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# The possibility of taking more stringent protective measures under Article 193 TFEU for Member States under EU-environmental law: Illusion or Reality?

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# List of Abbreviations

AG: Advocate General

CJEU/ the Court: The Court of Justice of the European Union

EU/ the Union: European Union

EU-ESD : The European Union Effort Sharing Decision

EU-ESR: The European Union Effort Sharing Regulation

EU-ETS: The European Union Emission Trading System

MSPM: More stringent protective measures

MSR: Market Stability Reserve

TEU: The Treaty on the European Union

TFEU: The Treaty on the Functioning of the European Union

The Treaties: TEU and TFEU

The *Urgenda case*: The State of the Netherlands versus Urgenda Foundation (in all three instances)

# Abstract

Albeit the EU stepping up its game in the fight against climate change and environmental protection, some Member States may want to go a step further by applying even stronger protection than what is laid down under EU-law. This possibility is enshrined in Article 193 TFEU, making the option to implement more stringent protective measures dependent on certain conditions. Nevertheless, the CJEU has come up with various additional conditions through its case law, some of which are rather unclear. The lack of case law on this matter adds another layer of complexity, leading to legal uncertainty for Member States wanting to opt for higher protection on a national level. This contribution therefore looks at the different hurdles a Member State has to overcome in order to adopt Article 193 TFEU-measures. Unlike previous scholarly contributions, this paper not only looks at the scope of application of the provision in question and the various conditions a Member State has to fulfil in more detail, but importantly imbeds the discussion within the analysis of recent national climate litigation cases. This is done by reviewing three national cases in which claimants sought their national governments to opt for higher ambitions for the sake of the environment and showing how national governments may struggle in a next step in implementing these national judgments in light of Article 193 TFEU.

# 1. Introduction

## 1.1 Thematic introduction and relevance of the topic

While environmental concerns are rising among the population in the European Union (EU),[1] this sentiment has also reached top EU-officials, as can be seen by the recent initiation of a new, more ambitious plan to fight climate change and environmental degradation by the European Commission: the EU-Green Deal.[2] With the aim of reaching climate neutrality by 2050, the president of the EU-Commission, Ursula von der Leyen, has stressed that in order to reach this goal, 'we need to go faster and do things better.'[3] Besides obligations arising under EU-law, Member States are also bound by international commitments, such as the Paris Agreement:[4] According to Article 4(3) Paris Agreement, each party has to show its highest possible ambition to the global response to climate change. It therefore seems logical that Member States should be able to apply protection as high as desired through its national environmental measures.[5] Nevertheless, when looking at EU-law, it becomes apparent that the task of Member States to 'step up their game' is easier said than done.

With the environment being regulated under Chapter XX in Article 191 to 193 of the Treaty on the Functioning of the European Union (TFEU),[6] the principle for Member States to employ higher protection than required by EU-law is embodied in Article 193 TFEU. This provision states that protective measures adopted under the environmental legal basis of Article 192 TFEU shall not prevent any Member State from maintaining or introducing more stringent protective measures (MSPM). In doing so, those measures have to be compatible with the Treaties (TEU and TFEU) and shall be notified to the Commission. At first sight, this provision thus seems to be rather straight-forward. In reality, much more seems to be written between

[1] 'Special Eurobarometer 490- "Climate Change" Report' (European Commission, April 2019) <https://ec.europa.eu/clima/sites/clima/files/support/docs/report_2019_en.pdf> accessed 21 June 2021, 3-4.
[2] European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal', 11 December 2019, COM (2019) 640 final.
[3] 'State of the Union Address by President von der Leyen at the European Parliament Plenary' (European Commission, 16 September 2020) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655> accessed 21 June 2021.
[4] Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), UNFCCC Decision 1/CP.21 (2015).
[5] In this regard it must be mentioned that the EU and the EU Member States act *jointly* under the Paris Agreement, meaning that- according to Article 4(18) Paris Agreement- each Member State individually and together with the EU shall be responsible for its emission level as set out in the Paris Agreement. This nevertheless should not hinder Member States wanting to go even further than what has been agreed between the EU and the Member States.
[6] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, 47–390 (TFEU).

the lines though, posing various challenges to the Member States before they can actually implement more stringent protective measures. The Court of Justice of the European Union (CJEU; the Court) has shed some light on which conditions have to be fulfilled in order to rely on Article 193 TFEU on few occasions.[7] Nevertheless, the legal situation is yet far from clear, not least because of the small number of cases rendered by the Court in this context.[8] Member States thus find themselves in a legally uncertain situation.

On the one hand, several theoretical issues arise. One of them, for example, is whether Article 193 TFEU-measures must only be in line with the Treaties, as stipulated in the text of the provision, or whether they also have to follow secondary (non-environmental) objectives of the secondary Union-legislation in question. Besides this, more general questions can be asked, like to what extent Member States are able to opt for MSPM in regard to legislation not adopted on the environmental legal basis (Article 192 TFEU) but on the internal market legal basis (Article 114 TFEU), to which Article 193 TFEU does not apply. As various legislations with environmental objectives have been adopted on the internal market legal basis,[9] this constitutes an important issue.

On the other hand, although there has not been a multitude of cases brought before the CJEU on MSPM, there has been a development across the EU in the past years in which individuals brought claims against their national governments seeking them to adopt stronger commitments for the protection of the environment and climate change mitigation.[10] In those

[7] See e.g. Case C-6/03 *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz* ECLI:EU:C:2005:222.

[8] Deutscher Bundestag, Unterabteilung Europa Fachbereich Europa, *Zur Vereinbarkeit des Klimaschutzbeitrags mit Art. 193 AEUV und dem EU Beihilferecht* (PE 6 - 3000 - 54/15, 2015) 7, <https://www.bundestag.de/resource/blob/417386/ef0e396eaa72c597f261bb3643579aa6/PE-6-054-15-pdf-data.pdf> accessed 21 June 2021.

[9] This applies in general to acts having a direct impact on the internal market- especially such laying down product standards; See for example Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms [2001] OJ L106/1.

[10] See e.g. *The State of the Netherlands v Urgenda Foundation*, Supreme Court of the Netherlands (20 December 2019), case No. 19/00135. For an English translation of the case see <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007> accessed 21 June 2021; *13 individuals and Greenpeace e.V. v. Federal Republic of Germany*, Administration Court Berlin (31 October 2019), case VG 10 K 412.18 ('Family Farmers'). For an (unofficial) English translation of the case see <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20211031_0027117R-SP_judgment.pdf> accessed 21 June 2021; *Neubauer et al. v. the Federal Republic of Germany*, Bundesverfassungsgericht (BVerfG), Order of the First Senate of the Federal Constitutional Court of 24 March 2021 (published on 29 April 2021), 1 BvR 2656/18 -, Rn. 1-270 ('German Climate Change Act case'). For an (unofficial) English translation of the case see <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210429_11817_judgment-2.pdf> accessed 21 June 2021; *ASBL Klimaatzaak v. The Belgian State et al*, French-speaking Court of First Instance of Brussels, Civil Section (4th Chamber) (17 June 2021), 2015/4585/A ('Klimaatzaak'). For an (unofficial) English translation of the case see <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617_2660_judgment-1.pdf> accessed 12 July 2021;

cases Article 193 TFEU was often only of secondary importance or not considered at all. From an EU-law perspective, it is therefore questionable how these national climate litigation cases discussing further going measures will perform in light of the conditions that have to be fulfilled under Article 193 TFEU.

In conclusion, one is left with many questions on Article 193 TFEU. By looking at these and similar considerations, this research focuses on exploring the various difficulties Member States are facing when trying to implement MSPM in the environmental field under Article 193 TFEU.

### 1.2 Research questions

In light of the various problems Article 193 TFEU brings with it, the following research questions have been developed.

Given the historic background of the legal basis of environmental measures, i.e. that environmental legislation was initially adopted on the basis of the internal market (Article 114 TFEU),[11] and sometimes still is today,[12] it is interesting to analyse how these two policy fields interact or might even stand in the way of each other in the context of the adoption of MSPM. Since Article 193 TFEU cannot apply to legislation adopted pursuant to Article 114 TFEU, what are the possibilities for Member States to adopt further going measures under Article 114 TFEU?

Furthermore, it is questionable which further conditions have to be fulfilled by Member States in order to implement Article 193 TFEU-measures. Over time, the CJEU has established various additional requirements under this provision. Nevertheless, more often than not, the case law of the Court does not entirely answer how these conditions have to be applied, thereby

see also the currently pending case before the European Court of Human Rights (ECtHR) of six Portuguese young people seeking to hold the EU Member States and various other parties to the ECHR accountable for failing to taking sufficient action against climate change: *Duarte Agostinho and Others v. Portugal and 32 Other States*, European Court of Human Rights (case filed on 3rd September 2020), application number 39371/20 (decision pending).

[11] I.e. until the adoption of the Single European Act (SEA) in 1987.

[12] See e.g. Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms [2001] OJ L106/1; Directive 2015/720 of the European Parliament and of the Council of 29 April 2015 amending Directive 94/62/EC as regards reducing the consumption of lightweight plastic carrier bags [2015] OJ L115/11; Directive 2017/2102 of the European Parliament and of the Council of 15 November 2017 amending Directive 2011/65/EU on the restriction of the use of certain hazardous substances in electrical and electronic equipment [2017] OJ L305/8; Directive 2018/852 of the European Parliament and of the Council of 30 May 2018 amending Directive 94/62/EC on packaging and packaging waste [2018] OJ L150/141.

creating even more uncertainties. Where can these uncertainties be located and what are scholarly opinions thereof?

Lastly, leaving the historical aspects of the environmental legal basis and its relations with the internal market behind, a closer look will be taken at more current issues that Member States face in practice when trying to implement Article 193 TFEU-measures. More specifically, given the increase of national climate litigation cases across the European Union[13] it is interesting to see that the EU-law perspective and especially Article 193 TFEU are rarely considered in detail. What implications do these national cases have in the context of Article 193 TFEU? Could the more ambitious measures discussed or ordered by national courts- which are now to be implemented by the national governments- lead to a conflict with Article 193 TFEU?

These considerations lead to the following research questions:

1. What are the consequences of Article 193 TFEU not applying to legislation based on Article 114 TFEU?
2. What are the conditions that have to be fulfilled by Member States to be able to implement Article 193 TFEU- measures?
3. What are the implications of recent national climate litigations in the context of Article 193 TFEU?

### 1.3 Method

To be able to answer the above questions, this paper will start by analysing the various conditions that have to be fulfilled in order to rely on Article 193 TFEU (Chapter 2). First, the relation of Article 192 and Article 114 TFEU will be examined while looking at the scope of application of Article 193 TFEU (Chapter 2.1). Chapter 2.2. will look at further conditions that have to be fulfilled by taking into account case law of the CJEU as well as different scholarly contributions. Importantly, there are already several contributions looking at the various conditions.[14] Within this thesis, a stronger focus will thus be put on those conditions which

[13] See n 10.

[14] See e.g. Lorenzo Squintani, *Beyond Minimum Harmonisation- Gold-Plating and Green-Plating of European Environmental Law* (1st edn, Cambridge University Press 2019), especially Chapter 1 and 3; David Langlet and Said Mahmoudi, 'Division and Exercise of Competence' in David Langlet, and Said Mahmoudi (eds), *EU Environmental Law and Policy* (Oxford University Press 2016); Leonie Reins, 'Where Eagles Dare: How Much Further May EU Member States Go under Article 193 TFEU?' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing Limited 2020); Nicolas De Sadeleer, *EU Environmental Law and the Internal Market* (1st edn, Oxford University Press 2014), 350 and further;

seem more controversial by comparing some scholars' views and concluding with the author's own view. Furthermore, this contribution will have an added value by involving the most recent case-law.[15]

Chapter 3 will analyse how national courts within the EU rule on more stringent protective measures and what implications this could have in the context of Article 193 TFEU for national governments when implementing them. To the author's knowledge, so far there has not been any detailed scholarly contribution on the relation of national climate litigation cases with Article 193 TFEU. In this sense, this thesis can provide an added value to the current research field.

Finally, Chapter 4 will conclude the findings of the thesis.

Lorenzo Squintani, Marijn Holwerda and Kars de Graaf, 'Regulating greenhouse gas emissions from EU ETS installations: what room is left for the member states?', in Marjan Peeters, Mark Stallworthy and Javier de Cendra de Larragán (eds), *Climate Law in EU Member States – Towards National Legislation for Climate Protection* (Edward Elgar Publishing Limited 2012); Jan H. Jans and Hans H.B. Vedder, *European Environmental Law* (4th edn, Europa Law Publishing 2012), 113 and further; Ludwig Krämer, *EC Environmental Law* (8th edn, Sweet & Maxwell 2016), 122 and further.

