



ARTICLES

THE HORIZONTAL CLAUSES OF ARTS 8-13 TFEU: NORMATIVE IMPLICATIONS, IMPLEMENTATION AND POTENTIAL FOR MAINSTREAMING

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THE ENVIRONMENTAL INTEGRATION PRINCIPLE IN EU LAW: NORMATIVE CONTENT AND FUNCTIONS ALSO IN LIGHT OF NEW DEVELOPMENTS, SUCH AS THE EUROPEAN GREEN DEAL

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ABSTRACT: The environmental integration principle, which aims to incorporate environmental considerations into the regulatory instruments in the fields outside Environmental Law, initially emerged and evolved in International and subsequently in EU Law. Since its emergence, the environmental integration principle has been closely linked to the concept of sustainable development, given that the principle is perceived as a key instrument for its realisation. The main aim of this *Article* is to an-

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swer the question of whether the environmental integration principle has not only a procedural, but also a substantive meaning in EU Law and, if this question is answered in the affirmative, the question of how the substantial component of the principle can be determined. Answering this question presupposes not only analysing the legal status, the addressees and the regulative context of the respective provision, but also certain recent critical developments that have taken place since the adoption of the EU Green Deal. The main message underpinning this *Article* is that the principle also has a substantive meaning that has been reinforced since the adoption of the EU Green Deal, but often it cannot be clearly delineated. The implementation of its substantive component through the respective legal instruments can also result in conflicts with the provisions of the EU Economic Constitution.

KEYWORDS: environmental integration principle – sustainable development – EU Green Deal – “do no significant harm” principle – integration clauses – environmental principles.

I. INTRODUCTION

The environmental integration principle has gained significant recognition in International and EU Law. Both at the international and the EU level, the principle, which aims to incorporate environmental considerations in the regulatory instruments and other policy instruments in fields outside Environmental Law, is closely linked to the concept of “sustainable development”, the latter considered a key instrument for its realisation. The main aim of this *Article* is to answer the question of whether the environmental integration principle has not only a procedural, but also a substantive meaning and if this question is answered in the affirmative, of how the substantial component of the principle is determined, also in conjunction with the concept of “sustainable development”. Answering these questions presupposes the analysis of the recent developments following the adoption of the European Green Deal (EGD) which constitutes a “paradigm shift” with regard to the EU policies aiming to promote sustainability.¹

To this end, the evolution of the environmental integration principle in International Law will be briefly analysed, as both the principle and the “concept” of “sustainable development”² have their origins in International Law and the EU bears the obligation to respect International Law (arts 3(5) and 21 TEU) (Section II). Section III analyses the legal status of the environmental integration clause in EU Primary Law and the reasons for its classification as a legal principle, the addressees and the functions of the principle. The analysis also focuses on its regulatory context, including its relationship with the objec-

¹ Communication COM(2019) 640 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 December 2019, ‘The European Green Deal’. See also S Schunz, ‘The “European Green Deal” – a Paradigm Shift? Transformations in the European Union’s Sustainability Meta-Discourse’ (2022) Political Research Exchange 19.

² The term “concept” is not used at this point in its strict legal meaning, but in a broad sense. This clarification seems necessary, as there is an intense scholarly discussion concerning the legal categorization of “sustainable development”, as will be analysed in the next sections.

tive of sustainable development in search of its substantive content. In Section IV, an analysis of how the substantive component of the environmental integration principle has gained new strength in light of the EGD and its accompanying Initiatives will be presented, as without it the green transition cannot be achieved. Finally, specific conclusions are drawn on the new role of the principle and its capacity to promote sustainable development.

