringent Protective Measures: A Definition

As written in the introduction to this book, Union environmental policy and law were introduced in the Treaty only with the Single European Act. Several Member States feared losing their sovereignty in a sensitive policy area. Article 130t EEC (today Article 193 TFEU) served to reassure the Member States that the level of environmental protection *remains* a national competence, at least partially, as the Union legislator can set a minimum level of protection, and subject to the limitation of having to respect the Treaties.¹¹⁹ This is the background in which the concept of

¹¹⁶ On this concept see, for example, Weatherill (2005). This practice is also called 'voluntary harmonisation'.

¹¹⁷ 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.

¹¹⁸ Article 1 in conjunction with, in particular, Article 2 of the Directive.

¹¹⁹ Jacqué (1986), p. 124 states that the clause in Article 193 TFEU was one of those introduced on request of the Federal Republic of Germany, with *Länder* and *Bundesrat* actually opposing the European Single Act because they feared losing competences over environmental policy (Nicolaysen [1988], p. 115). Germany insisted also on the introduction of a clause stating that the level of protection must be set at a 'high level'. Another clause thus inserted was the principle of subsidiarity.

‘more stringent protective measures’ was introduced in the environmental field by the first sentence of nowadays Article 193 TFEU stating:

The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures.

A closer look at the first sentence of Article 193 TFEU reveals that this provision introduces the concept of ‘more stringent protective measures’ by means of an obligation ‘not to prevent the adoption of more stringent protective measures’. This obligation is linked to the measures taken pursuant to Article 192 TFEU. Therefore, the addressee of this obligation is the Union legislator.¹²⁰ The Union legislator is not allowed to take measures restricting Member States from adopting more stringent protective measures. This conclusion cannot be challenged, as argued in the literature, by noting that Article 193 TFEU does not include a clause stating that measures taken pursuant Article 192 TFEU must establish minimum requirements, as Article 153(2) TFEU does.¹²¹ The absence of such a clause does not change the nature of the first sentence of Article 193 TFEU. It is an obligation ‘not to prevent Member States’, and thus it can only be regarded as addressing the Union legislator.

Despite the elapse of thirty years, scholars have not yet agreed about the meaning of this provision. The following three positions have been taken:

- a) Measures based on Article 192 TFEU must always pursue minimum harmonisation, and therefore more stringent protective measures of the Member States cannot be prohibited;
- b) Measures based on Article 192 TFEU may pursue total harmonisation, but more stringent protective measures by the Member States are still allowed under Article 193 TFEU; and
- c) More stringent protective measures are not allowed if a measure based on Article 192 TFEU pursues total harmonisation.

The prevailing doctrine holds that Article 193 TFEU has a fundamental legal value, meaning that Member State competence to adopt more stringent protective measures cannot be restricted.¹²² For some of these authors, Union secondary environmental law must always pursue

¹²⁰ Similarly, Wagner (2000), pp. 102 and 103, Lenz & Borchardt (eds.) (2003), p. 1765 and Trüe (2005), p. 145. Cf. Hofhuis (2006), p. 46.

¹²¹ For example, Hofhuis (2006), pp. 45 and 46.

¹²² Mainly, Winter (2000a), p. 380 Winter (2000b), p. 666.

minimum harmonisation.¹²³ If Union environmental measures pursue total harmonisation, then they are in violation of Article 193 TFEU and can be annulled.¹²⁴ The main argument is that secondary law cannot violate primary law.¹²⁵ This line of thought refers to the *Fornasar* case and the *Deponiezwirkverband Eiterköpfe* case for confirmation.¹²⁶ Both cases relate to waste management. Italian and German law, respectively, went beyond what was required by the relevant Union directives. The Court of Justice determined whether this was allowed by stating that the Community rules do not seek to effect *complete* harmonisation in the area of the environment. Another argument used is that Union measures based on Article 192 TFEU aim to achieve the environmental objectives of Article 191(2) TFEU. A prohibition to maintain or introduce more stringent protective measures would be in contrast with the legal basis of the European environmental measure concerned.¹²⁷ Jans & Vedder criticise this argument in light of Case C-64/09, *Commission v France*,¹²⁸ in which the Court of Justice confirmed that measures based on Article 192 TFEU may also pursue non-environmental objectives, which may restrict Member States from adopting more stringent protective measures.¹²⁹

A second group of academics agrees that Member States can always take more stringent protective measures, but argue that although Article 193 TFEU does not exclude total harmonisation, Member States are still allowed to take or maintain more stringent measures under Article 193 TFEU.¹³⁰ Their main argument is, again, that secondary law cannot restrict primary law. Moreover, according to Winter, Article 193 TFEU would have hardly any significance at all if applied only to minimum harmonisation. If a directive pursues minimum harmonisation, more stringent measures can already be taken in the directive itself, with no need to rely on Article 193 TFEU.¹³¹

¹²³ For example, Wagner (2000), pp. 102–103.

¹²⁴ Van Ooik (1999), p. 307.

¹²⁵ *Idem*, p. 307.

¹²⁶ Case C-318/98, *Criminal Proceedings against Giancarlo Fornasar, Andrea Strizzolo, Giancarlo Toso, Lucio Mucchino, Enzo Peressutti and Sante Chiarcosso*, [2000] ECR I-4785, para. 46; and Case C-06/03, *Deponiezwirkverband Eiterköpfe v Land Rheinland-Pfalz* [2005] ECR I-2753, para. 27.

¹²⁷ This argument is reported by Jans & Vedder (2012), p. 119.

¹²⁸ *Ibidem*.

¹²⁹ Case C-64/09, *European Commission v French Republic*, [2010] ECR I-3283.

¹³⁰ Sevenster (1992), pp.297–303.

¹³¹ Winter (1998) and Winter (2000b), p. 666 and B.W. Wegener, Answers to the Questionnaire redacted in the context of the Avosetta meeting of February 2009 in Monção, Portugal, available at www.avosetta.org

Finally, a minoritarian group of academics argue that Article 193 TFEU does not prevent the Union legislator from adopting total harmonisation measures, and that as consequence, Member States are not allowed to take more stringent measures that go beyond the level of harmonisation achieved. This view is firstly based on the argument that Article 193 TFEU is simply a codification of the legal practice at the time when the predecessor of Article 193 TFEU was inserted in the Treaty. It did not, thus, aim at restricting the powers of the Union legislator.¹³² The idea of a simple codification process is, however, difficult to reconcile with what was stated at the beginning of this section, namely that Article 130t EEC was established to reassure those Member States who stood to lose sovereign rights in this policy area. Jans & Vedder also argue that total harmonisation is possible because Article 193 TFEU cannot be interpreted as granting the Member States the power unilaterally and without the ex ante supervision of the Commission to disregard standards set by the Union legislator.¹³³ According to Jans & Vedder, this seems strange, particularly in view of the procedure set out in paragraphs 4 to 6 of Article 114 TFEU.¹³⁴ Jans & Vedder also claim that total harmonisation is possible under Article 192 TFEU on the basis of paragraph 61 of the *Deponiezweckverband Eiterköpfe* case,¹³⁵ stating that it is Union law that governs the competence of the national legislators with regard to the introduction of more stringent protective measures.¹³⁶ To this extent, Jans & Vedder conclude:¹³⁷

[...] how can the competence of the Member States to take more stringent environmental measures be 'governed' by European law, if the European legislature is not granted such competences [to restrict Member States competence to introduce more stringent measures, LS]?

In the 2012 edition of *European Environmental Law*, Jans & Vedder reinforced their position by reference to the *ERG-II* case,¹³⁸ in which national law was unable to rely on Article 16 of the Environmental Liability Directive,¹³⁹ which is similarly worded to Article 193 TFEU,

¹³² Krämer (1987), pp. 677–678; Jans (1989), p. 232, where he refers to *codification of the practice*; Jans (1991), p. 26; and Jans & Vedder (2008), p. 108.

¹³³ Jans & Vedder (2012), p. 119.

¹³⁴ *Ibidem*.

¹³⁵ Case C-06/03, *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz* [2005] ECR I-2753.

¹³⁶ Jans & Vedder (2008), p. 110.

¹³⁷ *Ibidem*.

¹³⁸ *Idem*, p. 121.

¹³⁹ 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.

because it was in contrast with the goal and the legal framework of the Directive.¹⁴⁰ Jans & Vedder conclude:¹⁴¹

As appears from this judgment, a Member State cannot rely on a 'more stringent measure' clause in a directive if this is incompatible with the explicit content of the directive itself. There is no reason why this judgment cannot be applied by analogy to Article 193 TFEU.

Hofhuis agrees that total harmonisation is possible under Article 192 TFEU, but follows a different route. In particular, this author relies on the Opinion of Advocate General Cosmas in the *Fornasar Case*,¹⁴² in which the Advocate General stated:¹⁴³

35 Article 130t of the EC Treaty specifically implements, in the context of environmental protection, the principle of subsidiarity, which governs Community policy in this field.

The principle of subsidiarity regulates the application of the competences established in the light of the principle of conferred powers,¹⁴⁴ and constitutes a limit to Union actions in the fields of shared competences.¹⁴⁵ It was inserted into the Treaty with the Single European Act,¹⁴⁶ and, until the Maastricht Treaty, it was enshrined in Article 130r(4) EEC, hence applied only within the context of environmental policy and law.¹⁴⁷ This principle leaves great discretion to the European Union.¹⁴⁸ As indicated by Konstadinides, the subsidiarity principle reflects the reluctance of the Union institutions and Member States to limit their freedom of action.¹⁴⁹ Consequently, this could explain why Hofhuis considers that Article 193 TFEU does not preclude total harmonisation.¹⁵⁰

¹⁴⁰ Joined cases C-379/08 and C-380/08, *Raffinerie Mediterranée (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others (C-379/08) and ENI SpA v Ministero Ambiente e Tutela del Territorio e del Mare and Others (C-380/08)*, [2010] ECR I-2007 (ERG II), paras. 65–67.