[15] The research was conducted up until 31 May 2021.

# 2. Article 193 TFEU: Its Conditions and Legal Hurdles

## 2.1 Scope of Application: Article 192 TFEU vs Article 114 TFEU

One of the few conditions for adopting MSPM under Article 193 TFEU explicitly mentioned in the provision is that it can only be applied to legislation adopted pursuant to Article 192 TFEU. This observation carries important implications for legislation on environmental matters which are nevertheless not adopted on the legal basis of Article 192 TFEU but rather within the realm of the internal market under Article 114 TFEU. Although the latter does not have environmental protection as its primary objective,[16] various legislations are adopted thereunder which pursue core environmental objectives.[17] This is problematic, as Member States cannot- in regard to such legislations adopted under Article 114 TFEU- implement MSPM under Article 193 TFEU.[18] This relates to the historic background of environmental matters on EU-level and their legal bases: Before the enactment of the Single European Act (SEA) in 1987[19] there has been no explicit legal basis on which environmental protection could be implemented. Rather, the EU-legislator had to resort to an internal market legal basis (Article 100 EEC on the functioning of the common market; now Article 113 TFEU) and/or the then Article 235 EEC (now Article 352 TFEU).[20] The introduction of Article 192 TFEU by the SEA enabled a more flexible and decentralised approach, distancing itself from the well-known common market integration process of uniform harmonisation towards minimal harmonisation.[21]

Nevertheless, despite being able to rely on Article 193 TFEU, the SEA also introduced an 'environmental guarantee' within Article 100a EEC[22] (now 114 TFEU) in order for Member States to establish a higher degree of protection than what is laid down by the EU-legislator.[23] After further amendments of now Article 114 TFEU through the Treaty of Amsterdam,[24]

[16] According to Article 114(3) TFEU, legislation adopted pursuant to Article 114(1) TFEU must take as a base a high level of protection of the environment. This nevertheless does not change the fact that the primary objective of Article 114 TFEU remains the functioning of the internal market. This provision thereby gives a less important role to environmental protection than Article 192 TFEU, which makes the protection of the environment its primary objective.
[17] David Langlet and Said Mahmoudi, 'Division and Exercise of Competence' in David Langlet and Said Mahmoudi (eds), *EU Environmental Law and Policy* (Oxford University Press 2016), 97; for examples see n 12.
[18] Jan H. Jans and Hans H.B. Vedder, *European Environmental Law* (4th edn, Europa Law Publishing 2012), 114.
[19] Single European Act, OJ L 169, 29.6.1987, signed in February 1986, entered into Force 1 July 1987.
[20] Langlet and Mahmoudi (n 17) 98.
[21] Nicolas De Sadeleer, *EU Environmental Law and the Internal Market* (1st edn, Oxford University Press 2014), 10.
[22] See more specifically Article 100a(4) EEC.
[23] Langlet and Mahmoudi (n 17) 107.
[24] Treaty of Amsterdam, OJ C 340, 10 November 1997, signed 2 October 1997, entered into Force 1 May 1999; See for more details Langlet and Mahmoudi (n 17) 107.

Member States are now left with the choice between two derogatory mechanisms under this provision. The first is to be found in Article 114(10) TFEU and relates to the case in which the legislation adopted under Article 114 TFEU includes by itself a so-called 'safeguard clause' authorising Member States to (temporarily[25]) depart from the harmonisation measures at EU-level for one or more non-economic reasons referred to in Article 36 TFEU.[26] Secondly, if there is no such safeguard clause enshrined in secondary legislation, Member States have the possibility to maintain (Article 114(4) TFEU) or adopt (Article 114(5) TFEU) measures which are more stringent than what is laid down by the EU harmonisation measures on various grounds, including the protection of the environment.[27] Especially in regard to the latter derogatory mechanism, there are various detailed conditions[28] which have to be fulfilled in order to rely on it.[29]

From the outset it thus may seem that the possibility to take more stringent measures than what is laid down in legislation based on Article 114 TFEU has sufficiently been provided for in paragraphs 4-6 and 10 of the provision. Nevertheless, the actual procedure under this provision seems much more complicated compared to that of Article 193 TFEU. This is not last shown by the wording of the two 'environmental guarantees', with Article 193 TFEU establishing the principle of minimum harmonisation *allowing* to deviate from EU-legislation under certain circumstances, and Article 114 TFEU *restricting* Member States to derogate from what has been laid down by the EU-legislator.[30] The different level of complexity can also be seen in the detailed procedure under which the Commission has to analyse the national provisions in question under Article 114(6) TFEU and decide whether they may amount to, *inter alia*, means of arbitrary discrimination or a disguised restriction on trade between Member States, compared to the 'mere' obligation of having to *notify* the national measures in question to the Commission under Article 193 TFEU. As a result of the Commission having such broad powers under Article 114 TFEU for approving relevant national measures, the consent procedure has been applied in a very strict way, thereby clearly having a negative effect on Member States'

[25] Article 114(10) TFEU talks about 'provisional measures' which are thus time-restricted.
[26] Such reasons include the protection of health and life of humans, animals or plants; See De Sadeleer (n 21) 360.
[27] Furthermore, to both of these cases paragraphs 6-7 of Article 114 TFEU apply; see De Sadeleer (n 21) 360.
[28] More specifically, those conditions relate to the Member State having to prove the specificity of the problem, the date of emergence of the problem having to be after the 'adoption' of the EU measure, providing scientific evidence which shows the need for the more stringent protective measure, and communicating the measure as well as the reasons for the adoption of the measure to the European Commission.
[29] For a more elaborate and complete discussion of these conditions see De Sadeleer (n 21) 360 and further.
[30] Ibid 350.

attempt to set higher environmental protection levels.[31] Furthermore, despite the CJEU having attempted to give some clarifications on the conditions to adopt more stringent measures under Article 114 TFEU, various questions remain,[32] such as the limits of the Commission's powers under the consent procedure,[33] making it even less attractive for Member States to rely on this possibility. It thus comes with little surprise that previous research revealed that Member States rarely make use of the possibility to introduce MSPM under Article 114(4)-(6) TFEU.[34]

In light of the foregoing, it is questionable how far Article 114 TFEU leaves sufficient room for Member States to take MSPM. Importantly, this consideration mainly accounts for legislation which aims at maximum harmonisation within the internal market. For legislation based on Article 114 TFEU but only laying down minimum rules- of which there is a high number of-, these standards only constitute the 'floor', leaving it open to each Member State to raise the ceiling.[35] This depends on each respective legislative act and how it stipulates the possibilities to opt for more stringent measures.[36] Nevertheless, for such legislation adopted under Article 114 TFEU and aiming for maximum harmonisation, the possibility to adopt stricter measures logically gets much more difficult. Given the fact that the EU-legislator[37] is now- after the implementation of the SEA- capable of choosing to a certain extent[38] on which legal basis certain secondary legislation with environmental objectives shall be established, the question can be raised in how far one might expect a deliberate choice of an internal market legal basis (Article 114 TFEU) over an environmental legal basis (Article 192 TFEU) by the EU-legislator, in order to restrict the Member States' leeway of derogating and implementing more protective environmental measures. Due to the 'cross-cutting nature' of environmental

[31] Ibid 381, referring to Michael Doherty, 'The Application of Article 95(4)–95(6) of the EC Treaty: Is the Emperor Still Unclothed' (2008) 8 YbEEL, 62.
[32] De Sadeleer (n 21) 360.
[33] Ibid 382.
[34] See Lorenzo Squintani, Beyo*nd Minimum Harmonisation- Gold-Plating and Green-Plating of European Environmental Law* (1st edn, Cambridge University Press 2019), 11- 12, who refers to several contributions under footnote 46; Especially the reference to Peter Pagh, 'The Battle of European Policy Competences' in Richard Macrory (ed.), *Reflections on 30 Years of EU Environmental Law* (1st edn, Europa Law Publishing 2006) is of high importance, who states on page 6 that the Commission has only granted Member States the power to permanently maintain stricter measures in eight cases, all regarding the same directive. See also Stephen Weatherill, 'The Fundamental Question of Minimum or Maximum Harmonisation' in Sacha Garben and Inge Govaere (eds.), *The Internal Market 2.0* (Oxford: Hart Publishing 2020), 264-265.
[35] Stephen Weatherill, 'The Fundamental Question of Minimum or Maximum Harmonisation' in Sacha Garben and Inge Govaere (eds.), *The Internal Market 2.0* (Oxford: Hart Publishing 2020), 268.
[36] Ibid.
[37] In the following, the 'EU-legislator' is to be understood as the European Commission, European Parliament and Council of the European Union acting jointly under the legislative decision- making procedure.
[38] Importantly, certain rules have been laid down by the CJEU regarding the choice of the legal basis for legislation; see text to n 47- 49.

issues leading to the interaction with various other EU policy areas[39]- such as, and especially, the internal market- it is thereby not easy for the EU-legislator to find a concrete dividing line between a legislation falling into environmental policy or internal market policy.

Nicolas de Sadeleer attempts to draw this line by relying on the case-law[40] of the CJEU as follows: Acts having a direct impact on the internal market- especially such laying down product standards- have to be adopted with Article 114 TFEU as legal basis.[41] These include, *inter alia*, acts addressing environmental risks of chemical substances, GMOs or motor vehicles.[42] Legislation falling within the category of Article 192 TFEU as legal basis encompasses, according to de Sadeleer, all acts which- in regard to the aim and content of the measure- show that they seek to achieve a high level of environmental protection, while only affecting the establishment of the internal market at most on an *ancillary* basis.[43] This sort of act includes, *inter alia*, legislation on the protection of wildlife, different ecosystems, soils, marine, climate and so forth.[44] At the same time, de Sadeleer also acknowledges that this division does not work that easily in practice.[45] Furthermore, there are also cases of legislative acts which follow inextricably and equally associated environmental and internal market goals, which is often the case for measures relating to operating standards, in which- according to de Sadeleer- environmental policy comes into the purview of the internal market.[46]

When it comes to the choice of the legal basis, the CJEU has laid down that it 'must be based on objective factors which are amenable to judicial review and include in particular the aim and content of the measure'.[47] At the same time, if a measure pursues more than one purpose, the Court applies the 'centre of gravity test' by analysing the main or predominant purpose or

[39] Helle Tegner Anker, 'Competences for EU Environmental Legislation: About Blurry Boundaries and Ample Opportunities' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing Limited 2020), 7.
[40] Case C-300/89 *Commission of the European Communities v Council of the European Communities* ECLI:EU:C:1991:244.
[41] De Sadeleer (n 21) 158-159; See also Tegner Anker, who follows a similar differentiation of legislation adopted on one of the two legal base: Tegner Anker (n 39) 10.
[42] De Sadeleer (n 21) 159.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ibid 157-158.
[47] Case C-178/03 *Commission of the European Communities v European Parliament and Council of the European Union* ECLI:EU:C:2006:4, para 41, see also C-155/91 *Commission of the European Communities v Council of the European Communities* ECLI:EU:C:1993:98, para 7 and Case C-300/89 *Commission of the European Communities v Council of the European Communities* ECLI:EU:C:1991:244, para 10; C-176/03 *Commission of the European Communities v Council of the European Union* ECLI:EU:C:2005:542, para. 45; see also Tegner Anker (n 39) 11.

component determining the legal basis.[48] Although the EU-legislator is therefore under some scrutiny by the CJEU, he still enjoys a certain degree of discretion,[49] especially in such cases where the dividing line between the internal market and the environmental policy is not clear. Could the hypothesis therefore be confirmed that the EU-legislator may purposely adopt a legislative act on the former rather than the latter in order to minimise the leeway of Member States' action in regard to more stringent measures?

While one may suspect the internal market and its proper functioning enjoys a higher significance over environmental protection due to the simple fact that the EU was founded on predominantly economic aspects which have traditionally received more attention,[50] it is questionable whether this consideration can still be upheld today.