II. THE ORIGINS AND THE EVOLUTION OF THE ENVIRONMENTAL INTEGRATION PRINCIPLE IN INTERNATIONAL LAW

At the international level, the principle first emerged in art. 13 of the Stockholm Declaration and was closely linked to the idea of planning.³ The principle re-appeared in the Brundtland Report and was linked for the first time to the implementation of the concept of sustainable development.⁴

The strong link between the integration principle and sustainable development in the sense that the former constitutes a key instrument for the realisation of the latter was re-affirmed in art. 4 of the Rio Declaration. The key role of the integration principle in achieving sustainable development was reaffirmed in the Johannesburg Plan of Implementation adopted by the 2002 Johannesburg Summit on Sustainable Development and in the Document adopted by the Rio +20 Conference.⁵ The integration principle also underpins the UN 2030 Agenda for Sustainable Development, which contains 17 sustainable development goals (SDGs) and 169 targets. The Agenda states that the goals and targets are universal and indivisible and balance the three dimensions of sustainable development: the economic, social and environmental dimension (Declaration, Preamble, para. 5). Moreover, it requires that SDGs are implemented in an integrated manner (art. 13 of the 2030 Agenda).⁶

³ United Nations, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, UN Doc.A/CONF 48/14/REV.1. See V Barral and P-M Dupuy, 'Principle 4: Sustainable Development through Integration' in JE Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015) 157-158.

⁴ World Commission on Environment and Development, Report of the World Commission on Environment and Development: Our Common Future, transmitted to the UN General Assembly as an Annex to document A/47/42, 4 August 1987. See also M Montini, 'The principle of Integration' in L Krämer and E Orlando (eds), *Principles of Environmental Law* (Edward Elgar 2018) 139-140.

⁵ United Nations, Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002, A/CONF.199/20, New York 2002, p. 8, para. 2; United Nations, 'The future we want', Outcome Document of the United Nations Conference on Sustainable Development, Rio de Janeiro, Brazil, 20-22 June 2012, 2012, para. 10, available at: sustainabledevelopment.un.org.

⁶ General Assembly, UN Resolution 'Transforming our World: The 2030 Agenda for Sustainable Development' of 21 October 2015, UN Doc A/RES/70/1. See K Bosselmann, 'Sustainable Development Law' in E Techera and others (eds), *Routledge Handbook of International Environmental Law* (Routledge 2020, 2nd edition) 37.

Furthermore, the integration principle has influenced the content of certain Multi-lateral Environmental Agreements (MEAs) by facilitating an integrated approach to their respective field of regulation and the content of the Trade Agreements that include an environmental or a sustainable development chapter.⁷

The principle of integration has also found its way into the jurisprudence of International Tribunals, as it plays a role in the application and interpretation of the respective legal rules, also by facilitating a balancing exercise between economic and environmental considerations. More specifically, it has been implicitly recognized by the ICJ in the *Gabčíkovo Nagymaros* case and in the *Pulp Mill* case.⁸ The most explicit application of the principle can be found in the *Iron Rhine* case that was decided by the Permanent Court of Arbitration (PCA), in which the Tribunal ruled that International and European Community law require the integration of appropriate environmental measures in the design and implementation of economic development policies and that the Principle 4 of the Rio Declaration reflected this trend.⁹

In this context, there are two issues that need further attention. The first one concerns the qualification of the integration duty in International Environmental Law as an objective, rule or principle.¹⁰ Although the inclusion of the integration duty in the Rio Declaration is not enough to elevate its status to a legal principle, it is persuasively argued that “it has a relatively high degree of generality and abstraction which indeed suits to the category of the principles” and that “it is however more than a goal or a concept with no legal grounding”.¹¹ Supportive to this approach is that the PCA in the *Iron Rhine* Case referred to Principle 4 of the Rio Declaration as a principle, although it

⁷ The following MEAs include, among others, provisions that reflect the content of the integration principle: *i*) the UN Framework Convention on Climate Change (art. 3(4)); *ii*) the Convention on Biological Diversity (CBD) [1992] (art. 6 (b) and art. 10 (a)); *iii*) the UN Convention to Combat Desertification (UNCCD) [1994] (art. 4 (2)) and *iv*) the Paris Agreement [2015] (Preamble, art.2 and art. 4). The Trade Agreements, which contain an environmental or a sustainable development chapter, are, among others, the United States-Mexico-Canada Agreement (UMSCA) [art. 24] and the EU-Canada Comprehensive Economic and Trade Agreement (CETA) [Chapter 22-Trade and Sustainable Development and Chapter 24-Trade and Environment]. See V Barral and P-M Dupuy, ‘Principle 4’ cit.169-172.