¹⁴¹ Jans & Vedder (2012), p. 121.

¹⁴² Hofhuis (2006), p. 54.

¹⁴³ Opinion of the Advocate General Cosmas in Case C-318/98, *Criminal Proceedings against Giancarlo Fornasar, Andrea Strizzolo, Giancarlo Toso, Lucio Mucchino, Enzo Peressutti and Sante Chiarcosso*, [2000] ECR I-4785, para. 35.

¹⁴⁴ Van Ooik (1999), p. 44.

¹⁴⁵ Cf. Lenaerts & Van Nuffel (2005), p. 104.

¹⁴⁶ Single European Act [1987] OJ L 169/1.

¹⁴⁷ Originally, it was formulated in more general terms, Lenaerts (1994), pp. 858–865.

¹⁴⁸ Konstadinides (2009), p. 121, referring to D. Wyatt, Examination of the Witnesses (Questions 1–19), House of Lords Select Committee on European Union (7 December, 2004).

¹⁴⁹ Konstadinides (2009), p. 121.

¹⁵⁰ Hofhuis (2006), p. 54.

Figure 1.1 The steps to rely successfully on Article 193 TFEU

I postulate that a middle ground between these three views is possible. Such a middle ground becomes evident by looking at the constitutive requirements of more stringent protective measures. As further discussed in the following sections, these grounds can be reduced to the following three, interconnected, requirements:

- Falling within the field of application of a measure based on Article 192 TFEU;
- Staying within the boundaries of the EU balance between environmental and non-environmental objectives; and
- Pursuing a higher goal or establishing a stricter means.

Together with the legality requirements discussed in Chapter 3, these requirements infer the steps that Member States need to comply with to rely successfully on Article 193 TFEU. Figure 1.1 provides a schematic overview of these steps.

Accordingly, I argue that Article 193 TFEU precludes the EU legislature from impeding the Member States to maintain or adopt more stringent protective measures, as also sustained by the majoritarian view presented above. In order to claim fulfilment of the first sentence of Article 4(3) TEU, the EU legislature must respect this duty – clearly spelled out in Article 193 TFEU – when adopting measures based on Article 192 TFEU. Yet not all national measures aiming at a higher level of environmental

protection than that pursued by the EU legislation under Article 192 TFEU can be considered more stringent protective measures within the meaning of Article 193 TFEU. Only when national law fulfils the constitutive requirements evincible from the wording of Article 193 TFEU and the case law of the Court of Justice, can Member States rely on the concept of more stringent protective measure in a way which is compatible with the third sentence of Article 4(3) TEU. This means that, as argued by the minoritarian view, the content of measures based on Article 192 TFEU limits Member States' power to establish unilaterally the height of the level of protection of the environment. Such limitations, as further discussed in the following sections, are not in conflict with primary law as Article 193 TFEU itself envisages them.

1.3.1 Falling within the Field of Application of a Measure Based on Article 192 TFEU

As shown by the first sentence of Article 193 TFEU, the Treaty links the concept of 'more stringent protective measures' to protective measures adopted on the basis of Article 192 TFEU. This means that more stringent protective measures based on provisions other than Article 192 TFEU are not covered by Article 193 TFEU. As stated by Jans & Vedder, Article 193 TFEU cannot be used to adopt protective measures taken pursuant to Treaty provisions, such as Articles 114, 207 or 43 TFEU.¹⁵¹

Moreover, since Article 193 TFEU refers to the generic concept of a 'measure' based on Article 192 TFEU, I agree with Krämer that it does not matter whether the measure adopted under Article 192 TFEU is a regulation, directive or decision. It is also not relevant which decision-making procedure is followed (Art. 192(1) or 192(2) TFEU).¹⁵² Kromarek suggests that environmental action programmes are also covered by this concept.¹⁵³ Moreover, the concept of 'measure' also covers international environmental agreements concluded by the European Union.¹⁵⁴ Under Article 191 TFEU, the Union has the objective of promoting measures at the international level to deal with regional or worldwide environmental problems, and in particular to combat climate change. The legal basis of the opening negotiations of the decisions, providing negotiating directives, authorising the signing and concluding of international agreements

¹⁵¹ Jans & Vedder (2012), p. 114.

¹⁵² Krämer (2011), p. 114.

¹⁵³ Kromarek (1988), p. 84.

¹⁵⁴ Similarly, Krämer (2011), p. 114.

is Article 192 TFEU.¹⁵⁵ Under Article 216(2) TFEU, once an international agreement has been concluded by the Union, its provisions are binding upon its Member States as a matter of Union law.¹⁵⁶ When Member States are a party to such international agreements as well, these are so-called [environmental] mixed agreements. As indicated in the *Demirel* case,¹⁵⁷ the provisions of mixed agreements are Union obligations for the Member States insofar as they fall within the scope of Union competences.¹⁵⁸ Under Union law, they are measures adopted under Article 192 TFEU.

Article 192 TFEU allows the Union legislator to enact legislation to achieve the objectives referred to in Article 191 TFEU. Among the objectives listed, there is an objective of *preserving, protecting and improving* the quality of the environment. The reference only to '*protective measures*' in Article 193 TFEU caused academics to wonder whether Article 193 TFEU also covers measures aimed at '*preserving and improving*'.¹⁵⁹ According to Krämer, this is the case because a clear distinction between these objectives cannot be drawn.¹⁶⁰ I agree with Krämer on this point: it is indeed difficult to state whether, for example, measures aiming at preventing environmental damage under the so-called Environmental Liability Directive should be considered as measures for preserving or protecting the environment. The concept '*protective measures*' under Article 193 TFEU seems sufficiently broad also to cover preserving and improving measures.

From the above, we can conclude that the *first* constitutive requirement of a more stringent protective measure is that it must fall within the field of application of a Union measure based on Article 192 TFEU. This, however, raises questions about what the field of application of a Union environmental measure is, something which is not easy to establish at times.¹⁶¹

¹⁵⁵ For example, Council Decision 2002/628/EC authorising the conclusion of the Convention on Biological Diversity Council Decision of 25 June 2002 concerning the conclusion, on behalf of the European Community, of the Cartagena Protocol on Biosafety, [2002] OJ L 201/48.

¹⁵⁶ Van Rossem (2012), p. 66. See also Case C-104/81, *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, [1982] ECR 3641, para. 13.

¹⁵⁷ Case C-12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd*, [1987] ECR 3719.

¹⁵⁸ Van Rossem (2012), p. 70 with reference to Case C-459/03, *Commission of the European Communities v Ireland*, [2006] ECR I-4635 (*Mox Plant*).

¹⁵⁹ Krämer (2011), p. 114.

¹⁶⁰ *Ibidem*.

¹⁶¹ Jans & Vedder (2012), p. 98.

The scope of a Union environmental measure must be assessed on the basis of an analysis of the personal, material, geographical and temporal scope of a specific measure. Sometimes, a Union environmental measure explicitly states that it does not cover a certain matter. If a national measure regulates these matters, then the Court of Justice does not consider it as being a more stringent protective measure. For example, this has been stated in the *ERG* case concerning the Environmental Liability Directive.¹⁶² This Directive applies to certain cases of environmental damage. The Directive explicitly states that, *inter alia*, it does not apply to damages caused by actions that ended before 30 April 2007.¹⁶³ An Italian measure seemed also to apply to damages caused by actions that ended before 30 April 2007, with the issue being whether this was compatible with the Directive. During the dispute, it was claimed that the Italian measure was a more stringent measure under Article 16 of the Directive, which is worded similarly to Article 193 TFEU. The Court of Justice approached the case by clarifying that damage caused by actions that ended before 30 April 2007 was a matter governed by national law in compliance with the rules of the Treaty and without prejudice to other secondary legislation.¹⁶⁴ In this case, the Court of Justice assessed the claim based on the concept ‘more stringent measure’ only to the extent that the Italian measure applied to damages caused by actions that ended after 30 April 2007. Since Article 16 of the Directive is worded similarly to Article 193 TFEU, I see no reason why the rule established in this judgment should not apply to measures adopted under Article 193 TFEU.

The scope of application of a Union environmental measure is also influenced by the objectives of the measure concerned. Its objectives are usually stated in the regulation or directive itself. For example, the Habitats Directive aims at contributing to ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies (Article 2). Accordingly, national measures aiming at protecting the beautiful natural scenery of a certain habitat cannot be viewed as measures falling within the scope of the Habitats Directive. It should be noted

¹⁶² Case C-378/08, *Raffinerie Mediterranée (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others*, [2010] ECR I-1919 (ERG).

¹⁶³ See Article 17 of the Environmental Liability Directive.

¹⁶⁴ Case C-378/08, *Raffinerie Mediterranée (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others*, [2010] ECR I-1919 (ERG), paras. 44 and 59.

that the analysis of the objective of a Union legislative act should take into account all the values that were taken into consideration while establishing the Union act,¹⁶⁵ including those that were implicit.