First, as the EU is enshrining highly ambitious goals for environmental protection within EU-law, as can be seen by the adoption of the recent EU Green Deal, it seems doubtful that the EU-legislator can 'easily' argue that the internal market inherently enjoys a higher significance than environmental protection and accordingly choose the former over the latter as legal basis.[51] Furthermore, it must also be emphasised, as Weatherill demonstrated, that there are good reasons for the EU-legislator choosing maximum harmonisation in the first place. As already mentioned, maximum harmonisation in the context of the internal market is typically chosen for acts laying down product standards as they have a direct impact on the internal market and its functioning.[52] In this way, a level regulatory playing field in the internal market can be formed, within which legal and commercial certainty is enhanced.[53] By addressing regulatory concern at a uniform way at EU level, previously national rules disturbing the smooth functioning of the internal market are absorbed.[54] Where rules do not directly affect the composition of products but rather have incidental distortive effects on trade patterns, minimum harmonisation in form of an Article 192- TFEU legal basis are conceivable.[55] The

[48] Case C-300/89 *Commission of the European Communities v Council of the European Communities* ECLI:EU:C:1991:244; see also Tegner Anker (n 39) 11.
[49] See Article 5 of the Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, 13–390 (TEU): An emphasis is put on finding a legal basis, while the actual choice of legal basis remains undiscussed; see also Tegner Anker (n 39) 11.
[50] De Sadeleer (n 21) 218.
[51] At the same time, it shall not be forgotten that the EU also has international legal commitments for the environmental protection and the fight against climate change, such as those enshrined in the Paris Agreement.
[52] Weatherill (n 35) 267; see also Weatherill's comment that maximum harmonisation within the internal market is not only limited to product standards; see also De Sadeleer (n 21) 158-159.
[53] Weatherill (n 35) 267.
[54] Ibid.
[55] Ibid 269; In this regard it shall also be mentioned that the EU-legislator today also draws a distinction in some directives between provisions falling under Article 114 TFEU and provisions falling under Article 192 TFEU,

choice for Article 114 TFEU as legal basis over another one, like Article 192 TFEU, is thus not arbitrary but rather depends on what one wishes to achieve.[56]

Secondly, also the CJEU- but here in the context of negative integration- has already shown as far as 20 years ago that the internal market does not have an automatic 'free pass' over environmental protection. In the Court's judgment of *PreussenElektra*[57] it has found that the German Feeding-in Act 1990 - albeit encroaching upon the free movement of goods by obliging distributors to purchase electricity produced within the territory in which they are active- was justified by its aim of environmental protection as well as the specific characteristics of the EU electricity market at the time of the judgment.[58] What was interesting about this judgment is that the Court did not- as usually common under the internal market rules- conduct a proportionality test in regard to the measure taken by Germany.[59] Without the Court having clarified its precise position thereon in subsequent case-law,[60] it led van Calster to conclude that this might have been an implicit reversal of the Court's case law (*Cassis de Dijon*[61]*)* which stipulated that infringements of the free movement of goods may only be based on the court-invented 'mandatory requirements' when not discriminating.[62] If this was indeed the case and the Court would make this explicit in future case-law, van Calster argues further, this may amount to an 'Urgenda-type' reasoning insofar as the Court seems to be prepared to 'judge out of the box' when it comes to climate change.[63]

In conclusion, although it cannot be determined with absolute certainty what the exact intentions of the EU-legislator are when choosing a legal basis for a certain legislative act, the hypothesis that the he may purposely adopt it on Article 114 TFEU rather than Article 192 TFEU cannot be confirmed through the conducted analysis. On the contrary, there seem to be obvious reasons for why and when an act shall be adopted pursuant to Article 114 TFEU. And even if there are cases in which the division between legislation falling into environmental

thus not deeming a whole directive to fall into the realm of Article 114 TFEU; See, e.g. Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources [2009] OJ L140/16: While being based on Art. 175(1) EC (Art. 192 TFEU), some provisions setting out product standards are based on Art. 95 EC (Art. 114 TFEU) (Arts 17, 18, and 19); see also De Sadeleer (n 21) 161.

[56] Weatherill (n 35) 261.

[57] Case C-379/98 *PreussenElektra AG v Schhleswag AG* ECLI:EU:C:2001:160.

[58] Geert Van Calster, 'Environment and Trade Law' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing Limited 2020), 93.

[59] Ibid 94.

[60] For more details see Van Calster (n 58) 94 and further.

[61] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ECLI:EU:C:1979:42.

[62] Van Claster (n 58) 95.

[63] Ibid 97.

policy or internal market policy prove difficult, it is rather unlikely that the EU-legislator would give systematic priority to Article 114 TFEU given the increasing importance of environmental protection and climate change mitigation under EU-law. Furthermore, maximum harmonisation does not necessarily always bring an advantage over minimum harmonisation for the EU-legislator, thereby confirming that a systematic prioritisation of Article 114 TFEU is unlikely.[64]

## 2.2 Requirements to successfully rely on Article 193 TFEU

Having discussed the first major condition for Member States to be able to rely on Article 193 TFEU, i.e. that this provision can only be applied to legislation adopted under Article 192 TFEU, this section will now look at further conditions.

### 2.2.1 National measures must follow the same objectives as the Union act

#### *2.2.1.1 In regard to primary environmental objectives*

According to Article 193 TFEU, measures adopted under Article 192 TFEU shall not prevent any Member State from maintaining or introducing MSPMs. This inevitably means that an Article 193 TFEU-measure is adopted in inextricable relation to the previously adopted EU-measure under Article 192 TFEU, suggesting that the measure in question must generally follow the same approach to tackle its environmental objectives as the Union measure.[65] This seems to be confirmed by the CJEU in its judgment *Deponiezweckverband Eiterköpfe*[66] concerning a national regulation laying down more stringent measures than required by the Directive on the landfill of waste[67] and its compatibility with this directive in question.[68] Accordingly, the Court determines the national measures to pursue the same (environmental) objectives as the directive,[69] and in so far as it also imposes stricter requirements than the directive, it constitutes a MSPM under Article 193 TFEU.[70] On the contrary, a national

[64] According to Weatherill, minimum harmonisatsion can have the advantage of locating responsibility not only at EU level but also on a Member State level even after the EU has legislated. Thereby, space for regulatory experimentation, learning and development arguably is opening up. In this sense, it does not automatically mean that the EU would *always* have an advantage from excluding Member State's possibilities to opt for their own, more stringent measures by applying maximum harmonisation. See Weatherill (n 35) 270.
[65] Langlet and Mahmoudi (n 17) 102.
[66] Case C-6/03 *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz* ECLI:EU:C:2005:222.
[67] Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste [1999] OJ L 182/1.
[68] Lorenzo Squintani, Beyond Minimum *Harmonisation- Gold-Plating and Green-Plating of European Environmental Law* (1st edn, Cambridge University Press 2019), 47.
[69] Case C-6/03 *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz* ECLI:EU:C:2005:222, para 38.
[70] Ibid para 41.

measure pursuing different objectives than the Union measure does not amount to a more stringent measure under Article 193 TFEU.[71]

At the same time, it must be mentioned that a Member State generally continues to bear the responsibility to transpose a directive adopted at the EU-level on its national level, even though it aims to implement MSPM. This has been confirmed by the Court in *Commission v Austria*, where it ruled that the obligation to ensure the full effectiveness of a directive cannot be interpreted as meaning that the Member States are released from transposing it albeit considering their national provisions to be 'better' than the Community provisions concerned.[72] Although the existence of national rules may render the transposition of the directive superfluous, this can only be relied upon if those rules *actually* ensure the full application of the directive by the national authorities.[73] Therefore, it can be concluded that the transposition of a directive in regard to which a Member State wants to introduce MSPM amounts to a- in the words of Leonie Reins- 'precondition' for relying on Article 193 TFEU.[74]

#### *2.2.1.2 In regard to secondary (non-environmental) objectives*

Less clear is whether an Art 193 TFEU-measure must also be in line with secondary, non-environmental goals of a Union measure based on Article 192 TFEU. This would amount to a rather far-reaching restriction of the Member State's latitude to adopt such measures, taking into account the wording of the provision which merely calls for the measure having to be compatible with the *Treaties*. This question relates to the overall discussion in literature of whether Article 193 TFEU grants a 'free pass' to *always* adopt MSPMs following harmonisation under Article 192 TFEU- which is the prevailing view among scholars-[75] or whether complete harmonisation regimes adopted under Article 192 TFEU legislation may prevent a Member State from relying on Article 193 TFEU. Notwithstanding the arguments for and against the possibility of always being able to adopt such measures- which has been

[71] Case C- 43/14 *ŠKO–Energo s. r. o. v Odvolací finanční ředitelství* ECLI:EU:C:2015:120, para 25; see also Langlet and Mahmoudi (n 17) 102 at footnote 15.
[72] Case C- 194/ 01 *Commission of the European Communities v Republic of Austria* ECLI:EU:C:2004:248, para 39; see also Langlet and Mahmoudi (n 17) 105 ; see in this regard also Joint cases C- 379/08 and C- 380/08 *ERG et al* ECLI:EU:C:2010:127, para 65-66 : The minimum level of protection guaranteed by a Directive cannot be called into question by relying on the possibility to adopt more stringent measures.
[73] Case C- 194/ 01 *Commission of the European Communities v Republic of Austria* ECLI:EU:C:2004:248, para 39; see also Case C-281/11 *European Commission v Republic of Poland* ECLI:EU:C:2013:855, para 115, where the CJEU ruled that a Member State could not implement an Article 193 TFEU-measure if it did not transpose a Directive accordingly.
[74] Leonie Reins, 'Where Eagles Dare: How Much Further May EU Member States Go under Article 193 TFEU?' in Marjan Peeters and Mariolina Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar Publishing Limited 2020), 27.
[75] Jans and Vedder (n 18) 118.

extensively discussed elsewhere-[76], the Court has repeatedly confirmed that EU rules 'do not seek to effect complete harmonisation in the area of the environment'.[77] Although this latter observation would speak for the possibility of being able to *always* adopt MSPMs, the Court nevertheless has suggested that Article 193 TFEU does have its limits when it comes to non-environmental secondary objectives pursued by Article 192 TFEU-legislation. This was discussed in the Court's judgment in *Commission v France*[78] concerning the legality of a MSPM taken by France pursuant to Directive 2000/53/EC on end-of-life vehicles which is based on Article 175 EC Treaty (now: Article 192 TFEU).[79] French national law asked for a certificate showing that a vehicle was destroyed by a certified installation in order to get it removed from the register of vehicles and goes thereby further than the directive, which merely asks for a certificate indicating that a vehicle was given to a certified installation. The Court nevertheless found that Article 5(3) of Directive 2000/53 provides for a precise procedure for cancelling the registration of end-of-life- vehicles which must be followed in order to ensure the coherence between national approaches, as asked for in the preamble of the directive,[80] and thus ensure the functioning of the internal market. Importantly, the Court said in this regard that MSPMs must 'be compatible with the provisions of the EC Treaty and, *inter alia*, must not frustrate the achievement of the objective pursued in the second instance by that directive, namely to ensure the smooth functioning of the internal market and to avoid distortions of competition in the Union'.[81] The Court therefore clearly laid down that Article 193 TFEU-measures must also be in line with secondary objectives of Union legislation based on Article 192 TFEU. Nevertheless, as stressed by Langlet and Mahmoudi, Directive 2000/53/EC is unusually explicit about pursuing secondary objectives by laying down in its preamble that end-of life vehicles should be harmonised in order, first, to minimise the impact on the environment, 'and, second, to ensure the smooth operation of the internal market and avoid distortions of competition in the Community.'[82] It was therefore very clear that the directive aimed at harmonising the national measures in order to ensure the well-functioning of the

[76] Ibid; Squintani (n 68) 37; De Sadeleer (n 21) 353; Langlet and Mahmoudi (n 17) 103.
[77] Case C-2/10 *Azienda Agro-Zootecnica Franchini and Eolica di Altamura v Regione Puglia* ECLI:EU:C:2011:502, para 48 with references to further case law.
[78] Case C- 64/09 *European Commission v French Republic* ECLI:EU:C:2010:197.
[79] 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.
[80] Case C- 64/09 *European Commission v French Republic* ECLI:EU:C:2010:197, para 36.
[81] Ibid para 35.
[82] 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, recital 2 of the preamble; see also Langlet and Mahmoudi (n 17) 104.

internal market.[83] This raises the question whether the Court would have decided differently in case of a directive not having such an explicit secondary objective and need to harmonise a certain procedure. Furthermore, it is questionable whether the Court would have decided differently if the secondary objective of the directive was not referring to the internal market- a goal that traditionally enjoys a high value for the CJEU-, but a different objective, such as public health.[84] Nevertheless, until more clarification will be given by the Court in future case law, it must be accepted that secondary objectives have to be respected as well when implementing Article 193 TFEU-measures.

### 2.2.2 Compatibility of national measures with the Treaties

An explicit condition defined under Article 193 TFEU is that of the national measure having to be compatible with the Treaties. According to Krämer, this means that MSPMs may not conflict with any provision in the Treaties.[85] This is especially relevant for the rules on the free movement of goods (Articles 34 and 36 TFEU) as well as competition law,[86] but also in the context of harmonisation and taxation rules.[87]

#### *2.2.2.1 National measures and the principle of proportionality and fundamental rights*

What is not entirely clear though is whether the principle of proportionality- meaning that a national measure is appropriate and necessary in relation to the objectives pursued- applies to MSPMs and whether fundamental rights have to be respected.