⁸ ICJ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [25 September 1997] paras 140-141; ICJ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits) [20 April 2010] paras 76-77.

⁹ Permanent Court of Arbitration, Award of 24 May 2005, *Iron Rhine Railway Case* between the Kingdom of Belgium and the Kingdom of Netherlands, para. 59.

¹⁰ According to Dworkin, rules set certain conditions upon the fulfillment of which a legal consequence comes and are thus applied in an “all or nothing fashion”. By contrast, principles provide a general direction with regard to justice, fairness and other moral rules to which positive law must comply. See R Dworkin, *Taking Rights Seriously* (Harvard 1977) 22 ff. For the distinction between rules and principles in International Environmental Law, according to the degree of generality see P-M Dupuy and J Viñuales, *International Environmental Law* (2nd edition, Cambridge University Press 2018) 58-59.

¹¹ V Barral and P-M Dupuy, ‘Principle 4’ cit. 164.

accepted the distinction between principles and rules in International Law.¹² The second issue concerns whether the integration principle has a mere procedural meaning in the sense of establishing an obligation to take into account the environmental impact of the designed policies, plans or projects, irrespective of the substantive outcome or whether it also has a substantive meaning in the sense that the integrative approach should exert influence on the content of the decisions taken. The decisive factor that has to be considered is that the integration of environmental concerns in the development process is a prerequisite for achieving sustainable development, which cannot be achieved, if the decisions taken fail to achieve an adequate level of environmental protection. Such an approach speaks for the recognition of a substantive element of the integration principle. This namely requires that the decisions taken through a process of integrating economic, environmental and social concerns should mitigate, at least, to some extent, the anticipated environmental damage.¹³

In conclusion, the principle does not have a solid legal foundation and a well-defined legal content,¹⁴ so that it can be a rather vague point of reference for the determination of its regulative contours in EU Law.

III. THE EVOLUTION, LEGAL STATUS, NORMATIVE CONTENT AND FUNCTIONS OF THE ENVIRONMENTAL INTEGRATION PROVISION IN EU LAW

III.1. THE EVOLUTION OF THE ENVIRONMENTAL INTEGRATION PRINCIPLE AND ITS LEGAL STATUS IN EU LAW: TOWARDS A LEGAL PRINCIPLE OF ENVIRONMENTAL INTEGRATION

The environmental integration clause was first introduced in EU Primary Law with the Single European Act (art. 130(r)(2) of the Treaty establishing the European Economic Community (hereafter EEC Treaty), as amended by the Single European Act). The content of the clause was modified in the subsequent Treaty amendments and since the Amsterdam Treaty it has been closely linked with sustainable development.¹⁵

The most recent changes to the content of the clause were brought by the 2007 Treaty of Lisbon, which re-organized the structure of the Treaties. The clause in its current version is enshrined in art. 11 TFEU and its content remained, to a large extent, unchanged. The current version reads as follows: “Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development”.

¹² *Iron Rhine Railway Case* between the Kingdom of Belgium and the Kingdom of Netherlands, cit., para. 58.

¹³ V Barral and P-M Dupuy, ‘Principle 4’ cit. 164.

¹⁴ E Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing 2017) 87.

¹⁵ J Jans, ‘Stop the Integration Principle’ (2011) *Fordham International Law Journal* 1533, 1536-1538; M Montini, ‘The Principle of Integration’ cit. 143-144.