Despite some unclarity, a national measure extending the legal regime established for a part of the subject matter of a Union environmental measure to another part of that subject matter constitutes a more stringent protective measure. Indeed, it is relevant to note that Article 193 TFEU refers to the concept of ‘measure’ as a whole. This approach seems to be confirmed in the *Nationale Raad van Dierenkwekers en Liefhebbers* case.¹⁶⁶ In this case, the Court of Justice was called upon to decide whether a national prohibition on importing, holding or trading in mammals listed under Annexes B, C and D to the EU regulation implementing the Convention on International Trade in Endangered Species of Wild Fauna and flora (CITES)¹⁶⁷ could be justified. The Regulation only applies this regime to mammals listed under Annex A. The Court of Justice responded that:

*As regards, specifically, the prohibition on the commercial use of specimens of species in Annex B to Regulation No 338/97, the Court has already held that that prohibition constitutes a more stringent measure for the purposes of Article 176 EC [today Article 193 TFEU, LS] (Tridon, paragraph 49). That is also true as regards specimens of species in Annexes C and D to that regulation, as the regulation does not contain any specific provision laying down a general prohibition on their commercial use.*¹⁶⁸

The Court continued by stating that the same findings are all the more compelling as regards specimens of species which are not covered by Regulation (EC) No 338/97, as there has been no adoption of any harmonisation measure at the Union level prohibiting their commercial use. Accordingly, the Court of Justice correctly relied on Article 193 TFEU, despite the fact that the commercial use of the species in question in the main proceeding had not been prohibited at the Union level, because

¹⁶⁵ Holwerda (2011), p. 45.

¹⁶⁶ Case C-219/07, *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat*, [2008] ECR I-4475. The reasoning in the *Nationale Raad van Dierenkwekers en Liefhebbers* case was confirmed in Case C-100/08, *Commission of the European Communities v Kingdom of Belgium*, [2009] ECR I-140 summary publication, para. 67 of the Dutch version of this judgment, which is available in full only in Dutch and French.

¹⁶⁷ Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, [1997] OJ L 61/1.

¹⁶⁸ Case C-219/07, *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat*, [2008] ECR I-4475, para 19.

these species are covered by the CITES Regulation. Indeed, Article 1 of the Regulation refers to all species of wild flora and fauna.

A consequence stemming from this requirement is that a national measure must be of the same *type* as the EU measure at hand in order to fall under Article 193 TFEU. Indeed, if the EU legislator has regulated one specific kind of measure, the other measures must be considered as not having been regulated and hence as falling under national law. Reliance on Article 193 TFEU in such cases is not only unnecessary, but also impossible due to the lack of a benchmark. Of course, there are cases in which, despite regulating only one specific kind of measure, the EU legislator intended to regulate other kinds of measures as well, by simply precluding them. This consideration is particularly important in regard to the emissions trading system (ETS) Directive. By establishing a cap-and-trade system to achieve cost-effectiveness, it can be argued that the EU legislator intended to exclude all other types of measures to reduce greenhouse gas emissions from the installations covered by the ETS Directive. The manner in which the EU legislator has regulated the relationship with the, nowadays, Industrial Emissions Directive,¹⁶⁹ shows the relevance of this statement. Indeed, the ETS Directive excludes the applicability of permit requirements limiting CO₂ emissions as regards installations covered by both Directives.¹⁷⁰ If the cap-and-trade instrument serves to achieve, next to a reduction of greenhouse gases, cost-effectiveness,¹⁷¹ the introduction of instruments regulating greenhouse gases from ETS installations other than cap-and-trade, can hardly be considered to respect the balance established by the EU legislature, which is the second constitutive requirement as discussed in the next section.¹⁷²

1.3.2 *Staying within the Boundaries of the EU Balance between Environmental and Non-Environmental Objectives*

Article 193 TFEU only covers ‘more stringent’ protective measures. Accordingly, one should determine when a national measure is ‘more stringent’ than the protective measures taken pursuant to Article 192

¹⁶⁹ 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.

¹⁷⁰ Article 9(1) of the IE Directive. On this topic, Squintani, Holwerda & De Graaf (2012), pp. 67–88.

¹⁷¹ Article 1 of the ETS Directive.

¹⁷² Squintani, Holwerda & De Graaf (2012), pp. 67–88.

TFEU. In this context, there is nowadays little discussion in the literature that national law must follow the same objectives as the Union measure based on Article 192 TFEU in respect of which the national legislator wants to introduce stricter standards.¹⁷³ Given that, under the principle of conferral,¹⁷⁴ measures based on Article 192 TFEU must follow, as their main objective,¹⁷⁵ the goals indicated under Article 191 TFEU, i.e. environmental protection, this means that the national measure relying on Article 193 TFEU must pursue the same environmental objective as the Union measure at hand.¹⁷⁶ The German *Deponiezweckverband Eiterköpfe* case illustrates this point.¹⁷⁷

This case concerns four national requirements that were alleged to be more stringent than required by the so-called Landfill Directive.¹⁷⁸ The first and the third requirements were linked to the goal of the Directive. As regards the first requirement, German law established a stricter reduction target for organic waste remaining in waste accepted in landfill than that required by Article 5(2) of the Directive. The Court of Justice stated that such a measure clearly pursues the same objectives as the Directive (paragraph 38). As regards the third requirement, German law regulated biodegradable and non-biodegradable organic waste, while Article 5(1) and (2) of the Directive covered only biodegradable waste. In addition, in this case the Court of Justice responded that the German measure in question pursued the same objectives as the Directive. After having established that the national measures pursued the same objectives as the Directive, the Court of Justice concluded that they *constituted* a more stringent protective measure – a reinforced (*verstärkte*) protective measure in the original German version of the judgment – for the purpose of Article 193 TFEU (then Article 176 EC). In this case, the Court of Justice seems to interpret the German version – and by doing so also the French (*renforcée*) and the Italian (*rinforzata*) versions – of Article 193

¹⁷³ In the past, the requirement of ‘following the same direction’ and ‘being of the same type’ were contested by Sevenster, who in 1992 stated that goal and type are not requirements imposed by Article 193 TFEU (then Article 130t EEC), but by the proportionality principle, Sevenster (1992), p. 285.

¹⁷⁴ Article 5(1 and 2) TEU.

¹⁷⁵ For example, the seminal judgments in Case C-300/89, *Commission of the European Communities v Council of the European Communities*, [1991] ECR I-2867 and Joined Cases C-164/97 and C-165/97, *European Parliament v Council of the European Union*, [1999] ECR I-1139.

¹⁷⁶ See also Krämer (2011), p. 115.

¹⁷⁷ Case C-6/03, *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*, [2005] ECR I-2753.

¹⁷⁸ Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste, [1999] OJ L 182/1.

TFEU, in such a way that the requirement to pursue the same objective becomes a prerequisite of more stringent protective measures.¹⁷⁹

Further, next to the environmental objectives, non-environmental objectives, such as economic development and social security, are relevant for the qualification of a national measure as a more stringent protective measure under Article 193 TFEU. Article 191(3) TFEU states:

In preparing its policy on the environment, the Union shall take account of:

- available scientific and technical data,
- environmental conditions in the various regions of the Union,
- the potential benefits and costs of action or lack of action,
- *the economic and social development of the Union as a whole and the balanced development of its regions.* [author's emphasis]

As the last bullet shows, Union policy on the environment shall take account of the economic and social development of the Union as a whole. The clause in Article 191(3) TFEU refines the principle of integration and inverse integration,¹⁸⁰ now codified by Article 7 TFEU, stating that the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers. In the structure of Title XX TFEU, this clause finds its way into Article 193 TFEU. Accordingly, to qualify as a 'more stringent protective measure', a measure must accord with *all* the Union objectives of the Union measure at hand, environmental and non-environmental, in a balanced manner.

This reasoning seems to be confirmed in the *ERG II* case.¹⁸¹ The *ERG II* case considers the implementation of the Environmental Liability Directive in Italy. This directive aims at establishing a framework for environmental liability based on the 'polluter pays' principle, to prevent and remedy environmental damage (Article 1). Article 7 of the Directive allows competent authorities to decide in cooperation with the relevant operators which remedial measures should be implemented. Moreover,

¹⁷⁹ According to Hofhuis, the French, German and Italian versions suggest a closer relationship between the Union measure and the national measure than the English, Spanish (*mayor*) and Dutch (*verdergaande*) versions, Hofhuis (2006), p. 53.

¹⁸⁰ On the principle of integration, see Jans (2010).

¹⁸¹ Joined cases C-379/08 and 380/08, *Raffinerie Mediterranée (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others (C-379/08) and ENI SpA v Ministero Ambiente e Tutela del Territorio e del Mare and Others (C-380/08)*, [2010] ECR I-2007 (*ERG II*).

the competent authority is required in any event to invite any person on whose land remedial measures are to be carried out to submit their observations and must take them into account. In the context of the remediation of the environmental damage occurred in the Rada di Augusta, in Sicily, Italian authorities imposed reparatory measures without hearing the operators who should have undertaken these measures and the owner of the field where the reparatory measures were to be taken. Before the Court of Justice, the Italian measure was described as a more stringent measure under Article 16 of the Directive, which as stated above, is worded similarly to Article 193 TFEU. The Court of Justice stated:

'[. . .] a Member State cannot validly rely on Article 16(1) of Directive 2004/35, that is, the pursuit of the same objective of protecting the environment as laid down in the directive (see Case C-6/03 Deponiezweckverband Eiterköpfe [2005] ECR I-2753, paragraph 41), if it maintains or adopts provisions or authorises a practice enabling the competent authority to disregard, [. . .], the operators' right to be heard and the obligation to invite the persons on whose land remedial measures are to be carried out to submit their observations and, [. . .] (paragraph 65).'