In regard to the principle of proportionality, the Court initially ruled in *Deponiezweckverband Eiterköpfe*[88] against the necessity of conducting such a test in regard to national measures adopted under Article 193 TFEU, insofar as such measures go beyond the minimum requirements laid down by the directive in question and no other provisions of the Treaty are involved.[89] Nevertheless, the principle of proportionality continues to apply for actions taken by a Member State that aim to ensure that the minimum requirements laid down by the directive

[83] Langlet and Mahmoudi (n 17) 104.
[84] Lorenzo Squintani, Marijn Holwerda and Kars de Graaf, 'Regulating greenhouse gas emissions from EU ETS installations: what room is left for the member states?', in Marjan Peeters, Mark Stallworthy and Javier de Cendra de Larragán (eds), *Climate Law in EU Member States – Towards National Legislation for Climate Protection* (Edward Elgar Publishing Limited 2012), 76-77.
[85] Ludwig Krämer, *EC Environmental Law* (8th edn, Sweet & Maxwell 2016), 124.
[86] Ibid; Langlet and Mahmoudi (n 17) 103; Reins (n 74) 28; Jans and Vedder (n 18) 115.
[87] Jans and Vedder (n 18) 115. Importantly, this contribution will not go further into detail on these provisions as they are less relevant for the posed research question it aims to answer.
[88] Case C-6/03 *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz* ECLI:EU:C:2005:222.
[89] Ibid para 63.

in question are enforced.[90] Reins argues that the Court possibly re-introduced the applicability of this principle in its recent case *Túrkevei Tejtermelő Kft*,[91] where the Court ruled that in regard to the requirement of compatibility with the Treaties, a MSPM must also comply with EU law, 'in particular its general principles, which include the principle of proportionality'.[92] However, it should be mentioned, as demonstrated by Advocate General (AG) Kokott in her Opinion on this case, that a provision in the directive at stake in this case expressly provided for the proportionality test in regard to the act in question to which the MSPM relates.[93] AG Kokott thereby relied on the condition of the MSPM having to be in line with the objectives of the EU-law rules in question, rather than the general application of the proportionality principle, which the Court seems to have suggested. This is in line with the Court's prior case law, as it similarly decided in the *Windmills* case that a proportionality test was needed when implementing MSPMs,[94] whereby this requirement was again explicitly prescribed for in the directive in question.[95] It is thus questionable, whether the Court's reasoning would have been the same, if the directive in question in both, the *Túrkevei Tejtermelő Kft* and the *Windmills* case, did not explicitly call for a proportionality test.

Furthermore, it is in the author's view questionable why the Court seemingly tried to reintroduce the principle of proportionality in regard to MSPMs, considering the fact that the CJEU has ruled in its later decision *TSN and AKT*[96] that such national MSPMs fall outside the scope of Union law. The case regarded the question whether the Charter of Fundamental Rights applies also to measures taken by Member States that go further than the minimum rule on vacation laid down under Directive 2003/88/EC.[97] AG Bot has thus raised the question within

[90] Ibid para 62.
[91] Case C-129/16 *Túrkevei Tejtermelő Kft.* ECLI:EU:C:2017:547.
[92] Ibid para 61; The Court refers here also to its judgment in Joint cases C- 379/08 and C- 380/08 *ERG et al* ECLI:EU:C:2010:127, paragraph 79: 'Directive 2004/35 does not specify the precise conditions under which the competent authority may require the operators concerned to take the remedial measures identified by the authority. In such circumstances, it is for each Member State to determine those conditions, which must, first, seek to attain the objective of the directive, as set out in Article 1 thereof, namely to prevent and remedy environmental damage and, second, comply with EU law, in particular its general principles.'. In this latter case, there was no explicit mentioning of the principle of proportionality in regard to its general principles though.
[93] Case C-129/16 *Túrkevei Tejtermelő Kft.* ECLI:EU:C:2017:547, Opinion of AG Kokott, para 72: '(…) And Article 36(2) of the Waste Directive expressly provides that penalties for breach of the law on waste management must be proportionate. (…)'.
[94] Case C-2/10 *Azienda Agro-Zootecnica Franchini and Eolica di Altamura v Regione Puglia* ECLI:EU:C:2011:502, para 73.
[95] Squintani (n 68) 122-123.
[96] Joined Cases C-609/17 and C-610/17 *TSN and AKT* ECLI:EU:C:2019:981.
[97] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/9; Importantly, the case did not explicitly refer to

his opinion on this case whether Member States- by adopting MSPMs- are implementing EU law. According to him, the adoption of national measures going beyond a hard core of minimum protection defined by a directive constitutes the 'domestic extension of the provisions laid down in that directive', which is why he sees the criteria of implementing Union law through the adoption of such a measure fulfilled.[98] Nevertheless, the Court has ruled contrary to this view by stipulating that national MSPMs fall outside the scope of Union law, meaning that the further going part of the national legislation cannot be regarded as implementing EU law under Article 51 of the Charter of Fundamental Rights.[99] Therefore, if MSPMs fall outside the scope of Union law, also the principle of proportionality cannot apply. Hereby, the Court thus clearly contradicts itself in comparison to its earlier judgment in *Túrkevei Tejtermelő Kft*. As demonstrated by De Cecco, it is not the first time that the Court has given contradictory judgments on the question whether measures going above the EU-minimum fall within the scope of EU-law and whether fundamental rights thus apply or not.[100] In the author's view, it seems more plausible to say that MSPMs are national measures and fall under the mere sovereignty of the Member States, as also argued by De Cecco.[101] Therefore, such measures do not implement EU law, as the Court has ruled in *TSN and AKT*, meaning that the general principles do not apply to Article 193 TFEU-measures. In the end, it seems like it regrettably cannot be said with full certainty that this is the Court's definitive opinion on this matter, meaning that further case law must be awaited to gain certainty.

Regarding the question of whether a national measure adopted pursuant to Article 193 TFEU has to also respect fundamental rights, it must be first of all stressed that according to Article 51 of the European Charter of Fundamental Rights,[102] Member States must abide by the provisions laid down thereunder only when they are implementing EU law. The question thus arises, whether Member States, by adopting MSPM, are implementing Union law. As already mentioned, the Court ruled in the *TSN and AKT* case that Member States are not acting within

Article 193 TFEU but more generally to further going protective measures and is therefore nevertheless relevant for the question raised in the environmental field.

[98] Joined Cases C-609/17 and C-610/17 *TSN and AKT* ECLI:EU:C:2019:981, Opinion of AG Bot, para 86.

[99] Joined Cases C-609/17 and C-610/17 *TSN and AKT* ECLI:EU:C:2019:981, para 49; See for more detail Mirjam de Mol, 'De toepasselijkheid van Uniegrondrechten op nationale verdergaande beschermingsmaatregelen' (2020) 5-6 Nederlands tijdschrift voor Europees recht, 160; see also Francesco De Cecco, 'Minimum harmonization and the limits of Union fundamental rights review: *TSN and AKT*'(2021) 58 Common Market Law Review, 187.

[100] Francesco De Cecco, 'Minimum harmonization and the limits of Union fundamental rights review: *TSN and AKT*'(2021) 58 Common Market Law Review, 194.

[101] Francesco De Cecco, 'Room to Move? Minimum Harmonisation and Fundamental Rights' (2006) 43 Common Market Law Review, 25-26; see also Squintani (n 68) 120.

[102] Charter of Fundamental Rights of the European Union [2012] OJ 326/02.

the scope of EU-law when applying MSPMs. Similarly to AG Bot in this latter case, AG Kokott held in her opinion in *Tallinna Vesi*[103] on the interpretation of the Waste Framework Directive[104] that MSPMs under Article 193 TFEU must also comply with EU law, in particular its general legal principles including fundamental rights.[105] Nevertheless, in its final judgment the Court did not pick up this argument by neither referring directly to Article 193 TFEU and the possibility of taking MSPMs, nor to the relation of such measures with EU fundamental rights.[106] In conclusion, similar to the question of the applicability of the principle of proportionality, it remains to be seen whether EU fundamental rights have to be abided by when adopting an Art 193 TFEU-measure.[107] In the author's view, as already mentioned, it is nevertheless more plausible that Member States are not implementing EU law by introducing MSPMs, meaning that fundamental rights do not apply.

#### *2.2.2.2 Compatibility of national measures with secondary legislation*

Furthermore, it is questionable whether 'compatible with the Treaties' includes the requirement of the national measure's compatibility with secondary legislation. This consideration has been extensively analysed in literature.[108] While there have been both scholars in favour as well as against this requirement,[109] the Court seems to have clarified this discussion in its case law. In its *Windmills* case[110] on the legality of an Italian MSPM pursuant to what was laid down in the Birds Directive[111] and Habitats Directive[112], the Court undertook its analysis of legality of the national measure also in the light of Directives 2001/77/EC[113] and 2009/28/EC[114], thereby taking account of secondary legislation.[115] Furthermore, in its judgment *Túrkevei Tejtermelő*

[103] Case C-60/18 *AS Tallinna Vesi v Keskkonnaamet* ECLI:EU:C:2018:969.
[104] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives [2008] OJ L312/3.
[105] Case C-60/18 *AS Tallinna Vesi v Keskkonnaamet* ECLI:EU:C:2018:969, Opinion of AG Kokott, para 45; see also Reins (n 74) 30.
[106] Reins (n 74) 30.
[107] Ibid 31.
[108] See e.g. Squintani (n 68) 119; Reins (n 74) 29; Jans and Vedder (n 18) 116; Langlet and Mahmoudi (n 17) 103; Krämer (n 85) 124.
[109] See for more details Squintani (n 68) 119.
[110] Case C-2/10 *Azienda Agro-Zootecnica Franchini and Eolica di Altamura v Regione Puglia* ECLI:EU:C:2011:502 (Windmills).
[111] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [1979] OJ L103/1.
[112] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.
[113] 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 L283/33.
[114] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources [2009] OJ L140/16.
[115] See Case C-2/10 *Azienda Agro-Zootecnica Franchini and Eolica di Altamura v Regione Puglia* ECLI:EU:C:2011:502, para 59; See for more details Squintani (n 47) 119.

*Kft*[116] the Court ruled that national legislation aiming for more protection under Article 193 TFEU must, *inter alia*, comply with 'all relevant provisions of the EU and FEU Treaties *and* of the acts of secondary law of the European Union'.[117] In the end, the author agrees with Krämer and Langlet and Mahmoudi who explain that the requirement of a MSPM to comply with secondary law follows simply from the fact that secondary law is based on the Treaties.[118]

### 2.2.3 National measures having to pursue a higher level of environmental protection

One of the more obvious conditions- as also explicitly stated in Article 193 TFEU- is that the national measure in question must be *more* stringently protective than what has been laid down by the EU-legislator under the original secondary legislation. While it is clear that the national measure must follow the same environmental objectives as the union measure[119] it is questionable whether such national measures must lead to more protection only in *theory*, or actually in *practice*. Scholars have so far paid very little attention to this consideration. According to Squintani et al, a national measure 'must be more stringent, meaning that it has to achieve a higher level of environmental protection than that offered by the Union act, *at least in theory'*. [120] Peeters, on the other hand, seems to suggest the opposite. In her contribution[121] analysing the *Arcelor case*,[122] she considers whether the introduction by a Member State of a closure rule for installations implying the cancellation of allowances on a national basis and thereby going further than what is laid down under the EU-Emission Trading System Directive[123] could actually be interpreted as an Article 193 TFEU-measure.[124] Thereby, Peeters stresses the consequences of the introduction of such a measure, namely that- under the usual procedure- 'non-allocated (and hence also cancelled) allowances are transferred by the Member State to the reserve deposit for new entrants, with the result that new enterprises have a greater

[116] Case C-129/16 *Túrkevei Tejtermelő Kft.* ECLI:EU:C:2017:547.
[117] Ibid para 63 [emphasis added].
[118] Krämer (n 85) 124; Langlet and Mahmoudi (n 17) 103.
[119] Compare to Section 2.2.1.1.
[120] Squintani, Holwerda and de Graaf (n 84) 77 [emphasis added].
[121] Marjan Peeters, 'De zaak Arcelor en de ontluikende contouren van het Europese broeikasgasemissiehandelssysteem' (2010) 37(6) Milieu& Recht; for an English translation of this article see: Marjan Peeters, 'The EU ETS and the role of the courts: Emerging contours in the case of Arcelor' (2011) 2(1) Climate Law.
[122] Case T-16/04 *Arcelor SA v European Parliament and Council of the European Union* ECLI:EU:T:2010:54.
[123] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275.
[124] See for more detail Marjan Peeters, 'The EU ETS and the role of the courts: Emerging contours in the case of Arcelor' (2011) 2(1) Climate Law, 26-30; On the discussion of the functioning of the EU-ETS system also see the analysis made in this contribution under Chapter 3.1.1.

chance of being allocated free allowances'.[125] Nevertheless, this does not- in the end- actually lead to further greenhouse gas emission reductions,[126] which is why Peeters concludes that in this specific case the national measures could not be regarded as being more protective and thus cannot fall under Article 193 TFEU.[127] Therefore, although these national measures may well theoretically lead to more protection, they do not so in practice. Peeters thus seems to suggest that MSPMs have to lead to a higher level in practice, at least in this case discussed by her.