The environmental integration duty also in connection with the principle of sustainable development is enshrined in art. 37 of the Charter of Fundamental Rights of the EU (EUCFR).¹⁶ Contrary to the integration clause enshrined in art. 11 TFEU, art. 37 EUCFR makes reference to the policy objective of a “high level of environmental protection” and the objective of “the improvement of the quality of the environment”. It strengthens, thus, the obligation of EU institutions to pursue these ambitious objectives in the design and implementation of sectoral policies.¹⁷ Art. 194(1) TFEU, which constitutes the legal basis for EU energy policy, also makes reference to the need to protect and preserve the environment within the context of that policy. Furthermore, art. 114(3) TFEU, which is characterised as a “passive integration clause”¹⁸ sets out that EU institutions should pursue a high level of health, safety, environmental and consumer protection when legislation on the internal market is adopted.

In light of the above, the first question that arises concerns the legal status of the environmental integration duty as enshrined in art. 11 TFEU and especially whether it can be classified as a principle or not.¹⁹ A first reason that could speak for its classification as a principle is the “strong” wording of the relevant provision (“must be integrated”) also in relation to the other integration clauses. More particularly, the provision sets a clear-cut obligation for the integration of environmental considerations into all EU policies and activities.²⁰ Supportive to this argument is the fact that the environmental integration clause is the only such clause associated with a fundamental objective (*i.e.* sustainable development), which requires at least equal weight for environmental

¹⁶ E Scotford, ‘Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights’ in S Bogojević and R Rayfuse (eds), *Environmental Rights in Europe and Beyond: Swedish Studies in European Law* (Hart Publishing 2018) 133 ff.

¹⁷ L Krämer, ‘Giving a Voice to the Environment by Challenging the Practice of Integrating Environmental Requirements into other EU Policies’ in S Kingston (ed.), *European Perspectives on Environmental Law and Governance* (Taylor and Francis 2013) 88.

¹⁸ B de Witte, ‘Conclusions: Integration Clauses: A Comparative Epilogue’ in F Ippolito, ME Bartolini and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2019) 181.

¹⁹ For the classification of the environmental integration duty as a legal principle see NML Dhondt, *Integration of Environmental Protection into other EC Policies: Legal Theory and Practice* (Europa Law Publishing 2003) 143; G van Calster and L Reins, *EU Environmental Law* (Edward Elgar 2017) 22; M Montini ‘The Principle of Integration’ cit. 139 ff.; M Geelhoed, E Morgera and M Ntona, ‘European Environmental Law’ in E Techera and others (eds), *Routledge Handbook of International Environmental Law* cit. 241; E Scotford, *Environmental Principles and the Evolution of Environmental Law* cit. 87-88; N de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (2nd edition, Oxford University Press 2020) 472-483. Other authors take a more cautious approach with regard to its classification as a principle. See J Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press 2016) 15 ff.; L Krämer, ‘Giving a Voice to the Environment by Challenging the Practice of Integrating Environmental Requirements into other EU Policies’ cit. 89.

²⁰ N de Sadeleer, *Environmental Principles* cit. 473. See also case C-379/98 *PreussenElectra* ECLI:EU:C:2000:585, opinion of AG Jacobs, para. 231 with regard to the previous version of the integration clause.

considerations. A second reason is that its content is sufficiently abstract in the sense that it does not provide any direction about the tools and the extent of the “desired” integration. Subsequently, EU organs enjoy a degree of discretion in implementing the enshrined principle and in weighing it against competing principles or interests.²¹ This discretion can be, though, limited by the association of the environmental integration clause with the objective of “sustainable development”, because legislative instruments or decisions that do not guarantee an adequate level of environmental protection, cannot contribute to the achievement of the afore-mentioned objective. A third reason is that the clause has been used by the EU courts as a standard to review the validity of the EU secondary legislation adopted in a specific sector and its potential impact on the environment, as it will be discussed below in Section III.4.²² For all the above reasons, the environmental integration duty can be classified as a directing principle of EU Environmental Law²³ that serves several functions also associated with the particularities of EU Environmental Law, as it will be analysed in Section III.4.