In *ERG II*, the Court of Justice considered the operator's right to be heard and the right of the persons whose land was affected by remedial measures to submit their observations, as laid down in Article 7 of the Environmental Liability Directive, as a minimum level of protection guaranteed by the Environmental Liability Directive, which according to the Court of Justice cannot reasonably be called into question.¹⁸² The rights referred to by the Court of Justice in this case are social rights contributing to the social development of Europe as a whole.¹⁸³ The explicit reference to paragraph 41 of the *Deponiezweckverband Eiterköpfe* case, in which the requirement to pursue the same objectives as the Union measure is declared, confirms that social values can contribute to meeting the criteria to qualify as a more stringent protective measure.

In the light of Articles 7 and 191(3) TFEU, a similar reasoning can be applied to economic goals. To qualify as 'a more stringent protective measure' national law must not only follow the primary environmental objectives of a Union measure, but must also be in line with any secondary, non-environmental goals it contains. This ensures that the national legislator respects the balance struck by the Union legislator between

¹⁸² *Idem*, para. 66.

¹⁸³ Article 41 of the Charter of Fundamental Rights of the European Union, [2016] OJ C 202/389.

environmental, economic and social values. Sincere cooperation between the Union and the Member States is also enhanced by such an approach. To sum up, I argue that to qualify as ‘a more stringent protective measure’ national law must pursue the same objectives as those pursued by the Union legislator, in a balanced manner.

It goes without saying that in order to qualify as ‘a more stringent protective measure’, national law must not only *pursue* the same objectives, but must also be *in accordance* with the Union measure concerned. A closer look at *Deponiezweckverband Eiterköpfe* and *ERG II* cases confirms this.

In the *Deponiezweckverband Eiterköpfe* case, as regards the use of different methods to assess the amount of organic matter remaining in waste accepted in landfills and about the fact the German law also covered certain kinds of non-municipal waste while the relevant provisions of the Directive covered only municipal waste, the Court of Justice stated that these measures were compatible (‘in keeping’) with the Directive. Concerning the assessment of organic matter, the Court of Justice stated that these measures constituted a more stringent protective measure only after having stated that the measures were in keeping with the Directive. In regard to the covering of non-municipal waste, the Court of Justice stated that the measure concerned, which pursued the same objectives as the Directive, but covered more kinds of waste than the Directive, was compatible with the Directive and constituted a more stringent protective measure.

In *ERG-II* the Court of Justice explicitly did not consider a national measure pursuing the general objective of a Union measure but disregarding its operational framework, a ‘more stringent protective measure’.¹⁸⁴ The measure imposed by the Italian authorities was adopted without applying the criteria for determining the ‘best’ recovery measure, as laid down in Annex II of the Directive, in order to speed-up the remediation action. As mentioned above, the Court of Justice responded that:

¹⁸⁴ Joined cases C-379/08 and 380/08, *Raffinerie Mediterranée (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others* (C-379/08) and *ENI SpA v Ministero Ambiente e Tutela del Territorio e del Mare and Others* (C-380/08), [2010] ECR I-2007 (ERG II). See also Case C-281/11, *European Commission v Republic of Poland*, ECLI:EU:C:2013:855, para. 71 in which the Court of Justice stated that the national measure concerned was a more stringent protective measure and thus could not be considered as being in contrast with the Directive at hand.

[...] a Member State cannot validly rely on Article 16(1) of Directive 2004/35, that is, the pursuit of the same objective of protecting the environment as laid down in the directive [...] if it maintains or adopts provisions or authorises a practice enabling the competent authority to disregard, [...], the obligation to carry out a detailed examination of the potential options for environmental recovery [as established in Annex II, LS].¹⁸⁵

In this case, the Court of Justice concluded that a national measure adopted by the competent authority without following the operational framework set out in Article 7 and Annex II of the Environmental Liability Directive could lead, *contrary to the objectives laid down in the directive*, to an inappropriate assessment of the significance of the damage and/or the remedial measures which should be taken.¹⁸⁶ This prevented Italy from validly relying on Article 16 of the Directive, which has a similar formulation to Article 193 TFEU. I see no reason why this reasoning should not apply to Article 193 TFEU.

1.3.3 Establishing a Higher Goal or Stricter Means

There is no discussion in the literature about the requirement that, in order to fall under Article 193 TFEU, a national measure must come closer than the Union in achieving the goals under Article 191 TFEU.¹⁸⁷ This requirement covers the following two aspects. First, it covers measures establishing a higher (more ambitious) *goal*. For example, in the *Deponiezweckverband Eiterköpfe* case, one of the German measures fixed lower thresholds for organic waste remaining in waste accepted in land-fill than the Directive did (paragraph 34, last sentence). Second, it covers measures providing more stringent *means* or *instruments* than those required by the Union measure. For example, in the *Windmills* case an Italian regional measure introduced a *general* prohibition on the building of windmill parks in and near areas covered by the Natura 2000 network.¹⁸⁸ This measure was claimed to be more stringent than that required by Article 6(3) of the Habitats Directive. This provision only

¹⁸⁵ Joined cases C-379/08 and 380/08, *Raffinerie Mediterranée (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico and Others (C-379/08) and ENI SpA v Ministero Ambiente e Tutela del Territorio e del Mare and Others (C-380/08)*, [2010] ECR I-2007 (ERG II), para 65.

¹⁸⁶ Such a measure would have been accepted only if the competent authority could have demonstrated the grounds justifying there being no need for a detailed examination in the light of those criteria, or that it was not possible to carry out such an examination due, for example, to the urgency of the environmental situation.

¹⁸⁷ Krämer (2011), p. 115.

¹⁸⁸ Case C-2/10, *Azienda Agro-Zootecnica Franchini srl and Eolica di Altamura Srl v Regione Puglia*, [2011] ECR I-6561 (*Windmills*).

prohibits projects if, after an appropriate assessment, it is shown that the project adversely affects the integrity of the site concerned. Both measures pursue the same goal, namely that of ensuring the conservation of a Natura 2000 site, but the instruments were different.¹⁸⁹ The Court of Justice clearly stated that the Italian measure constituted a more stringent protective measure under Article 193 TFEU (paragraph 52).

It is understood that if the field of application of a Union environmental measure partially or wholly overlaps with the field of application of another Union environmental measure, the national measure in question must go further than the aggregated level of protection required by the two Union environmental measures concerned. For example, national provisions imposing upon operators of certain industrial activities an obligation to draw up a document setting out their major accident prevention policy and produce a safety report fall under the fields of application of both the Environmental Liability Directive and the so-called 'Seveso II Directive'.¹⁹⁰ The Environmental Liability Directive does not oblige the Member States to impose such measures.¹⁹¹ However, for those operators covered by the Seveso II Directive, the duties to have a major accident prevention policy and to produce a safety report are *not* more stringent protective measures, since such measures are required under Articles 7 and 9 of the Seveso II Directive.

1.3.4 'More Stringent Protective Measures' or 'More Stringent Measures'?

While the Treaty refers to the concept of 'more stringent protective measures', secondary law usually refers to the concept of 'more stringent measures'. Yet the latter category of measures can be considered as a specification of the former. It is not a separate category of measures. Therefore, I agree with Jans & Vedder that the concept of 'more stringent protective measures' in Article 193 TFEU covers measures going further

¹⁸⁹ In this section, I used the terms 'instrument' and 'means' to avoid using confusion with the term 'type' used in Section 1.3.1. In the *Windmills* case we have an example of a national measure using a different instrument than the one required by the EU measure (*specific* appropriate assessment versus *generic* appropriate assessment), without breaching the requirement of being of the same type. Both instruments are a form of appropriate assessment.

¹⁹⁰ Council Directive 96/82/EC of 9 December 1996 on the control of major-accident hazards involving dangerous substances, [1997] OJ L 10/13.

¹⁹¹ Article 5 of the Directive allows competent authorities to require operators to take measures to prevent environmental damage from occurring.

than required and not only measures going further than allowed.¹⁹² The reason for this conclusion is the following.

Distinct from Article 193 TFEU, minimum clauses in secondary Union environmental law are mostly addressed to the Member States. These clauses usually state that Member States are *allowed* to take more stringent measures.¹⁹³ This seems to indicate that Member States have an incontestable *right* to adopt more stringent measures. This begs the question as to how these clauses relate to Article 193 TFEU. In line with the general rule that secondary Union law must be interpreted in line with primary Union law, I argue that minimum clauses in secondary Union law must be regarded as a manner by which the Union legislator fulfils its obligation under Article 193 TFEU, showing compliance with Article 4(3) TEU. Therefore, minimum clauses in Union directives and regulations can be regarded as a restatement of Article 193 TFEU and are meant to reassure the Member States that the Union legislator has not restricted the Member States' right to introduce or maintain more stringent measures. Minimum clauses in secondary law use a different wording than that used in Article 193 TFEU only because minimum clauses are addressed to the Member States, while Article 193 TFEU is addressed to the Union legislator.

It should be noted that reassuring the Member States that their right has not been eliminated by the Union legislator is not the only role that minimum clauses play. Under the principle of sincere cooperation in Article 4(3) TEU, the Union and the Member States must, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The second sentence of Article 193 TFEU states that more stringent protective measures must be compatible with the Treaties, which requires complex analysis. Minimum clauses in secondary law can be regarded as the way by which the Union legislator assists the Member States in their task, in this case a competence protected under

¹⁹² Jans & Vedder (2012), pp. 114 and 115, with reference to Case C-6/03, *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz*, [2005] ECR I-2753, para 44 and Case C-100/08, *Commission of the European Communities v Kingdom of Belgium*, [2009] ECR I-140 summary publication, in particular paras. 60, 66 and 67 of the Dutch version of this judgment. To the contrary, although more implicitly, Winter (1998) and Winter (2000b), p. 666 and B.W. Wegener, Answers to the Questionnaire redacted in the context of the Avosetta meeting of February 2009 in Monção, Portugal, available at www.avosetta.org.