In the author's view though, it is questionable whether such a strict dichotomy between theory and practice has to be made *at all.*[128] If a measure does not lead to more protection, it is plausible that it also does not qualify as a MSPM. The question that has to be asked is rather how the CJEU would actually analyse an Article 193 TFEU-measure in the context of the 'scope' of protection it can or shall achieve. In the author's view, it is likely that the Court will also examine what the effect of the aimed national measure would be.[129] While a Member State thus is unlikely of having to prove that its MSPM *actually* leads to more protection, it is- in the author's view- likely that the CJEU rather analyses whether it is *plausible* that the MSPM leads to more protection. Nevertheless, there has been- to the author's knowledge- no case before the CJEU yet that provides for more clarity on this discussion.

### 2.2.4 Notification of national measures to the European Commission

Rather uncomplicated and clear-cut is the condition of Member States having to communicate the national MSPM to the European Commission. As already stipulated earlier,[130] the notification procedure under Article 193 TFEU is much less elaborate than the one enshrined for the internal market environmental guarantee under Article 114(4)-(5) TFEU. This requirement is rather serving for information purposes and thereby does not require an authorisation *per se*.[131] Furthermore, there is no time limit for Member States to notify their national measures to the Commission.[132] Even if a Member State has not communicated such

[125] Ibid 27.
[126] This is the so-called 'waterbed effect'. For a more elaborate discussion see the analysis made under Chapter 3.2.1 in the context of the Urgenda case.
[127] Peeters, 'The EU ETS and the role of the courts: Emerging contours in the case of Arcelor' (n 124) 27.
[128] This is especially questionable as the discussion above relates to the concrete example of the functioning of the EU-ETS, which comes with very specific characteristics and problems, such as the waterbed effect.
[129] This is possibly comparable to the careful examination by the Court on whether an Article 193 TFEU-measure follows the same objectives as the Union measure in the Case C-6/03 *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz* ECLI:EU:C:2005:222.
[130] See Chapter 2.1.
[131] De Sadeleer (n 21) 358.
[132] Krämer (n 85) 128; De Sadeleer (n 21) 358.

a measure to the Commission, the Court has ruled that this cannot in itself render a MSPM unlawful.[133]

### 2.3 Interim-Conclusion

When looking at the wording of Article 193 TFEU it is possible to identify four explicit conditions that have to be fulfilled in order to rely on this provision: The measure has to be taken in the realm of a Union measure adopted under Article 192 TFEU, the measure has to be more stringent in its protection compared to the original Union measure adopted under Article 192 TFEU, the measure in question has to be compatible with the Treaties and finally, the measure must be notified to the Commission. Nevertheless, as this section has shown, the CJEU has continuously read more conditions into Article 193 TFEU throughout its case-law. Due to the restricted number of cases decided on Article 193 TFEU it nevertheless is far from certain whether this is the final standpoint of the Court or whether more cases have to follow to establish such certainty. Until then, Member States are barred from taking MSPMs with legal certainty.

## 3. National Climate Litigation: How are More Stringent Protective Measures approached on a National Level?

After having looked at the theoretical background of Article 193 TFEU, it shall now be analysed how MSPMs are implemented in practice. As already mentioned before, one of the main reasons why Article 193 TFEU is not a completely clear-cut topic (yet) is because there have not been many cases that have been referred to the CJEU.

Interestingly, there have recently been a number of cases at national level in which individuals claim that their national governments should adopt stronger protective measures for the environment and mitigation of climate change compared to what is currently pursued. Especially in the field of greenhouse gas emission reduction, several national courts have ruled that national governments have to aim for higher targets than what they had established and

[133] Case C-2/10 *Azienda Agro-Zootecnica Franchini and Eolica di Altamura v Regione Puglia* ECLI:EU:C:2011:502, para 53.

importantly than what was laid down under EU-law.[134] Whereas these cases raise a number of interesting legal and political questions- such as whether the judiciary wrongly interferes with law-making- these judgments are also specifically interesting in regard to the question if and to what extent they may interfere with EU-law, including Article 193 TFEU. As will be shown in the subsequent analysis, EU-law- including Article 193 TFEU- thereby tends to play a secondary role in these national climate litigation cases.

This chapter will thus analyse three of these cases by focusing on the question of which problems national governments, as addressees of the order to adopt stricter measures, could face when implementing those measures in regard to Article 193 TFEU. Importantly, what all these three cases have in common is the fact that they regard a claim for the government to increase its emission reduction targets. On an EU-level, the field of emission reduction is governed by a complex combination of regulatory instruments, of which the most prominent are the EU Emission Trading System Directive (EU-ETS)[135] and the EU Effort Sharing Decision (EU-ESD)[136] as well as its successor the EU-Effort Sharing Regulation (EU-ESR).[137] Therefore, before delving into the subject matter of the national cases, a short introduction to the underlying EU-legal framework shall be given.

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[134] See e.g. *The State of the Netherlands v Urgenda Foundation*, Supreme Court of the Netherlands (20 December 2019), case No. 19/00135. For an English translation of the case see <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007> accessed 14 June 2021 ; ASBL Klimaatzaak v. The Belgian State et al, French-speaking Court of First Instance of Brussels, Civil Section (4th Chamber) (17 June 2021), 2015/4585/A ('Klimaatzaak'). For an (unofficial) English translation of the case see <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617_2660_judgment-1.pdf> accessed 12 July 2021 ; to some extent also the case of *Neubauer et al. v. the Federal Republic of Germany*, Bundesverfassungsgericht (BVerfG), Order of the First Senate of the Federal Constitutional Court of 24 March 2021 (published on 29 April 2021), 1 BvR 2656/18 -, Rn. 1-270 ('German Climate Change Act case'). For an (unofficial) English translation of the case see <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210429_11817_judgment-2.pdf> accessed 14 June 2021.

[135] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L 275/32 (EU-ETS Directive).

[136] Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020 [2009] OJ L140/136 (EU-ESD).

[137] Regulation 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 [2018] OJ L 156 (EU-ESR); see also Marjan Peeters, 'Case Note Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (2016) 25(1) Review of European Community& International Environmental Law (RECIEL), 124.

## 3.1 Regulation of Emission Reduction under EU-law

In the fight against climate change, the EU has set itself certain climate and energy targets which are laid down in its 2020 climate and energy package.[138] This package includes a set of laws to meet its targets for the year 2020, while its successor- the 2030 climate and energy framework[139]- regulates the targets for the year 2030.[140] The 2020 package sets out three key targets: (1) 20% cut in greenhouse gas emissions compared to 1990 levels; (2) 20% of EU energy from renewables; (3) 20% improvement in energy efficiency.[141] The 2030 framework follows the exact same targets- albeit non-binding-, by setting the goals higher to 40%, 32% and 32,5% respectively.[142] For the first target- the cut in greenhouse gas emissions- the EU-ETS and EU-ESD come into play, which shall now be looked at more in detail.[143]

### 3.1.1 The EU-Emission Trading System

The EU-ETS was introduced by Directive 2003/87/EC (EU-ETS Directive), which got amended twice so far[144] with a new amending proposal from the Commission expected for June 2021.[145] Currently, the system covers around 40% of the EU's greenhouse gas (GHG) emissions by regulating the emission of approximately 10.000 installations in the power sector and manufacturing industry, as well as airlines operating in the application area.[146] Despite the fact that the main objective of the EU-ETS relates to environmental protection, it importantly

[138] '2020 climate& energy package' (European Commission) <https://ec.europa.eu/clima/policies/strategies/2020_en> accessed 14 June 2021.
[139] '2030 climate& energy framework' (European Commission) <https://ec.europa.eu/clima/policies/strategies/2030_en> accessed 14 June 2021.
[140] 'Climate strategies & targets' (European Commission) <https://ec.europa.eu/clima/policies/strategies_en> accessed 14 June 2021.
[141] '2020 climate& energy package' (European Commission) <https://ec.europa.eu/clima/policies/strategies/2020_en> accessed 14 June 2021.
[142] '2030 climate& energy framework' (European Commission) <https://ec.europa.eu/clima/policies/strategies/2030_en> accessed 14 June 2021.
[143] The other two goals of the 2020 climate and energy package and 2030 climate and energy framework respectively will not be looked at in detail as only the emission reduction tools are relevant for this contribution.
[144] See Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L 140/63; Directive 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 [2018] OJ L 76/3.
[145] European Parliament, Legislative Train, *Revision of the EU Emission Trading System (ETS)/ Before 2022-12* (2021) <https://www.europarl.europa.eu/legislative-train/api/stages/report/current/theme/a-european-green-deal/file/revision-of-the-eu-emission-trading-system-(ets)> accessed 14 June 2021.
[146] The application area encompasses all EU Member States, Iceland, Liechtenstein and Norway; See 'EU-Emission Trading System (EU ETS)' (European Commission) <https://ec.europa.eu/clima/policies/ets_en> accessed 14 June 2021.

has a number of non-environmental objectives,[147] such as cost-effectiveness and economic efficiency.[148]

The basic principle the EU-ETS follows is that of cap- and trade: An overall, unionwide cap is put on the total amount of certain GHGs that can be emitted by all installations[149] within the system.[150] Within the cap, industries then receive or buy emission allowances, which they can trade as needed according to Article 12(1) EU-ETS Directive.[151] While there are some industries that have to buy their allowances through auctioning,[152] others get a part of their allowances for free.[153]

Importantly, the cap decreases each year in a linear manner of 1,74% compared to the average annual total quantity of allowances issued by Member States.[154] Therefore, the amount of allowances on the EU-wide market in which industries can trade is necessarily reduced over time.

Finally, by the 30 April each year, Member States have to ensure that their industries surrender the amount of allowances that is equal to the total emissions from that installation during the preceding calendar year.[155] If an operator of an industry fails to surrender his respective amount of allowances, he has to pay an excess emissions penalty.[156] In case a company remains with an amount of spare allowances after rendering its amount equivalent to its emissions, it can either sell them to another installation or keep them for the following period.[157]

[147] See EU-ETS Directive, Article 1 and Recitals 5 and 7.
[148] Squintani, Holwerda and de Graaf (n 84) 83.
[149] The sort of installations the EU-ETS Directive applies are set out in Annex I of the EU-ETS Directive.
[150] 'EU-Emission Trading System (EU ETS)' (European Commission) <https://ec.europa.eu/clima/policies/ets_en> accessed 14 June 2021.
[151] Ibid.
[152] See for more detail EU-ETS Directive, Article 10.
[153] The allocation rules for the allowances are set by the European Commission according to Article 10a EU-ETS Directive.
[154] See EU-ETS Directive, Article 9; This linear factor shall be 2,2% in the fourth phase (2021-2030); See also 'Emissions cap and allowances' (European Commission) <https://ec.europa.eu/clima/policies/ets/cap_en> accessed 14 June 2021.
[155] See EU-ETS Directive, Article 12(3).
[156] See EU-ETS Directive, Article 16(3): 'The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances.'.
[157] See 'EU-Emission Trading System (EU ETS)' (European Commission) <https://ec.europa.eu/clima/policies/ets_en> accessed 14 June 2021.

### 3.1.2 The EU-Effort Sharing Decision/ Effort Sharing Regulation

The EU-ESD/ EU-ESR set differentiated emission reduction targets for Member States[158] and concern emissions from most sectors not included in the EU-ETS, such as transport, buildings, agriculture and waste.[159] While the EU-ESD has set out annual targets from 2013-2020, its successor- the EU- ESR - enshrines the respective targets for the period of 2021-2030. The differentiated national targets of emission reductions are based on Member States' relative wealth measured by gross-domestic product per capita.[160] Under the current applicable legal framework, the national targets will collectively amount to a reduction of around 10% in total EU emissions from the sectors covered by 2020 and of 30% by 2030, compared with 2005 levels.[161] Importantly, it is the Member States themselves that are responsible for establishing national policies and measures to limit emissions from the sectors covered by the Effort Sharing legislation.[162] This constitutes a crucial difference compared to the EU-ETS, where sectors are regulated at EU level.[163] What the latter instrument and the EU-ESD/ EU-ESR have in common though is the possibility to make use of certain flexibilities in fulfilling their emission reduction targets. Accordingly, also under the EU-ESD/EU-ESR a certain form of trading is possible; Member States can, *inter alia*, trade national emission reduction commitments among each other.[164]

In conclusion, one can see that Member States are facing a number of obligations amounting from EU-law regulating emission reduction targets. Nevertheless, this- generally- does not hinder Member States from adopting MSPMs under Article 193 TFEU. However, these measures must be compatible with the conditions outlined under Chapter 2, which could lead to certain difficulties as will be analysed next.