III.2. THE ADDRESSEES AND SCOPE OF THE PRINCIPLE

Another preliminary issue that arises concerns the addressees of the duty of environmental integration. In accordance with art. 11 TFEU, this duty is placed mainly on the Commission, the European Parliament and the Council – the three EU institutions, which have the core competences in legislative decision-making procedures and are obliged to integrate environmental concerns when adopting secondary legislation other than environmental policy.²⁴ Furthermore, the integration duty also applies to cases where the Commission acts as a “Guardian of the Treaties” with respect to the implementation of EU Law both by the other EU institutions, bodies and agencies and by Member States (MS).²⁵ In addition to this, the EU Courts are bound by the principle when they interpret the respective EU Law provisions.²⁶

The material scope of art. 11 TFEU is determined in a broad manner in the sense that the integration duty applies to all policies and activities in the various policy fields outside environmental policy, such as the Common Agricultural Policy, the Fisheries Pol-

²¹ N de Sadeleer, *Environmental Principles* cit. 473-474.

²² *Ibid.* 475; E Scotford, *Environmental Principles and the Evolution of Environmental Law* cit. 144 ff.

²³ N de Sadeleer, *Environmental Principles* cit. 411 ff. and 471 ff.

²⁴ B Sjøfjell, ‘The Environmental Integration Principle: A Necessary Step Towards Policy Coherence for Sustainability’ in F Ippolito, M-E Bartolini and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 105, 109.

²⁵ *Ibid.* 115.

²⁶ Although art. 11 TFEU does not directly impose obligations on MS, it is persuasively argued that MS have to respect the environmental integration duty, when they implement EU-originated policies and legislation. Such an obligation can be inferred from the duty of loyalty and cooperation enshrined in art. 4(3) TEU. See B Sjøfjell, ‘The Environmental Integration Principle’ cit. 116 ff.; J Nowag, *Environmental Integration in Competition and Free-Movement Laws* cit. 22 and 24.

icy and the policies associated with the internal market.²⁷ The wording of the provision and, specifically, the reference to “activities” supports the view that EU institutions are bound by the integration duty not only when they adopt policies or legislation but also when they adopt individual decisions, such as competition and state aid decisions. This thesis is supported by certain judgments of the EU Courts.²⁸ It is also apparent from the wording of art. 11 TFEU that the incorporation of the environmental requirements must take place in the early planning phase and, specifically, at the definition of the policy objectives and should apply to every stage of the legislative process.²⁹

Another central issue concerning the application of the integration principle is the question of “what precisely has to be integrated?” in the policies and legislative measures outside the environmental area, as art. 11 TFEU speaks of “environmental protection requirements”, without providing any further specification. It is persuasively argued³⁰ that the environmental protection requirements, which must be incorporated in the various legislative measures, policies and decisions, include the environmental objectives listed in art. 191(1) TFEU, the environmental principles listed in art. 191(2) TFEU and the environmental policy aspects enshrined in art. 191(3) TFEU. Such a broad interpretation of the “environmental protection requirements” is supported by the holistic character of environmental protection.³¹

Another central question concerns whether the integration duty bears a merely procedural character or also a substantive character. That would be in the sense that it only imposes an obligation on the respective actors to take the environmental considerations into account, yet irrespectively of the substantive content of the final act or decision (weak interpretation), or in the sense that, by contrast, it should exert an influence on the substantive outcome of the final decision and, thus, mainly in the context of a balancing process of the competing interests (stronger interpretation). If the question of the substan-

²⁷ N de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford University Press 2014) 26; M Geelhoed, E Morgera and M Ntona, ‘European Environmental Law’ cit. 241-242 who distinguish between external integration which concerns the incorporation of the environmental requirements in EU sectoral policies and internal integration which requires that the environmental legislation itself is interpreted in light of the principles, the objectives and the criteria set in art. 191 TFEU, even when these are not explicitly incorporated in the concrete piece of the legislation at stake. The internal integration is also associated with the adoption of a holistic regulatory approach to environmental law making that relies on various forms of assessment, on permitting instruments which promote the integrated pollution prevention and control and legislative instruments which set the framework for the integrated protection and management of the natural resources and promote the eco-system approach.