¹⁹³ Minimum clauses in Union environmental law are analysed further, *infra*, Chapter 3, Section 3.3.

Title XX TFEU. They increase legal certainty. This topic will be further elaborated in Chapter 3.¹⁹⁴

In the following, when I refer to more stringent protective measures, I am referring to both more stringent protective measures and more stringent measures.

1.4 Gold-Plating: A Misleading Overarching Concept

After having analysed the various elements of, on the one hand, the concept of 'more stringent protective measures' and, on the other hand, the concept of 'gold-plating', it is possible to compare the scope of application of these two concepts. As discussed in Section 1.4.1, at first glance, these two concepts could be considered as synonyms, or, at least, it could be argued that gold-plating is an overarching concept including the concept of 'more stringent protective measures'. This is misleading and, as further explained in Chapter 2, it can jeopardise the functioning of the system of environmental protection envisaged by the Treaties.

1.4.1 Gold-Plating as an Overarching Concept

Section 1.2 has indicated which measure can be considered gold-plating. On the basis of the information provided in Section 1.3, it is possible to write a similar enumeration for more stringent protective measures. Table 1.1 represents schematically the various measures considered more stringent protective measures and those considered gold-plating.

As we can see from Table 1.1, not all cases of gold-plating are more stringent protective measures. Firstly, more stringent protective measures under Article 193 TFEU do not cover cases where a Member State does not take advantage of exceptions. The general idea accepted in the literature is that using opt-out clauses results in *less* stringent protection.¹⁹⁵ For example, Article 8(3) of the CITES Regulation¹⁹⁶ states:

Exemption from the prohibitions referred to in paragraph 1 may be granted by issuance of a certificate to that effect by a management authority of the Member State in which the specimens are located, on a case-by-case basis where the specimens [fall under one of the categories thereafter indicated, LS].

¹⁹⁴ On the links between minimum clauses and the review of the lawfulness of more stringent protective measures see further, *infra*, Chapter 2, Section 2.1.

¹⁹⁵ For example, Veltkamp (1998), p. 188 and Jans & Vedder (2012), p. 114, footnote 64. See also Misonne (2011), p. 198.

¹⁹⁶ Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, [1997] OJ L 61/1.

Table 1.1 Schematic comparison of measures covered by the concepts of gold-plating and MSPMs

Measures covered by the two concepts	Gold-plating	MSPMs
<i>Extending the scope of application of the legal regime introduced by Union law</i>	Yes	Depends
<i>Substituting wider national legal terms for those used in the Union law</i>	Yes	Depends
<i>Interpreting concepts left vague by the Union more stringently than strictly required</i>	Yes	Depends
<i>Adopting means to achieve a Union goal that are more stringent than strictly necessary</i>	Yes	No
<i>Not taking full advantage of derogations clauses</i>	Yes	No
<i>Adding in some way to the substantive requirement</i>	Yes	Depends
<i>Implementing a provision before the date given in the directive</i>	Yes	Depends
<i>Retaining or introducing national standards that are higher than those required by the directive</i>	Yes	Yes
<i>Enforcing a level of protection more strictly than required by a Union measure explicitly regulating the enforcement regime</i>	Yes	Yes

Article 8(3) is formulated as an exception with respect to Article 8(1). The relevance of this finding for the distinction between gold-plating and more stringent protective measures is visible by looking at the *Tridon* case.¹⁹⁷ Mr. Tridon is a trader who between November 1995 and November 1997, sold to partners or customers captive born and bred specimens of species of macaw occurring in the overseas département of Guyane (France). France, which had made use of this exception, had prosecuted Mr. Tridon for breaching Article 6(1) of the old CITES Regulation, which is worded similarly to Article 8(1) of the new CITES Regulation. After noticing that Article 8(3) of the Regulation only establishes an exception and that France had not used it, the Court of Justice did not assess the national measure in light of the free movement of goods as required by the national court. This can only be explained by concluding that the

¹⁹⁷ Case C-510/99, *Criminal Proceedings against Xavier Tridon*, [2001] ECR I-7777.

Court of Justice considered French law nothing more than the implementation of the Regulation, and that national law did nothing more than what was required by Union law. French law in this case established gold-plating, but not a more stringent protective measure.

Another example would be Article 8(4) of the Environmental Liability Directive allowing Member States to exempt operators from bearing the costs of preventive and reparatory measures if they duly operate their installations in accordance with the requirements of a permit.¹⁹⁸ The decision not to implement this exception qualifies as gold-plating, because burdens not required by Union law are imposed. However, a national measure not taking advantage of the option to exempt operators from bearing the costs of remediation measures does not qualify as 'a more stringent protective measure', because national law is *less* stringent than the required minimum level. Accordingly, Article 17.16(4) of the Dutch Environmental Management Act (EMA),¹⁹⁹ which states that the State can refrain from recovering the costs of a remedial action from an operator if these costs cannot be reasonably imposed upon the operator,²⁰⁰ is a case of gold-plating but it is not a more stringent protective measure. Dutch law adds a reasonability test and operators cannot recover from the State the costs they incurred themselves. This increases the burdens upon business, but it does not increase the level of protection of the environment required by the Union legislator. The same applies to the measures adopted by Austria, Belgium (at federal level), Bulgaria, Germany Hungary, Ireland, Poland, Romania and Slovenia, which by 2010 had not implemented the option under Article 8(4) of the Environmental Liability Directive.²⁰¹

Similarly, Article 7 of the Birds Directive establishes that, under certain conditions, species listed in Annex II may be hunted under national legislation. If Member States do not use this option, they do not keep burdens to a minimum. In the Netherlands, the Birds Directive allows the hunting of thirty-one species.²⁰² Section 3.20 of the Nature

¹⁹⁸ 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.

¹⁹⁹ *Wet milieubeheer*, Stb. 1979, 442, many times amended.

²⁰⁰ According to the government, this option comes close to a non-transposition of Article 8(4), see Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/2007, 30 920, nr. 7, p. 8.

²⁰¹ Based on the implementation report of the Commission, COM(2010) 581 final.

²⁰² Annex II/1 and Annex II/2 of the Directive.

Protection Act²⁰³ allows hunting for five species only,²⁰⁴ four of which are covered by the Birds Directive. This is because the Dutch parliament considers hunting as having lower importance than nature conservation.²⁰⁵ A similar approach was followed in other countries, although in a more limited form.²⁰⁶ In these cases national law is a case of gold-plating, but it is not an example of more stringent protective measure.

This finding is perfectly in line with the fact that these two concepts – i.e. more stringent protective measures and gold-plating – focus on different objectives. As indicated above, the concept of ‘more stringent protective measures’ focuses on environmental protection, while gold-plating focuses on economic values.

Secondly, the concept of ‘more stringent protective measures’ under Article 193 TFEU does not always cover cases where Member States adopt stricter means to achieve a Union goal than otherwise possible. If Union environmental law leaves discretion with respect to the methods and means of achieving a Union goal, any choice by a Member State that ensures compliance with the Union goal is seen as a correct implementation of the Union measure, regardless of whether the method chosen by the Member State is stricter than would have otherwise been possible. For example, the Air Framework Directive established *emission* limit values for certain pollutants into ambient air.²⁰⁷ It thus established a clear goal that the Member States had to achieve. However, the Member

²⁰³ *Wet van 16 december 2015, houdende regels ter bescherming van de natuur*, Stb. 2016, 34.

²⁰⁴ It should be noted that Dutch law allows hunting in the context of the prevention of damage (Article 9 Directive). This is regulated under Sections 3.12–3.19 of the Nature Protection Act.

²⁰⁵ See the discussion that took place during the parliamentary debate of the Flora and Fauna Act (*Flora- en Faunawet*, Stb. 1998, 402), which the Nature Protection Act replaces, Proceedings of the Second Chamber of the States General, Kamerstukken II 1995/96, 23 147, nr. 7, p. 20 with further reference to Proceedings of the Second Chamber of the States General, Kamerstukken II 1993/94, 22 980, nrs. 4 and 7.

²⁰⁶ For the period 1981–1991 see the implementation report of the Commission, COM(93) 592 final, pp. 58–62. For example, Belgium reported that only eight of the thirty-one species listed in Annex II of the Directive can be hunted in Flanders or Wallonia. For other periods see COM(2000) 180 final, pp. 15–17; COM(2002) 146 final, pp. 15–17; Report to the Commission on the implementation of Directive 79/409/EEC on the Conservation of Wild Birds, Part II. Summary of the national reports by the Member States, Update for 2002–2004, pp. 24–27 (Commission Report 2002–2004); and Report to the Commission on the implementation of Directive 79/409/EEC on the Conservation of Wild Birds, Part II. Summary of the national reports by the Member States, Update for 2005–2007.

²⁰⁷ Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, [1996] OJ L 296/55.

States were left with an almost completely free choice as to how to achieve this goal.²⁰⁸ For example, until 2009,²⁰⁹ the Netherlands applied the limit values directly to any decision of a competent authority affecting air quality, unless otherwise provided.²¹⁰ Limit values had to be respected by any decision affecting air quality. In such a system, if the project contributed to worsening an already bad situation, the permit had to be refused. A study performed in 2006 at the request of the Commission shows that France often adopted measures to reduce industrial and power plant emissions, Germany and Italy predominantly adopted measures aiming to reduce emissions from road traffic and Spain mostly undertook studies.²¹¹ Studies are surely less burdensome than measures restricting road traffic or industrial activities. Accordingly, assuming that the less stringent regimes pursued in other Member States were equally applicable in the Netherlands, the Dutch approach followed until 2009 could be considered a case of gold-plating. At the same time, the Dutch regime in force until 2009 cannot be considered a more stringent protective measure.