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[158] For the EU-ESD see Annex II to the EU-ESD; for the EU-ESR see Annex I to the EU-ESR.
[159] Peeters (n 137) 125; see also 'Effort sharing: Member States' emission targets' (European Commission) <https://ec.europa.eu/clima/policies/effort_en> accessed 14 June 2021.
[160] 'Effort sharing: Member States' emission targets' (European Commission) <https://ec.europa.eu/clima/policies/effort_en> accessed 14 June 2021.
[161] Ibid.
[162] Ibid.
[163] Ibid.
[164] See EU-ESD, Article 5 and EU-ESR, Article 5; see also Peeters, 'Case Note Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (n 137) 125.

## 3.2 National Climate Litigation: An analysis in light of Article 193 TFEU

### 3.2.1 Urgenda Case

Being the first climate case in which a State was ordered to opt for higher emission reduction targets, the Urgenda case was widely praised for its positive implications it can have for the protection of the environment and climate change.[165] Nevertheless, it also received criticism in view of certain legal considerations,[166] such as whether the Dutch court(s) failed to refer the case to the CJEU.[167] Most importantly, the Urgenda case has interesting implications for Article 193 TFEU, which shall be the focus of this analysis. First, a short overview and background of the case will be given.[168]

**Case Summary**

In November 2013, a Dutch non-governmental organization (NGO) named Urgenda Foundation (Urgenda) brought a case on its behalf as well as 886 individuals against the Dutch government before the District Court of The Hague. At the centre of their claim stood the assertion that the State was liable for its role in causing dangerous climate change.[169] More specifically, Urgenda requested the District Court to order the Dutch State to reduce its annual GHG emissions by 40%, or at least by 25% compared to 1990 by the end of 2020.[170] On 24 June 2015, the Dutch District Court rendered its unique judgment by ordering the Dutch State to reduce its GHGs by 25% by 2020 compared to 1990 emissions levels.[171] Unsurprisingly, the State of the Netherlands appealed this decision before the Court of Appeal of The Hague.

[165] Jaap Spier, 'The "Strongest" Climate Ruling Yet': The Dutch Supreme Court's Urgenda Judgment' (2020) 67 Netherlands International Law Review, 319.
[166] See e.g. Peeters, 'Case Note Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (n 137); Kars J. de Graaf and Jan H. Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (2015) 27 Journal of Environmental Law, 517.
[167] Peeters, 'Case Note Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (n 137) 123 and 125.
[168] For a more detailed analysis of the background and development of the case see e.g. Spier (n 165); see also Christine Bakker, 'Climate Change Litigation in the Netherlands: The Urgenda Case and Beyond' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill | Nijhof 2021).
[169] Kars J. de Graaf and Jan H. Jans, 'The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change' (2015) 27 Journal of Environmental Law, 518.
[170] Christine Bakker, 'Climate Change Litigation in the Netherlands: The Urgenda Case and Beyond' in Ivano Alogna, Christine Bakker and Jean-Pierre Gauci (eds), *Climate Change Litigation: Global Perspectives* (Brill | Nijhof 2021), 202.
[171] *Urgenda Foundation v. The State of the Netherlands*, District Court of The Hague (24 June 2015), case C/09/456689/HA ZA 13-1396. For an English translation of the case see <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196> accessed 14 June 2021.

Nevertheless, the latter upheld the original decision in its judgment of 2018,[172] followed by a further appeal by the state which was remarkably rejected by the Dutch Supreme Court (SC) on 20 December 2019.[173] Importantly, while the District Court had based its judgment on Dutch tort law, the Supreme Court followed the Court of Appeal's reasoning that the Netherlands failed to comply with its obligations arising from the European Convention on Human Rights (ECHR)[174] by failing to adopt sufficient measures to prevent climate change.[175]

**Art 193-implications**

In a next step, it shall be analysed to what extent Article 193 TFEU played a role in the context of the Urgenda case. When the Urgenda case was decided, the EU's GHG reduction target aimed at 20% reduction by 2020.[176] This target was enshrined in its Climate and Energy Package, which- as already mentioned before- makes use of the EU-ETS and EU-ESD/EU-ESR[177] as key tools to reach this goal.[178] The EU-ETS itself sets out a collective reduction target of 21% for the industries covered by 2020 compared to 2005-levels.[179] Under the EU-ESD, the collective target amounts to 10% of emission reductions by 2020 compared to 2005-levels for sectors covered,[180] with a specific reduction target for the Netherlands of 16% by 2020 compared to 2005-levels.[181] Therefore, by the SC ordering the Dutch State to raise its emission reduction target to 25% by the end of 2020, it is clear that the Netherlands would go

[172] *The State of the Netherlands v Urgenda Foundation*, The Hague Court of Appeal (9 October 2018), case 200.178.245/01. For an English translation of the case see <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610> accessed 14 June 2021.
[173] *The State of the Netherlands v Urgenda Foundation*, Supreme Court of the Netherlands (20 December 2019), case No. 19/00135. For an English translation of the case see <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2019:2007> accessed 14 June 2021.
[174] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) (ECHR).
[175] Bakker (n 170) 200.
[176] Peeters, 'Case Note Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (n 137) 124; see also '2020 climate & energy package' (European Commission) <https://ec.europa.eu/clima/policies/strategies/2020_en> accessed 14 June 2021.
[177] Note that for the Urgenda case merely the EU-ESD played a role, as it enshrined the targets up and until 2020. Therefore, in this analysis only the EU-ESD will be referred to.
[178] see also '2020 climate & energy package' (European Commission) <https://ec.europa.eu/clima/policies/strategies/2020_en> accessed 14 June 2021.
[179] Ibid; see also Directive 2009/29/EC of the European Parliament and of the Council of 23 April 2009 amending Directive 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading scheme of the Community [2009] OJ L 140/63, Recital 5.
[180] 'Effort sharing: Member States' emission targets' (European Commission) <https://ec.europa.eu/clima/policies/effort_en> accessed 14 June 2021.
[181] See Annex II to EU-ESD.

beyond the EU-target of the 20% cut in greenhouse gas emissions by 2020 compared to 1990 levels.[182]

As such, the Dutch SC is asking the Dutch government to implement more stringent measures than what is laid down under EU-law, which could amount to MSPM under Article 193 TFEU within the realm EU-ETS and/or the EU-ESD. In the context of the EU-ETS Directive, especially the condition of a MSPM having to be in line with secondary (non-environmental) objectives could be problematic.[183] As already mentioned earlier, the EU-ETS also pursues a number of non-environmental objectives,[184] such as cost-effectiveness and economic efficiency.[185] The criterion of cost-effectiveness is reached through the EU-ETS system's market-based approach, i.e. through its incorporated trading possibilities of the emission allowances across the EU.[186] Thereby, emissions are cut where it costs the least to do so.[187] If the Dutch government adopts unilateral MSPMs under the EU-ETS, it is questionable whether or *how* the cost-effectiveness criteria could be fulfilled. For instance, if the Dutch State would require its national industries to emit less and thus limit its usage of available emission allowances, it could arguably also be harder for them to adopt cost-effective measures to reduce their emissions. This could lead to the Netherlands themselves operating in a less cost-effective way and thereby running risk to frustrate the secondary, non-environmental goal of the EU-ETS Directive. In conclusion, it must be stressed that too much uncertainty around the criterion of cost-effectiveness exists to be sure of what could or could not be regarded as such.[188] This is enforced by the uncertainty discussed under section 2.2.1.2 regarding the question whether the Court will always take secondary, non-environmental objectives of secondary legislation into account, or whether this restricts itself to certain ones, like the internal market. In any way, the Dutch government will face the difficult task of having to find an alternative, at least equally cost-effective instrument on a national level.[189]

[182] By having to implement a 25% reduction goal until 2020, the Dutch government will thus likely have to also go further than the applicable collective 21% target under the EU-ETS and the country-specific 16%-target under the EU-ESD, as these are the key tools to lower emissions within the EU.
[183] Compare Chapter 2, sub-section 2.2.1.2.
[184] See EU-ETS Directive, Article 1 and Recitals 5 and 7.
[185] Squintani, Holwerda and de Graaf (n 84) 83.
[186] 'EU Emissions Trading System (EU ETS)' (European Commission) <https://ec.europa.eu/clima/policies/ets_en> accessed 14 June 2021.
[187] Ibid.
[188] Peeters, 'Case Note Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (n 137) 125.
[189] This of course only applies in so far as the Netherlands would opt for applying measures leading to its 25% reduction target by 2020 that fall under the application of the EU-ETS.

Furthermore, even if the national measure chosen by the Dutch government would fulfil the requirement of cost-effectiveness, it is also questionable in how far applying stricter requirements for national industries under the EU-ETS can actually lead to more protection in practice. This scenario is called the 'waterbed effect' and entails that under the EU-wide cap of emissions, industries can trade their emission allowances across the EU.[190] If a Member State now applies stricter requirements to its industries and thus less emission allowances are needed by them, these 'left-over' allowances may be used up by industries in other Member States.[191] Only in the case that the allowances not being used are *cancelled*,[192] an overall EU-wide emission reduction could be achieved.[193] This argument has also been brought up by the State of the Netherlands in its defence by indicating that European countries will 'neutralise reduced emissions in the Netherlands, and that greenhouse gas emission in the EU as a whole will therefore not decrease'.[194] The Dutch Lower Civil Court rejected this argument by stating that it has been shown that there are no signs of carbon leakage yet.[195] Nevertheless, as demonstrated by Peeters, the Court seems to have confused the waterbed effect and carbon leakage, while equating the latter to the waterbed effect.[196] Different from the waterbed effect, carbon leakage refers to the international dimension by considering how EU industries may have a competitive disadvantage compared to industries outside the EU which are not subjected to carbon regulations.[197] In the author's view, it is therefore possible that a MSPM falling under the applicability of the EU-ETS could be void under Article 193 TFEU, as it does not lead to more protection. The discussion around the waterbed effect has been reiterated before the Appeals Court. The Appeals Court thereby argued that it 'cannot be assumed beforehand that

[190] Peeters, 'Case Note Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (n 137), 128.
[191] Ibid.
[192] At the time the Urgenda case was decided, no such possibility of 'cancelling' allowances was possible. Since the adoption of Directive 2018/410 (amending the EU ETS Directive), the cancellation of allowances is possible- but also only in the situation of Member States taking the more protective measure by closing electricity generation capacity, thereby restricting this possibility; see Article 1(20) of Directive 2018/410: 'In the event of closure of electricity generation capacity in their territory due to additional national measures, Member States may cancel allowances from the total quantity of allowances to be auctioned by them referred to in Article 10(2) up to an amount corresponding to the average verified emissions of the installation concerned over a period of five years preceding the closure. The Member State concerned shall inform the Commission of such intended cancellation in accordance with the delegated acts adopted pursuant to Article 10(4).'.
[193] Peeters, 'Case Note Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (n 137) 125.
[194] District Court of The Hague, *Urgenda case* (n 171) para 4.81.
[195] Ibid.
[196] See for a more detailed discussion Peeters, 'Case Note Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (n 137), 128.
[197] Ibid.

other Member States will take less far-reaching measures than the Netherlands',[198] especially as they have an individual responsibility to limit CO2 emissions as far as possible.[199] Nevertheless, not only does the Dutch Appeals Court seem to imply that other Member States would also take MSPM sunder the EU-ETS, but its argument also seems to miss the point that such national unilateral reduction measures do not have any long-term effect on the actual emissions of greenhouse gases under the EU-ETS as long as the cap on the emissions is not adequately adjusted[200] or the remaining Member States are not hindered from using up the spared allowances of the Member State taking MSPMs. In the end, it must be stressed that also the waterbed effect is not a clear-cut topic, leaving open many questions in practice.[201] Importantly, it should be mentioned that a new mechanism, the Market Stability Reserve (MSR), has been introduced within the EU-ETS system applying from 2019 onwards.[202] This mechanism has been introduced in order to address the large surplus of allowances, thereby removing 12% of the surplus and putting it into the MSR.[203] Arguably, this could have an effect on the waterbed effect but it is probably too early to draw conclusions.[204] Nevertheless, the fact that the waterbed effect *can* occur cannot be denied and if the case had been brought before the CJEU, it is in the author's view likely that it would have played a role in deciding whether (future) national measures taken within the realm of the EU-ETS by the Netherlands pursuant the SC's judgment could be contrary to Article 193 TFEU.