²⁸ J Nowag, *Environmental Integration in Competition and Free-Movement Laws* cit. 24. See case C-487/06 P *British Aggregates v Commission* ECLI:EU:C:2008:757 para. 90; case C-594/18 *Austria v Commission* ECLI:EU:C:2020:742 para. 100.

²⁹ B Sjøfjell, ‘The Environmental Integration Principle’ cit. 110; M Geelhoed, E Morgera and M Ntona, ‘European Environmental Law’ cit. 241.

³⁰ J Jans, ‘Stop the Integration Principle?’ cit. 1542.

³¹ J Nowag, *Environmental Integration in Competition and Free-Movement Laws* cit. 25.

tive character of the environmental integration principle is answered in the affirmative, then the question of the strength of the integration duty arises. This essentially concerns whether it is required that environmental protection is to be given priority over the interests representing the other two pillars of the sustainable development concept (economic and social) in the case of a rather irresolvable conflict (strong interpretation of the environmental integration principle).³² To answer these interrelated questions and to define the regulative contours of the environmental integration principle, it is necessary to explore its relationship with sustainable development, as the former does not stand alone, but is perceived as a prerequisite for achieving the latter.

III.3. THE NORMATIVE CONTENT OF THE ENVIRONMENTAL INTEGRATION PRINCIPLE IN EU LAW THROUGH ITS ASSOCIATION WITH THE “OBJECTIVE” OF “SUSTAINABLE DEVELOPMENT”

More than any other principle or concept in EU (Environmental) Law, sustainable development is connected to international legal developments, as it was first defined in the 1987 Brundtland Report.³³ There is an intense debate with regard to the legal nature of sustainable development, as a wide array of opinions exists concerning its classification in International Law. These opinions range from its recognition as a principle of Public International Law to an objective, a concept or even a paradigm, with the most common classification being that of a concept or a principle.³⁴ Furthermore, while it is agreed that sustainable development is structured around the three interrelated and complementary pillars of economic growth, social cohesion and environmental protection, there is a discussion concerning the weight that is given to each of them.³⁵ Moreover, in the quest to determine the content of sustainable development there have been certain efforts to break the concept (or the multi-faceted principle) into clearly defined princi-

³² S Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press 2012) 113 ff.

³³ Report of the World Commission on Environment and Development: Our Common Future (1987), cit., Part I, Chapter II, Point 1.

³⁴ Ph Sands and J Peel, *Principles of International Environmental Law* (Cambridge University Press 2018, 4th edition) 217 classifying it as a principle; P-M Dupuy and G Viñuales, *International Environmental Law* cit. 91 classifying it as a concept. See also V Barral, ‘The Principle of Sustainable Development’ in L Krämer and E Orlando (eds), *Principles of Environmental Law* cit. 103 and 106 classifying it as a legal principle in its most abstract formulation.

³⁵ M-C Cordonier-Segger, ‘Sustainable Development in International Law’ in H Ch Bugge and Ch Voigt (eds), *Sustainable Development in International and National Law: What did the Brundtland Report do to Legal Thinking and Legal Development, and Where Can we Go From Here?* (Europa Law Publishing 2008) 93, 103 arguing that the three pillars are of equal importance; K Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Routledge 2017, 2nd edition) 104 arguing that the environment is the overriding system which sets the limits for economic and social development.

ples or elements, which include the integration principle, the principle of sustainable use of natural resources and the principle of intergenerational equity.³⁶