Similarly Article 3 of the so-called Old Waste Directive required Member States to take appropriate steps to encourage the prevention, recycling and processing of waste, the extraction of raw materials and energy therefrom, and any other process for the reuse of waste.²¹² It also indicated which measures were available.²¹³ Member States could employ studies and factual measures, such as campaigns promoting recovery, to fulfil Article 3 of the Directive. Alternatively, Member States could adopt measures regulating the production of products and their

²⁰⁸ These goals are established by means of limit values inserted in so-called daughter directives; see further, *infra*, Chapter 2, Section 2.2.3.

²⁰⁹ See Section 5.16(1)(d) EMA which provides that public authorities exercising certain listed competences can exercise such competences only if the act to be taken is indicated in the National Cooperation Programme on Air Quality, entered into force in 2009, or when they do not contrast with it (Section 5.16(1) EMA. Schippers & Besselink (2009), pp. 75 ff., par. 4). Limit values are directly applied only in the context of a series of cases exhaustively listed in Section 5.16(2) EMA.

²¹⁰ Stb. 2001, 269, for example, Sections 5 and 6 on sulphur dioxide.

²¹¹ Nagl, Moosmann & Schneider (2006), p. 49.

²¹² Council Directive 75/442/EEC of 15 July 1975 on waste, [1975] OJ L 194/39.

²¹³ (1) Rules concerning the use of products which might be a source of technical difficulties as regards disposal or lead to excessive costs; (2) rules encouraging the reduction in the quantities of certain waste, the treatment of waste for recycling and reuse, the recovery of raw materials and/or the production of energy from certain waste; (3) rules on the use of certain natural resources, including energy sources, in applications where they be replaced by recovered materials.

packaging to prevent waste. Member States could also take measures encouraging recovery, such as a duty to dispose of paper separately from glass. Assuming that all the above-mentioned measures could fulfil the obligation under Article 3 of the Directive, it is clear that a Member State adopting the latter two kinds of measures imposed more burdens than Member States performing studies or promotional campaigns. The Netherlands belong to the former group. Article 3 of the Old Waste Directive was transposed by means of an extended legal framework, aiming to avoid waste rather than solving the problem of waste disposal.²¹⁴ Most importantly, Dutch law allowed the government to take measures restricting the production or commercialisation of environmentally unfriendly products,²¹⁵ and to take measures restricting how waste was collected and processed, including measures establishing return systems and separate collection systems. In the 1990s, the Netherlands introduced what is now called ‘extended producer responsibility’ in Section 10.5a of the Environmental Management Act.²¹⁶ In summary, the Netherlands adopted an extended legal framework targeting operators in the field of waste, waste producers and product producers, established targets and made plans to achieve them. Although Union law remained mostly vague as to the measures to be taken to prevent and recover waste, it is clear that the legal framework described above should be considered as measures which do not keep burdens to a minimum. Extended producer responsibility was not mentioned in Union law until 2008, when the so-called New Waste Framework Directive recast this field of EU environmental law.²¹⁷

The same applies to cases where national law interprets a concept, left vague in a Union environmental measure, relatively stringently. In the absence of a clarification by the Court of Justice on the meaning of the Union law, any national interpretation must be regarded as implementing Union law. However, if a Union environmental measure requires a specific instrument to be used by the Member States, but it explicitly or

²¹⁴ Proceedings of the Second Chamber of the States General, *Kamerstukken II* 1974/75, 13 364, nrs. 1–3, pp. 68 and 74.

²¹⁵ Indeed, the government only took a few measures on the collection of certain materials, such as glass and paper, and products, such as refrigerators, as reported by Neuerburg & Verfaillie (1991), p. 353.

²¹⁶ Here reference is made to the text of the EMA as amended by Stb. 1993, 283. The EMA was renumbered shortly thereafter, Stb. 1994, 80.

²¹⁷ 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.

implicitly allows the adoption at a national level of stricter instruments, national law falls within the concept of ‘more stringent protective measures’. Such reasoning cannot be applied, by definition, to vague concepts in Union law. For example, Articles 23 and 24 of the so-called Air Quality Directive require the drawing up of a plan to achieve the limit values established by the Union legislator.²¹⁸ Member States are free to choose the measures to be prescribed in such plans. This means that some Member States could prescribe stricter measures than other Member States. This would be a case of gold-plating, but not one of more stringent protective measures. Things are different in the context of measures aiming at protecting sensitive population groups. Articles 23 and 24 of the Air Quality Directive state explicitly that these kind of measures are additional. A national measure implementing such options presents a case for more stringent protective measures.

It should be noted that while it is possible to establish whether a national approach is stricter than required, it is extremely difficult to establish whether a national approach is indeed more stringent than strictly necessary. National law providing for instruments that are stricter than strictly necessary, are often the consequence of clauses in Union environmental directives such as ‘appropriate measures’ or ‘necessary measures’. These clauses are usually linked to the achievement of a goal, but leave scope for discretion as to the means that Member States employ. Vague concepts in Union law also leave space for discretion as to their interpretation. External comparison – i.e. between Member States – and internal comparison – i.e. between legal acts in the same legal field/order – can provide guidance to establish whether a Member State went further than strictly necessary. At the same time, what constitutes an ‘appropriate measure’ in the Netherlands may be more stringent than what constitutes an appropriate measure in Finland. Moreover, what is appropriate today and the hand of the current environmental situation might differ from what will be appropriate tomorrow. In the example made above concerning air quality law, in the absence of more precise information about the concrete circumstances in which the national measures were adopted, it is not possible to state whether the approach followed by Spain, for example, suffices to meet Union law.

²¹⁸ Directive 2008/50/EC of the European Parliament and of the Council on ambient air quality and cleaner air for Europe, [2008] OJ L 152/1.

Thirdly, the concept of ‘more stringent protective measures’ under Article 193 TFEU does not cover all national measures extending the scope of application of a Union measure. It depends what is meant by extending the scope of a Union measure. If it means applying the legal regime established by the Union measure to subjects or matters not covered by the Union environmental measure, then it is only possible to speak of gold-plating, because we do not have a Union measure to which the national measure can be compared. Consider, for example, the so-called IPPC Directive.²¹⁹ Its scope is to prevent and control pollution generated from a listed number of industrial activities (Article 1). If a Member State decided to apply the IPPC regime to an industrial activity not listed in Annex I to the IPPC Directive, this measure would not qualify as ‘a more stringent protective measure’, but only as ‘gold-plating’.²²⁰ When the EMA 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.²²¹ Dutch law focused on establishments and not on installations.²²² When more industrial installations belong to the same establishment, they are regulated by the same permit.²²³ In 2005 the Dutch legislator saw no reason to change the existing system and recognised that in certain cases the so-called Integrated Pollution Prevention and Control regime of the IPPC Directive, which covers only certain industrial installations, would have been applied upon non-IPPC installations.²²⁴ Accordingly, this case can be considered one of gold-plating, but not one of more stringent protective measure.

²¹⁹ 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.

²²⁰ At the time of writing, the Court of Justice has not expressed its opinion on this matter.
²²¹ Teekens (2005), pp. 13 and 14.

²²² On the meaning of the concept of ‘*inrichting*’ see Van der Veen (2005), p. 143 and Ba’tmeijer & De Vries (2005), p. 139. On the relationship between the concept ‘installation’ and the concept ‘establishment’ see Van ’t Lam, Jurgens & Michiels (2002), in particular chapters 2 and 3.

²²³ Section 1.1(1) EMA and Section 1.1(4) EMA read in conjunction with Section 8.1 EMA (today Section 2.1 GAEP).

²²⁴ Proceedings of the Second Chamber of the States General, Kamerstukken II 2003/04, 29 711, nr. 3, p. 13 and Proceedings of the Second Chamber of the States General, Kamerstukken II 2003/04, 29 711, nr. 6, p. 4.

Similar reasoning can be applied to national measures substituting broader national terms than those used in a directive,²²⁵ and to measures ‘adding in some way’ to its substantive requirements. These national measures will also not qualify as ‘more stringent protective measures’ if the broader national term covers cases falling outside the field regulated by the Union environmental measure concerned.

Instead, if by extending the scope, the extension of the regime applied by a Union environmental measure to a subject or matter not covered by that legal regime, but still falling within the field of application of the Union environmental measure at hand, this qualifies as ‘a more stringent protective measure’ and ‘gold-plating’. For example, the CITES Regulation.²²⁶ This regulation aims at protecting any species of wild fauna and flora (Article 1). However, the Regulation offers a more specific kind of protection for certain species.²²⁷ Some species are not specifically regulated at all.²²⁸ If a Member State decides to extend the legal regime that the Regulation establishes for Annex A to species not explicitly regulated by the Regulation, this extension will qualify as ‘a more stringent protective measure’.²²⁹ This is because the wording used to describe the scope of the Regulation is sufficiently broadly formulated to allow such an extensive interpretation.

All other measures are covered by the concept of ‘more stringent protective measures’ and ‘gold-plating’. However, it should be remembered that national measures qualify as ‘more stringent protective measures’ only if they follow the same objective as the Union measure and are of the same type. Hence, if the national law maintains or introduces national standards which are higher than those required by Union law for a *different purpose* or by means of a *different legal instrument* from a directive, this qualifies as ‘gold-plating’ but not of ‘more stringent protective measures’. As regards the requirement of following the same objective, we can build upon the previous example of the CITES

²²⁵ For example, the proposed substitution of the Dutch term ‘*inrichting*’ for the term ‘*installatie*’. Proceedings of the Second Chamber of the States General, Kamerstukken II, 2003–2004, 29 711, nr. 2, p. 2 and 3.