In the end, it can be concluded that there is reason to believe that the national measure may be found unacceptable by the CJEU in regard to Article 193 TFEU if the unilateral measures to be taken by the Netherlands endangered cost-effectiveness in the context of the EU-ETS system

[198] The Hague Court of Appeal, *Urgenda case* (n 172) para 56.
[199] Ibid.
[200] Squintani, Holwerda and de Graaf (n 84) 85-86; see also Chris W. Backes and Gerrit A. Van der Veen, 'Urgenda: The final judgment of the Dutch Supreme Court' (2020) 17 Journal for European Environmental& Planning Law, 317.
[201] See e.g. Squintani, Holwerda and de Graaf (n 84) 86; See also the Appeals Court relying on Urgenda's argument that 'supported by reasons and on submission of various reports, including a report of the Danish Council on Climate Change (Exhibit U131), that it is impossible for a waterbed effect to occur before 2050 owing to the surplus of ETS allowances and the dampening effect over time of the 'market stability reserve', see The Hague Court of Appeal, *Urgenda case* (n 172), para 56.
[202] Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC [2015] OJ L264/1.
[203] Joshua Prentice, 'The revision of the European Union's Emission Trading System Ahead of the Fourth Trading Period, 2021-2030' (2018) 8 Climate Law, 341.
[204] See also Christian Flachsland et al, 'How to avoid history repeating itself: the case for an EU Emissions Trading System (EU ETS) price floor revisited' (2020) 20(1) Climate Policy, 135.

and do possibly not even lead to the contribution to the EU-wide emission reduction due to the waterbed effect.[205]

Regardless of the discussion on whether future Article 193-measures taken by the Dutch State will be lawful or not, it must be stressed that the Dutch Lower Civil Court[206] should have sent a preliminary reference to the CJEU. As Peeters demonstrates, the Dutch Lower Civil Court suggests that the compliance with EU law (the 20% emission reduction target by 2020) would be unlawful under national civil law, thereby implying the negative assessment on the lawfulness of the core aim of EU climate law.[207] According to Article 263 TFEU, a preliminary reference becomes mandatory if a national Court doubts the legality of a Union measure, as is the case here.[208] If a preliminary reference was sent, the CJEU could and possibly would have also clarified some of the uncertainties in regard to Article 193 and the EU-ETS, namely the question of cost-effectiveness and the waterbed effect. Regarding the fact that the Court also explicitly mentioned the provision of Article 193 TFEU in its judgment(s),[209] it is questionable whether it did not see the problems arising thereunder or whether it did not *want* to see them. In any way, it is highly regrettable that no preliminary reference has been sent, leaving scholars and practitioners in further uncertainty on the practical application of Article 193 TFEU.

Importantly, the aforementioned considerations only referred to national measures that could have an effect on the EU-ETS Directive. Nevertheless, the SC Urgenda judgment[210] does not rule *how* the Netherlands is meant to reduce its emissions by 25% by 2020. Thus, the Dutch State may choose to implement measures to reach its goal that do not fall under the EU-ETS Directive, but, *inter alia*, the EU-ESD. This could be less problematic as the EU-ESD does not have the (secondary) objective of cost-effectiveness, thus not posing the problems the EU-ETS

[205] In this regard, it is though also important to mention that as the SC based its decision on the ECHR, the CJEU would have to take this aspect into due account. Accordingly, the CJEU- in case of a preliminary ruling- would have to interpret Article 193 TFEU in light of the Charter of Fundamental Rights of the EU, which- according to Article 52(3)- itself has to be interpreted in accordance with the corresponding rights of the ECHR. This adds an additional interesting layer to this case, and the question how Article 193 TFEU could be interpreted by the CJEU in the context at stake.

[206] Or in the later decisions of The Hague Court of Appeal, *Urgenda case* (n 172) and the Supreme Court of the Netherlands, *Urgenda case* (n 173).

[207] Peeters, 'Case Note Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (n 137) 125.

[208] See more in detail Peeters, 'Case Note Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (n 137) 125.

[209] District Court of The Hague, *Urgenda case* (n 171) para 2.55; The Hague Court of Appeal, *Urgenda case* (n 172) para 54-57; Supreme Court of the Netherlands, *Urgenda case* (n 173) para 7.3.3., although referring to Article 193 TFEU under the EU-ESD.

[210] As well as judgments in the District Court of The Hague, *Urgenda case* (n 171) and The Hague Court of Appeal, *Urgenda case* (n 172).

Directive brings with it.[211] Furthermore, the risk of the waterbed effect does not exist under the EU-ESD as it does not build up upon the cap and trade system that the EU-ETS follows.[212] Therefore, the Netherlands would run lower risks to implement Article 193 TFEU-measures legally under the EU-ESD, compared to the EU-ETS. Lastly, it shall be mentioned that the European Commission stated in a Q&A on the EU-ESD[213] that, although it is possible for Member States to adopt their own (higher) targets for emission reduction under the EU-ESD, 'national targets cannot be set for total greenhouse gas emissions in 2013-2020 because it cannot be known by how much emissions from sectors covered by the EU ETS will be reduced by each Member State. This is because from 2013 there is a single, EU-wide cap on EU ETS emissions in place of the national caps which existed previously.'[214] Nevertheless, in the author's view this does not hinder a Member State to implement a more stringent reduction target. As already mentioned before, the SC only ordered the Netherlands to thrive for an overall emission reduction target of 25% by 2020. The Dutch government could therefore choose not to include higher reduction targets under the EU-ETS at all, but rather higher reduction targets in the non-EU ETS sector, i.e. the EU-ESD, or to lower emissions even outside both instruments.

Lastly, it must be stressed that the *Urgenda case* is also specifically extraordinary in the aspect of the national SC *ordering* the Netherlands to adopt more stringent measures. One may question under what circumstances a national court can do so,[215] regarding the fact that Article

[211] Importantly, cost-effectiveness is mentioned in the EU-ESD's preamble under recital (10) and (18). Nevertheless, this criterion does not seem to carry the equivalent high importance compared to that under the EU-ETS, where it is clearly mentioned as the core 'subject matter' of the directive under Article 1. The author thereby also agrees with Squintani, who responded in the interview conducted on the 28 May 2021 by the author to the question whether the Dutch government will have difficulties to implement its 25% emission reduction target by 2020 if it does not aim for higher reductions under the EU-ETS and EU-ESD, that the emission reduction under the EU-ESD will not be problematic [in comparison to the EU-ETS] as it does not have the cost-effectiveness requirement.

[212] According to Squintani in his interview conducted on the 28 May 2021 by the author, the waterbed effect does not exist due to the non-existent cap and trade mechanism under the EU-ESD, at least not 'automatically'. Furthermore, although- as pointed out by Squintani- a part of a Member State's annual emission allocation may be transferred to another Member State according to Article 3(4) EU-ESD, this cannot exceed the total of 5% of its annual emission allocation for a given year. This maximum limit, as laid down in Article 3(4) EU-ESD, applies to Member States as a whole, i.e. a Member State cannot transfer a maximum of 5% of its emission allocation to *each* Member State, but the limit refers to Member States as a whole. Therefore, the trading possibilities under the EU-ESD are much more restricted compared to the EU-ETS, thereby significantly lowering the chances of the waterbed effect to occur.

[213] 'Questions and Answers on the Effort Sharing Decision (October 2013)' (European Commission) <https://ec.europa.eu/clima/policies/effort_en#tab-0-3> accessed 14 June 2021.

[214] Ibid question 5.

[215] Peeters, 'Case Note Urgenda Foundation and 886 Individuals v. The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (n 137) 125.

193 TFEU speaks of Article 192-legislation not *preventing* any Member States to adopt MSPMs.

In conclusion, this analysis has shown that although the *Urgenda case* constitutes an important and welcomed sign for environmental protection and the limitation of the effects of climate change, the Dutch court(s) seem to have missed to interpret their decision in light of EU-law. Although it cannot be shown with absolute certainty that the future measures to be taken by the Dutch government pursuant to this judgment will be contrary to Article 193 TFEU, hurdles certainly exist, thereby endangering the legality of such measures.

### 3.2.2 Family Farmers Case

**Case Summary**

In the same year as the Dutch Supreme Court gave its final judgment on the Urgenda case, the Administrative Court of Berlin rendered its decision in a similar, yet -regarding its outcome- very different case: The *Family Farmers case*.[216] In this case, three families of organic farmers and their children together with the organisation Greenpeace claim that the Federal Government of Germany shall be ordered to take additional measures in order to achieve the climate protection target it has set itself for 2020 and to fulfil its reduction obligations under European Law.[217] The claim is thus based on both, national and European law: Firstly, the claimants rely on the Action Programme Climate Protection 2020 which is based on a Cabinet decision of 2014 and sets the goal for the German government to reduce GHG emissions nationally by 40% by 2020 compared to 1990-levels.[218] This constitutes a more ambitious target than the aforementioned common emission reduction target of the EU (20% by 2020), and could as such qualify as Article 193 TFEU-measures. Nevertheless, in this case it was clear that Germany would miss this goal by 6.6- 8%.[219] Secondly, it was claimed that the German State is acting unlawfully as it is likely to fail its goal of its national reduction target of 14% by

[216] *13 individuals and Greenpeace e.V. v. Federal Republic of Germany*, Administration Court Berlin (31 October 2019), case VG 10 K 412.18 ('Family Farmers'). For an (unofficial) English translation of the case see <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20211031_0027117R-SP_judgment.pdf> accessed 14 June 2021.
[217] Ibid 2.
[218] Ibid.
[219] Ibid; see also Thomas Schomerus, 'Climate Change Litigation: German Family Farmers and Urgenda- Similar Cases, Differing Judgments' (2020) 17 Journal for European Environmental& Planning Law, 324.

2020 compared to 2005-levels under the EU-ESD.[220] Additionally, the claimants[221] argued that some of their fundamental rights under the Grundgesetz (GG)[222] were violated by the State.[223] Unlike the *Urgenda case*, the *Family Farmers case* was unsuccessful. The Court ruled- contrary to the view of the German government- that a complaint seeking more climate protection is admissible in principle.[224] Nevertheless, in the case at stake the Berlin Administrative Court dismissed the case as the claimants could not substantiate the violation of their fundamental rights.[225] In regard to their first claim, the Court ruled that the Climate Action Programme 2020 had no binding external effect as it constitutes a political declaration of intent, rather than containing any legally binding regulations.[226] Regarding the second claim, the Court ruled that even if Germany does not reach its 14% emission reduction target under the EU-ESD by 2020- which is likely- this would not lead to an infringement of EU law due to the flexibility mechanisms included within the legal framework.[227] Accordingly, Germany could make use of the possibility to purchase emission allocations pursuant to Article 3(4) or (5) and/or Article 5 EU-ESD.[228] Therefore, the Court argues, no obligation arises out of Article 3(1) in conjunction with Annex II EU-ESD for the Federal Government to take additional measures to protect the climate in Germany, i.e. to achieve a specific reduction of GHG emissions in its own country.[229] Importantly, the Court then concludes that 'The rules of the burden sharing decision are clear and unambiguous as regards the margins provided for. In this respect, there is no reason for a referral to the ECJ under Art. 267 TFEU, which the Administrative Court as a court of first instance is not obliged to do anyway.'.[230]

[220] *Family Farmers* case (n 216) 2.
[221] The 13 individuals, excluding Greenpeace e.V..
[222] Basic Law for the Federal Republic of Germany of 23 May 1949 (Federal Law Gazette Part III, classification number 100-1).
[223] This regarded the right to life and physical integrity (Article 2(2) GG), the right to occupational freedom (Article 12 GG) and the right to property (Article 14 GG); see *Family Farmers* case (n 216) 4; for a more detailed assessment of this argument see Thomas Schomerus, 'Climate Change Litigation: German Family Farmers and Urgenda- Similar Cases, Differing Judgments' (2020) 17 Journal for European Environmental& Planning Law, 326 and further.
[224] *Family Farmers* case (n 216) 9.
[225] Ibid 11 (and subsequent).
[226] Ibid 12.
[227] Thomas Schomerus, 'Climate Change Litigation: German Family Farmers and Urgenda- Similar Cases, Differing Judgments' (2020) 17 Journal for European Environmental& Planning Law, 327-328.
[228] *Family Farmers* case (n 216) 22.
[229] Ibid 21.
[230] Ibid 22.