Although no definition of “sustainable development” is given in EU Primary Law,³⁷ the term appears in certain provisions. It is first referred to as a principle in recital 9 of the Preamble of TEU. Furthermore, art. 3(3) TEU sets out that “the Union [...] shall work for the sustainable development of Europe” (and that it “shall promote [...] solidarity among the generations”), while art. 3(5) TEU underlines the global role of the EU in promoting sustainable development by stating that “the Union [...] shall contribute to peace, security, the sustainable development of the Earth [...]”. Art. 21(2)(d)(f) TEU sets forth the commitment of the EU to promote sustainable development in the context of the EU external relations and the commitment to promote policies aiming at the sustainable use of global natural resources.³⁸ Moreover, sustainable development is referred to in art. 37 EUCFR as a principle and in art. 11 TFEU without any legal classification.

The systematic and teleological analysis of the afore-mentioned provisions leads to certain conclusions. The first conclusion is that “sustainable development” mainly in the form of a concept that consists of three interrelated and complementary pillars of equal importance is set in rather clear terms in art. 3(3) TEU, while in art. 21(2)(d) TEU it is enshrined as a core component of EU external relations.³⁹ The second conclusion is that the relevant EU Primary Law provisions do not make any reference to any other procedural or substantive element of this multi-faceted concept, except for the sustainable use of global natural resources (art. 21(2)(f)) and for the intergenerational equity through the reference to the solidarity among generations in art. 3(3) TEU and the association of the enjoyment of the rights enshrined in the EUCFR with responsibilities and duties also with regard to future generations in the Preamble of the Charter. Subsequently, the legal provisions of EU Primary Law, also due to their vague formulation, do not provide significant and clear guidance for determining which economic model or which decisions concerning the authorization of major infrastructure or energy-related projects (*i.e.* decisions for the authorization of hydropower plants or offshore drilling installations) can be classified as compatible with sustainable development.⁴⁰ The third conclusion that can be drawn, is that because of the vague wording of the afore-mentioned provisions of EU Primary Law (art. 3(3)

³⁶ K Bosselmann, ‘Sustainable Development Law’ cit. 35-37.

³⁷ A definition of “sustainable development” was included in art. 2 of Regulation (EU) 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries which was repealed by Regulation 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation.

³⁸ G Bándi, ‘Principles of EU Environmental Law Including (the Objective of) Sustainable Development’ in M Peeters and M Eliantonio (eds), *Research Handbook on EU Environmental Law* (Edward Elgar 2020) 38-39.

³⁹ N de Sadeleer, *EU Environmental Law and the Internal Market* cit. 16 (with regard to art. 3(3) TEU).

⁴⁰ *Ibid.* 16.

and (5) TEU, art. 21(2)(d)(f) and art. 37 EUCFR), it can hardly be perceived as a principle or as a legal concept that imposes concrete legally enforceable obligations on EU institutions.⁴¹ It can be regarded merely as a legally binding objective that should guide EU institutions in the internal and external Union action. In addition, EU organs enjoy a rather wide margin of discretion on how to achieve it.⁴²

It is also worth noting that the CJEU has not shed sufficient light on the legal nature and the regulative context of the term “sustainable development”, which has appeared in certain rulings regarding its enshrinement in the EU Primary and Secondary Legislation. In the few cases in which “sustainable development” played a role in the shaping of legal reasoning, the Court seems to approach the concept in its dominant three pillar version without any further doctrinal elaboration.⁴³

The analysis concerning sustainable development as an overarching EU objective that EU institutions should respect and, which even in its weak version, presupposes striking a balance among the three pillars, provides guidance so as to answer the question of whether the environmental integration principle also has a substantive meaning. The linkage of the environmental integration principle with sustainable development gives the former a substantive meaning.⁴⁴ The latter is firstly meant in the sense that environmental considerations should be on equal footing with other sectoral policy objectives and be incorporated in the content of the respective legislative instruments or decisions in the various fields of EU policy as a result of a balancing process, in order for the fundamental objective of “sustainable development” to be achieved.⁴⁵ Its substantive character also requires that, if various options are possible, the most favourable