²²⁶ Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, [1997] OJ L 61/1.

²²⁷ See Annexes A, B, C, and D, to Regulation 338/97.

²²⁸ Case C-219/07, *Nationale Raad van Dierenkwekers en Liefhebbers VZW and Andibel VZW v Belgische Staat* [2008] ECR I-4475. In this case, Belgian law applied a completed prohibition of any commercial use for species not listed in Regulation 338/97.

²²⁹ *Idem*, para. 19.

Regulation. If national law extends the legal regime adopted by the CITES Regulation for Annex A species to all other species, national law qualifies as 'a more stringent protective measure' only if the national measure is to increase the level of protection provided for these endangered species. If the same measure had been taken for the purpose of preventing exotic species from impacting on native species, I believe that it does not qualify. This is because the national measure concerned falls outside what would be regulated by the CITES Regulation, as the regulation does not aim to protect native species from invasive aliens. In this example, national law qualifies as gold-plating because the national measure extends the field of application of the legal regime of the CITES Regulation to a different aim from that regulated by the CITES Regulation, and by doing so it increased the burdens upon industry and citizens.

As regards the condition that national law must use the same type of measure as in Union law, we can use, for example, the Air Quality Directive. This Directive aims at, *inter alia*, defining and establishing objectives for ambient air quality designed to avoid, prevent or reduce harmful effects on human health and the environment as a whole (Article 1). This is done by means of measures limiting the amount of pollutants in the ambient air. Article 23 of the Directive allows the Member States to take into consideration sensitive groups of the population while establishing their plans to fulfil the obligations in the Directive. The Netherlands uses this possibility, but with a 'Dutch twist'. Section 5.16 EMA allows the Government to pass an order regulating the assessment of building projects increasing the number of sensitive people exposed to air pollution in areas where limit values are potentially or actually exceeded. This happened with the Governmental Order on Sensitive Locations.²³⁰ This order states that, for example, schools, nurseries and healthcare centres (not including hospitals) must be built at a minimum distance of 300 m from national roads and 50 m from provincial roads if they are located in areas where limit values have been (or are at risk of being) exceeded.²³¹ Since, as discussed further in Chapter 3, the directives do not focus on the number of people exposed to air pollution, my opinion is that this is a case of gold-plating falling outside the scope of application of the Air Quality Directive. In cases such as the one just described, national law qualifies as 'gold-plating' only, since the burdens on industry are increased.

²³⁰ *Besluit gevoelige bestemmingen*, Stb. 2009, 14.

²³¹ This order only applies to sites built after 16 January 2009.

The above shows that in all cases where national law qualifies as ‘a more stringent protective measure’ it also qualifies as ‘gold-plating’. Basically, gold-plating covers three kinds of measures:

- a) Measures not keeping burdens to the minimum, such as when Member States do not take advantage of exceptions;
- b) More stringent protective measures; and
- c) Spillovers and ‘related measures’.

My view is that it is difficult to imagine any more stringent protective measure that does not qualify as ‘gold-plating’.²³² This explains why institutions at Union and national level, industry and academics use the concept of ‘gold-plating’ as an overarching concept. The concept contains national measures that qualify as ‘gold-plating which is more stringent protective measures’, on the one hand, and ‘gold-plating which is not more stringent protective measures’, on the other. This practice, however, does not take sufficient account of the rationale underlying the two concepts here analysed, as further discussed in the next section.

1.4.2 *Revealing the Misleading: Gold-Plating and the Functioning of the System of Environmental Protection Envisaged by the Treaties*

A closer look at the constitutive elements of, on the one hand, the concept of ‘more stringent protective measures’ and, on the other hand, the concept of ‘gold-plating’, shows that both concepts are based on three main conditions: 1) the presence of a Union measure, 2) the correct transposition thereof, and 3) the stringency of the legal regime. However, the conditions defining the concept of ‘more stringent protective measures’ are formulated more restrictively. More precisely, the concept of ‘more stringent protective measures’ applies only to national measures falling within the scope of application of the Union measure. The concept of ‘gold-plating’ seems also to apply to national measures outside the scope of a Union measure – i.e. national spillovers and measures regulating matters related to the Union measure concerned. In addition, the concept of ‘more stringent protective measures’ requires national law to follow all the objectives of the Union measure in a balanced manner. Finally, and most importantly, the concept of ‘more stringent protective measures’ regards the stringency of the legal regime from the perspective of the level of environmental protection. On the other hand, the concept of gold-plating is related to the level of burdens inflicted on

²³² This would imply a stricter national environmental measure which lowered the burdens on industry. Theoretically possible, but hard to find in real life!

Table 1.2 Schematic overview of the conditions for establishing MSPMs and gold-plating

Conditions	MSPM	Gold-plating
<i>Presence of a Union norm</i>	falls within the scope of application	falls within the scope; or extend the scope, or somehow linked to it
<i>Correct implementation thereof</i>	follows all objectives of the Union measure, in balanced manner	respects the minimum level of protection
<i>Stringency of the legal regime</i>	higher goals; or stricter means to achieve the Union's goals	more requirements, therefore higher burdens for business

industry and citizens. Table 1.2 provides a schematic representation of this comparison.

In the light of this comparison, we can confirm what was already evident at the hand of the comparison made in Section 1.4.1, namely that more stringent protective measures and gold-plating are *not* synonymous. More importantly, the focus on burdens in the definition of gold-plating has the potential to deprive the concept of 'more stringent protective measure' of one of its constituent requirements: 'a higher level of environmental protection'. A higher level of environmental protection is a burden for business, at least in general terms.²³³ Gold-plating policies and the gold-plating concept is business centric. Moreover, it mostly focuses on the costs of environmental protection for business, under estimating the potential benefits that environmental regulation can have for business. Chapter 4 will show how costs/benefits analyses used in the United Kingdom to establish whether gold-plating is justified do not take environmental benefits into sufficient account.

The use of gold-plating as an overarching concept, or even worse as synonym of more stringent protective measures, can erode the foundation of the system of environmental protection envisaged by the Treaties, namely, that environmental protection remains primarily a Member State's responsibility. As stated in the introduction to this book, shared competences in the field of environmental protection means that Member States have to protect the environment and certain measures have to be taken by the Union.²³⁴ As regards the level of environmental

²³³ This aspect is further discussed in Chapter 4.

²³⁴ Krämer (2011), p. 440.

protection, the Court of Justice has established that since Member States may adopt stricter measures, Union environmental measures do not need to be based on the highest level of environmental protection that is technically possible.²³⁵ As stated in the literature, this shows that the European system of environmental protection is based on the idea that Member States will adopt stricter measures.²³⁶ The concept of gold-plating, and the business-centric approach pursued therewith, has the power to block the adoption of more stringent protective measures.

Empirical evidence from the Netherlands confirms this. Since the introduction of the Dutch policy on gold-plating in 2003,²³⁷ Dutch law has been systematically reformed so as to remove gold-plating, especially in the fields of nature conservation and ambient air quality. For example, in the field of waste management, provisions promoting extended producer responsibility are mostly limited to fields already covered by Union measures. While the return system for tyres can be considered a more stringent protective measure,²³⁸ the measures taken in the field of batteries,²³⁹ electric and electronic equipment,²⁴⁰ scrap vehicles,²⁴¹ packaging, paper and cardboards²⁴² serve to implement Union directives.²⁴³ The Dutch government decided that, for the moment, it will not apply the provisions on extended producer responsibility to other sectors, to avoid increasing the burdens on industry.²⁴⁴

Similarly, Dutch nature conservation law was reformed in 2009 first,²⁴⁵ and in 2010 later.²⁴⁶ Most notably,²⁴⁷ first, the legislator added

²³⁵ Case C-284/95, *Safety Hi-Tech Srl v S. & T. Srl.*, [1998] ECR I-4301, para. 49.

²³⁶ Jans, Squintani et al. (2009) p. 418.

²³⁷ Further discussed in Chapter 4.

²³⁸ Stb. 2003, 564.

²³⁹ Stb. 1995, 45.

²⁴⁰ Stb. 2004, 340 and Stcrt. 2004, 142.

²⁴¹ Stb. 2002, 259.

²⁴² Stb. 2005, 183.

²⁴³ Proceedings of the Second Chamber of the States General, Kamerstukken II 2007/08, 31 501, nr. 3, p. 7.

²⁴⁴ Proceedings of the Second Chamber of the States General, Kamerstukken II 2005/06, 27 664, nr. 41, *Voortgangsrapportage Landelijk afvalbeheerplan* (LAP), pp. 46–48 as regards, for example, measures on PVC fibres and optical-fibre cables; and Proceedings of the Second Chamber of the States General, Kamerstukken II 2007/08, 31 501, nr. 3, p. 8.

²⁴⁵ Stb. 2009, 18.

²⁴⁶ Stb. 2010, 135. It should be noted that this Act regulates certain projects and it has temporary effect. However, as regards nature conservation, it applies to all projects and it has definitive effect, see Proceedings of the Second Chamber of the States General, Kamerstukken II 2009/10, 32 127, nr. 3, p. 4.