**Article 193 implications**

In regard to Article 193 TFEU, it must be stressed that in this case there have been no further going measures *per se*, but rather a non-binding commitment by the German government promising to implement such measures, which was finally left unfulfilled. Nevertheless, the Family Farmers case is interesting when compared to the *Urgenda case* for the following reason. In the Urgenda case, the court(s) seemed to avoid the inclusion of the discussion of EU-law in their decision(s) and even implicitly ruled that EU-law was unlawful, without considering its obligation to send a preliminary reference. The court(s) importantly also did not pay great tribute to the functioning of the emission reduction mechanisms under EU-law,[231] let alone the flexibility mechanisms of the EU-ETS for example. The Berlin Administrative Court, on the other hand, explicitly addressed the issue of whether it had to send a preliminary reference to the CJEU or not, by clearly ruling it out. Furthermore, it seemed to actually use EU-law in *defence* of the German government's less stringent emission reduction targets. This thereby shows how EU-law can also be instrumentalised to do the opposite of what Article 193 TFEU enables Member States to do, namely to enable states to justify less ambitious emission reduction targets.

Importantly, as suggested by Schomerus in his contribution of 2020, a future case trying to oblige Germany to adopt more stringent emission reduction targets should- in order to be successful- be based on the 2019 Climate Change Act[232] which enshrines legally *binding* targets.[233] This is indeed exactly what happened in the case that will be analysed in the next section.

### 3.2.3 German Climate Change Act Case

**Case Summary**

On 29 April 2021, the German Federal Constitutional Court published its decision in the case of Neubauer et al v. the Federal Republic of Germany (*German Climate Change Act Case*).[234]

[231] Meaning predominantly the EU-ETS and the EU-ESD.
[232] Federal Climate Change Act of 12 December 2019 (Federal Law Gazette I, p. 2513).
[233] Schomerus (n 227) 328-329; Note that the author must have accidentally written that the new Climate Change Act was passed in December *2012*, instead of 2019. It becomes though apparent that he meant to refer to the 2019 Climate Change Act as he references in footnote 24 back to footnote 15 of his contribution, where he indeed refers to the 2019 Climate Change Act.
[234] *Neubauer et al. v. the Federal Republic of Germany*, Bundesverfassungsgericht (BVerfG), Order of the First Senate of the Federal Constitutional Court of 24 March 2021 (published on 29 April 2021), 1 BvR 2656/18 -, Rn. 1-270, http://www.bverfg.de/e/rs20210324_1bvr265618.html ('German Climate Change Act case'). For an

The case comprises four constitutional complaints from various individuals which claim primarily that the German State has not taken sufficient measures to reduce GHGs as soon as possible. Thereby, the claimants oppose specific provisions of the German Climate Change Act (*Klimaschutzgesetz*; KSG), according to which Germany has to reduce GHG emissions by at least 55% by 2030 in comparison to 1990-levels.[235] Among the various claims- which shall not be further analysed here in detail- one is predominant for this contribution as it declared that the emission reduction target of 55% by 2030 enshrined in § 3 para. 1 KSG is insufficient and that the annually permissible emission quantities[236] until the year 2030 are set too high.[237] The court found the Constitutional complaints against the Climate Change Act partially successful. Although it could not establish that the legislator has violated his duty to protect the complainants from the risk of climate change or failed to satisfy the obligation arising from Article 20a GG to take climate action, the challenged provisions do violate the freedoms[238] of the complainants.[239] Importantly, the provisions offload major emission reduction burdens to periods after 2030, so the court.[240] More specifically, the court found that § 3 para. 1 sentence 2 and § 4 para. 1 sentence 3 KSG in conjunction with Annex 2 are unconstitutional insofar as there is no provision on the updating of the reduction targets for the period from 2031 onwards, as required by Article 20a GG and fundamental rights.[241]

**Article 193-implications**

Regarding the EU-law perspective of the case, it is important to mention that the EU-ETS as well as the ESR currently only regulate its emission reduction targets until 2030. Nevertheless,

(unofficial) English translation of the case see <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210429_11817_judgment-2.pdf> accessed 14 June 2021.

[235] Ibid 15.

[236] Set out in § 4 para. 1 sentence 3 KSG in conjunction with Annexes 1 and 2.

[237] Ibid 42.

[238] In regard to which freedoms are violated, see *German Climate Change Act* case (n 234) para 183: 'The decision of the legislature to allow the amount of CO2 emissions regulated in § 3.1 sentence 2 and § 4.1 sentence 3 KSG in conjunction with Annex 2 until the year 2030 has a preliminary effect similar to an intervention on the complainants' freedom, which is comprehensively protected by the Basic Law, and requires constitutional justification.'. More specifically, so the Court continues in para 184 'The Basic Law protects all human activities of freedom by means of special fundamental rights of freedom and, in any case, by means of the fundamental "general right of freedom" contained in Article 2.1 of the Basic Law (…).'.

[239] See *Climate Change Act* case (n 234) para 142; see also Sören Amelang, 'German top court finds key climate legislation insufficient in landmark ruling' (Clean Energy Wire, 29 April 2021) <https://www.cleanenergywire.org/factsheets/german-top-court-finds-key-climate-legislation-insufficient-landmark-ruling> accessed 14 June 2021.

[240] See *Climate Change Act* case (n 234) para 142; see also Sören Amelang, 'German top court finds key climate legislation insufficient in landmark ruling' (Clean Energy Wire, 29 April 2021) <https://www.cleanenergywire.org/factsheets/german-top-court-finds-key-climate-legislation-insufficient-landmark-ruling> accessed 14 June 2021.

[241] *Climate Change Act* case (n 234) para 266.

the EU-ETS Directive does not have- as such- an 'expiry date', i.e. there is no provision establishing the formal end of the legislation or more specifically of the linear decrease of the cap, meaning that the emission reduction will continue to be lowered. Additionally, both regulatory frameworks will continue after 2030 and deliberations on amendments and new targets are currently undergoing.[242] In this sense, as the concrete targets of the awaited amendments to the two regulatory frameworks are not yet known, it cannot be stated with certainty whether the measures Germany is obliged to take pursuant to this judgment will constitute Article 193-measures. Nevertheless, especially as soon as the EU-legislator has amended the EU-ETS and ESR accordingly to include such specific emission reduction targets for after 2030, Germany could run the risk of being in contradiction with EU-law.[243] If Germany's measures would still be more ambitious than what will be laid down under EU-law, the same considerations will apply as explained before under the *Urgenda case*, i.e. that especially the aspects of cost-effectiveness as well as the waterbed effect could constitute a hurdle for the legality of these measures under Article 193 TFEU.

Lastly, it shall be emphasised that within the judgment itself these considerations did not come up once. Furthermore, there is no direct mentioning of MSPM nor Art 193 TFEU, which raises the question whether national courts may purposely not mention Art 193 TFEU in order to avoid a possible obligation to refer a case to the CJEU and instead adjudicate on a national level without interference by the EU-Court. In this sense, it remains to be seen how the German national measures having to be implemented pursuant to this judgment will collide (or possibly not collide) with upcoming EU-legislation.

### 3.3 Interim Conclusion

In conclusion, the analysis carried out in this chapter has shown that national climate litigation entails numerous interesting implications for Article 193 TFEU by courts discussing the possibility or even ordering their governments to adopt MSPMs than what is laid down under EU-law. Nevertheless, it has also been shown that great uncertainty overshadows the implementation of Article 193 TFEU-measures in practice. This is not only due to the left-open questions surrounding the conditions of Article 193 TFEU, but also due to the lack of clarity

[242] This is not only evident from the EU's goal to reach climate neutrality until 2050, which thus calls for further action, but also from the European Green Deal, which will overhaul a multitude of legislation; see the European Parliament (n 145).

[243] This of course only holds true as long as Germany is taking its (future) measures regarding emission reductions that fall under the scope of the EU-ETS and/or EU-ESR.

regarding certain aspects of the EU-ETS and EU-ESD/EU-ESR. Lastly, it has also become apparent that national courts seem to prefer to decide themselves on questions of climate change, rather than referring them to the CJEU. This is unfortunate in the sense that legal scholars as well as practitioners will be further left in the ambiguity of Article 193 TFEU. In the end, it will be interesting to see how these national governments addressed by their courts will decide to finally implement their more ambitious emission reduction targets, which could possibly have adverse consequences under EU-law if not respecting Article 193 TFEU accordingly.

## 4. Conclusion

With the urgency to reverse climate change and enhance the protection of the environment, nothing should stand in a Member State's way when wanting to design a solid legal framework for the fulfilment of such commitments, and even more so if its attempt goes further than what it is legally bound to achieve under EU-law. Nevertheless, when looking at Article 193 TFEU- which grants this possibility-, this contribution has shown that Member States face a multitude of conditions which must be taken carefully into account in order not to contravene Article 193 TFEU. This may subsequently make the possibility to opt for such measures less attractive for them.

What became apparent is that there is a high number of conditions which are not clear-cut and left in uncertainty. This accounts for the following conditions: The condition of having to be in line with secondary non-environmental goals of a Union measure; the condition of having to follow the principle of proportionality; the condition of having to be compatible with fundamental rights under the European Charter of Fundamental Rights; the condition of having to pursue a higher level of environmental protection, i.e. in how far the Court would assess the actual effect of the planned national measure. On the other hand, among the clear-cut conditions are: The condition of the national measure having to follow the same primary environmental objective as the Union act; the 'pre-condition' of having to transpose the Union measure pursuant to which MSPMs are planned to be taken; the condition of having to be compatible with the Treaties; the condition of having to be compatible with secondary legislation; the condition of having to be compatible with general principles of EU law; the condition of having to notify the national measure to the European Commission. This also

shows that the Court has established many more conditions in the realm of Article 193 TFEU through its case-law than what its short text explicitly prescribes.[244]

In regard to the research question on what the consequences are of Article 193 TFEU not applying to legislation based on Article 114 TFEU, it must be stressed that the analysis conducted on Article 114 has shown that there are indeed possibilities for Member States to adopt further going measures under the latter provision. Even if those have shown to be more difficult to be implemented than under Article 193 TFEU, it must be stressed that much of today's EU legislation in the context of the internal market is adopted pursuing minimum harmonisation, thereby often providing for the possibility to go further within the legislation itself. Furthermore, it is unlikely that the EU-legislator has an inherent preference to adopt legislation based on Article 114 TFEU rather than Article 192 TFEU. This is not only shown by the reason just explained, but also by the EU's overall goal enshrined in law- such as the EU-Green Deal- to set environmental protection as top priority. While the legal considerations surrounding the internal market in relation to environmental protection within the realm of Article 193 TFEU are still relevant today, they do not seem to play such an important role in practice at the moment.

Regarding the question of what the implications of recent national climate litigation are in the context of Article 193 TFEU-measures, the analysis of three national cases has shown a rather unclear picture. In the *Urgenda case*, the national court(s) seemed to barely take the EU-law perspective into account, possibly leading to future problems when the Dutch government has to implement the decision through adopting MSPMs. Those could especially conflict with the conditions of the national measure having to be in line with secondary (non-environmental) objectives of the Union measure- which relates to the cost-effectiveness under the EU-ETS in this case- as well as the condition of the measure having to lead to more protection, which could be hindered by the waterbed-effect in the context of emission reductions. Importantly, it remains yet to be seen how the Market Stability Reserve within the EU-ETS system will affect, and possibly diminish the waterbed-effect in the future. The same considerations apply similarly to the two further cases analysed, namely the *Family Farmers case* and the *German Climate Action case*. It is highly regrettable that the national courts in the *Urgenda case* did not send the matter to the CJEU in form of a preliminary reference in order to get more clarity

[244] Article 193 TFEU merely mentions four conditions explicitly: the national measure has to be adopted pursuant to Article 192 TFEU; it has to be more stringent protective; it must be compatible with the Treaties; it has to be notified to the Commission.

on how Member States may legally implement MSPMs in the context of emission reduction targets. Moreover, it became apparent that national courts seemed rather reluctant in mentioning Article 193 TFEU or the issue that it could conflict with EU-law, with the latter being especially evident in the *Urgenda case*. Given the amount of uncertainty created by the unclear conditions under Article 193 TFEU, it is maybe less surprising why national courts seemingly refrain from doing so.

In conclusion, it is unfortunate that Member States are left with little clarity on the possibility to adopt MSPMs. While this contribution has shown that the possibility to take such measures certainly constitutes the reality rather than an illusion, the complexity of the provision and its conditions seemingly does not make it very attractive for Member States to adopt them. It can only be hoped for Member States getting more confident in sending questions on this matter to the Court in order to finally reach legal certainty on this apparently important provision.

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