²⁴⁷ For a systematic analysis see Squintani & Zijlmans (2013).

the adjective ‘significant’ to Section 19d of the Nature Conservation Act 1998. As a consequence, activities not significantly affecting the achievement of the conservation values protected in a Natura 2000 area were assessed but no longer subjected to a permit requirement.²⁴⁸ Moreover, the term ‘other activities’ was deleted from Sections 19f–19h and 19k. Now, only projects and plans are covered by these provisions. Further, the 2010 reform changed Article 19d of the Nature Conservation Act 1998 in such a way that it does not now apply to human activities affecting other values than those prescribed by the Birds Directive and the Habitats Directive. This means, *inter alia*, that the protection of Article 19g of the Nature Conservation Act 1998 enshrining the precautionary principle does not cover damage to values other than those regulated under the Birds Directive and the Habitats Directive.²⁴⁹ The government explained that these reforms aimed to follow the Directive more closely.²⁵⁰ In general, the government stated that the reform sought to eliminate cases where Dutch law goes further than required in order to meet the concerns of industry, agriculture and other sectors of Dutch civil society.²⁵¹

As regards air quality, the cases of gold-plating mentioned in Section 1.4.1 concerning the Netherlands were eliminated in a series of reforms adopted between 2005 and 2009.²⁵² In addition, the 2005 reform eliminated the standstill principle from the field of air quality law.²⁵³ This means that in areas in which air quality is better than required under Union law, air quality can be worsened. All these measures were taken to allow for socio-economic developments while respecting Union law obligations.²⁵⁴

²⁴⁸ Proceedings of the Second Chamber of the States General, *Kamerstukken II* 2006/07, 31 038, nr. 3, p. 14.

²⁴⁹ Backes, Poortinga & Woldendorp, (2010), p. 35.

²⁵⁰ Proceedings of the Second Chamber of the States General, *Kamerstukken II* 2006/07, 31 038, nr. 3, pp. 13–15 for the 2009 reform. Proceedings of the Second Chamber of the States General, *Kamerstukken II* 2009/10, 32 127, nr. 3, p. 73 for the 2010 reform.

²⁵¹ Proceedings of the Second Chamber of the States General, *Kamerstukken II* 2006/07, 31 038, nr. 3, p. 1.

²⁵² First with the Air Quality Order of 2005, *Stb.* 2005, 316; then with a ministerial Decree from 2007, *Stcrt.* 2007, 214; finally with the Air Quality Act of the same year, *Wet luchtkwaliteit* *Stb.* 2007, 414 and the National Cooperation Programme on Air Quality.

²⁵³ Article 2(1) Air Quality Order 2005 established that the standstill rule of Article 5.2(3) EMA did not apply to the limit values set in the order.

²⁵⁴ For example, Proceedings of the Second Chamber of the States General, *Kamerstukken II* 2005/06, 30 489, nr. 3, p. 3.

In certain cases, these policies were applied rather dogmatically. For example, a simple reference to the existence of the Dutch policy on gold-plating was sufficient to avoid extending the field of application of the strict liability regime of the Environmental Liability Directive to operators other than those listed under Annex III to the Directive.²⁵⁵

A similar approach to gold-plating is evident in the United Kingdom. For example, as regards the implementation of the Environmental Liability Directive, the Partial Regulatory impact assessment of the government highlighted that gold-plating in the three cases mentioned above would have led to additional costs of £2.8m and with an additional benefit of more than £4.8m.²⁵⁶ The government answered that costs/benefits analysis is only one ground to assess the opportunity of gold-plating and that it has a presumption against gold-plating.²⁵⁷ In the end the government maintained its original approach except in a couple of cases.²⁵⁸ At the same time, the government underlined how the new regulations did not amend or replace existing legislation, because the government did not want to downgrade the existing status quo.²⁵⁹

The above-mentioned examples make clear that national policies based on gold-plating restrict the practical value of Article 193 TFEU. Consequently, they have a negative impact on a system in which the Union legislator can opt to 'lower the high level of protection' at Union level in view of the possibility that Member States have to pursue a 'higher high level of protection' at national level. Moreover, as discussed in Chapter 2, stricter national standards for the protection of the environment can spur the development of Union environmental law, leading to an amelioration of the quality of European environmental law.

In conclusion, the concept of gold-plating can be considered a threat for environmental protection. Accordingly, it should be avoided.

²⁵⁵ Section 17.7(a), subparagraph 2, EMA. For the parliamentary discussion surrounding this provision see, Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 920, nrs. 12, 13 and 19 and Proceedings of the Second Chamber of the States General, Kamerstukken II 2006/07, 30 920, HAN8159A08.

²⁵⁶ Defra, Consultations on options for implementing the Environmental Liability Directive, Defra/WAG/DOENI, November 2006, p. 8.

²⁵⁷ House of Lords, The Environmental, Food and Rural Affairs Committee, Implementation of the Environmental Liability Directive: Government Response to the Committee's Sixth Report of Session 2006–07, Fourth Special Report of Session 2006–07, p. 3.

²⁵⁸ See Chapter 4, Section 4.4.

²⁵⁹ Explanatory Note to the Environmental Damage (Prevention and Remediation) Regulations 2009, p. 3.

Therefore, the use made by Union institutions of this concept and the negative connotation that these institutions give to gold-plating is regrettable. A more neutral concept needs to be developed and applied. This is discussed in the next section.

1.5 Conclusions: From Gold-Plating to ‘Green-Plating and Gold-Plating’

As concluded in the previous section, gold-plating is a business-centric concept. It is perfectly understandable that business uses it to lobby policymakers at Union and national levels. At the same time, the very nature of gold-plating makes it unsuitable to be used in more neutral environments, such as the academic one. Public institutions should also refrain from using such a concept, unless they are only competent for pursuing economic interests. Mostly, this is not the case; political institutions are responsible for the attainment of a variety of objectives, which must be pursued in an integrated manner. At Union level, this is clearly the case as regards the Commission, the Council and the European Parliament. They are responsible for the attainment of the objectives listed in Article 3 TEU and refined in the rest of the Treaties. Article 7 TFEU states that the Union shall ensure consistency between its policies and activities, taking *all* of its objectives into account in accordance with the principle of conferral of powers. Gold-plating takes business interest into account. It does not take environmental interests into consideration. More stringent protective measures do take into consideration environmental, economic and societal interests. Article 191(3) TFEU clearly mentions these interests which infers the meaning of the concept of ‘more stringent protective measures’ as discussed in Section 1.3. However, civil society and policymakers seem to consider this term incapable of representing the whole spectrum of the ongoing legislative practice at national level. Several measures affecting business at national level fall outside the scope of application of Article 193 TFEU, as shown above. If we consider the ongoing discussion on the actual meaning of Article 193 TFEU, we should be asking ourselves whether the concept of ‘more stringent protective measures’ should be maintained, especially in academic and institutional environments.

Accordingly, it would be beneficial if a new concept was developed. One broad enough to cover legal realities falling outside Article 193 TFEU, but capable of taking into account all public values pursued by the European Union on an equal footing. I propose here to anchor this new concept to the

principle of sustainability. This principle is recognised by the European Union, as evident in Article 3(5) TEU, as being one its objectives. Economic values, environmental values and social values are equally important under the principle of sustainability. As further explained below, *green-plating* seems the term more logically linked to the concept of sustainability.

The concept of ‘green-plating’ could be seen as the middle way between the concepts of gold-plating and more stringent protective measures. First, green-plating is not a legal term. Accordingly, it is not limited by the legal framework developed under the Treaties for the concept of ‘more stringent protective measures’. It is suitable to cover legislative practices falling outside the scope of application of Article 193 TFEU, and it can easily be adapted to new developments. Second, *green-plating* makes a direct reference to the environment. It is not business-centric. Of course, it could be argued that the colour of sustainability is not just green. However, ‘polychromatic-plating’ or ‘purple-plating’ do not sound appealing. Moreover, green is the colour associated with sustainability in those contexts in which environmental values are oppressed by economic ones. This could explain why, circa 2007, the UK government made use of this concept, without defining it, to justify gold-plating. As indicated above, during the transposition of the Energy Performance of Buildings Directive, the UK government defended a case of gold-plating by stating that climate change is important enough to justify going further than European requirements.²⁶⁰ The government called this case of gold-plating ‘*green-plating*’.

Accordingly, the reference to the colour green in green-plating is justifiable in the field dominated by a business-centric approach. To ensure that under the concept of ‘green-plating’, economic and social values are equally taken into account while assessing the sustainability of going beyond Union requirements, ad hoc cost/benefits assessments must be developed, as discussed in Chapter 4. Only in those cases in which the benefits of a national measure going beyond Union requirements are higher than its costs, the national measure at hand can be defined as being a case of green-plating. When the costs of a national measure going beyond Union requirements are higher than its benefits, the concept of ‘gold-plating’ can be retained.²⁶¹ This means that the

²⁶⁰ Thomas & Lynch-Wood (2008), p. 199 with reference to Hansard HC Deb., vol. 460 col. 646 16 May 2007 (Yvette Cooper MP, Minister for Housing and Planning).

²⁶¹ This concept is therefore similar to what in MacLeod et al. (2009), p. 18 is called ‘inappropriate over-implementation’.

concept of 'green-plating' does not replace that of 'gold-plating'. In my proposal, national measure going beyond Union requirements are divided in two categories: a) cases of green-plating, i.e. cases in which benefits prevail and b) cases of gold-plating, i.e. cases in which costs prevail. Both concepts cover the same three kinds of measures:

- a) Measures not keeping burdens to the minimum, such as when Member States do not take advantage of exceptions;
- b) More stringent protective measures; and
- c) Spillovers and 'related measures'.

In the absence of a clear assessment of the costs and benefits or of a convincing assumption that costs are higher than the benefits, I will use the concept of green-plating in order to smooth reading.