⁴¹ J Jans and HB Vedder, *European Environmental Law: After Lisbon* (Europa Law Publishing 2012, 4th edition) 8; J Verschuuren, ‘The Growing Significance of the Principle of Sustainable Development as a Legal Norm’ in D Fisher (ed.), *Research Handbook on Fundamental Concepts of EU Environmental Law* (Edward Elgar 2016) 276, 285 characterizing it as a mere political idea.

⁴² G Bándi, ‘Principles of EU Environmental Law Including (the Objective of) Sustainable Development’ cit. 39.

⁴³ Case C-91/05 *Commission v Council* ECLI:EU:C:2008:288 para. 98; case C-43/10 *Nomarchiaki Aftodioikisi Aitolokarnanias and others* ECLI:EU:C:2012:560 para. 139; case C-66/13 *Green Network* ECLI:EU:C:2014:2399 para. 55; case T-370/11 *Poland v Commission* ECLI:EU:T:2013:113 para. 108. In this context, see case C-371/98 *First Corporate Shipping* ECLI:EU:C:2000:108, opinion of AG Léger, para. 54, who adopted the thesis that sustainable development does not mean that environmental protection should prevail necessarily and systematically over other interests protected by EU policies and emphasised the need for a conciliatory approach between the various competing interests. See also case C-43/10 *Nomarchiaki Aftodioikisi Aitolokarnanias and others* ECLI:EU:C:2011:651, opinion of AG Kokott, para. 238 in which she deviates to some extent from the thesis of the equal importance of the three pillars. See also E Scotford, *Environmental Principles and the Evolution of Environmental Law* cit. 193 ff.

⁴⁴ If the environmental integration principle is limited to its procedural dimension, it cannot then be ensured that it contributes to the achievement of sustainable development as an overarching EU objective. See J Jans and HB Vedder, *European Environmental Law* cit. 23 who favour a rather procedural approach.

⁴⁵ B Sjøfjell, ‘The Environmental Integration Principle’ cit. 112; S Kingston, *Greening EU Competition Law and Policy* cit. 107, 114.

from an environmental perspective is chosen.⁴⁶ Furthermore, the threshold set by the environmental integration principle in substantive terms that cannot be exceeded in the balancing process lies in the avoidance of any significant damage to the environment by the adopted (legislative) measure or decision. The reason for this is that in such a case the environmental pillar of the afore-mentioned objective would be violated.⁴⁷ This thesis concerning the avoidance of significant environmental damage as a threshold is not expressly founded in the Treaties.⁴⁸ However, it may be argued that it can be founded on the requirement for the integration of a “high level of environmental protection” and of the “improvement of the quality of the environment” into EU policies set in art. 37 EUCFR. Likewise, it may be founded in the obligation to achieve a “high level of environmental protection, as set in art. 191(2) TFEU,⁴⁹ in conjunction with art. 3(3) TEU and art. 11 TFEU and the status of environmental protection as an EU fundamental objective.⁵⁰ In this respect, the substantive content of the environmental integration principle is identified, to some extent, with that of the “do no significant harm” principle set in certain recent EU legal instruments, as will be analysed in section IV.4.

Furthermore, the wording of the respective provisions (art. 3(3) TEU, art. 11 TFEU) in conjunction with art. 7 TFEU which requires that the EU institutions should take into consideration the objectives of all other policy areas when taking action in a specific policy field,⁵¹ cannot support the view that the environmental integration principle requires that priority should be given to environmental protection requirements vis-à-vis other competing interests (e.g. economic growth, social cohesion).⁵² This position is further justified by the fact that the Treaties do not set out any kind of hierarchy among the various integration clauses.⁵³ On the contrary, a thesis for the prioritisation of environmental interests over other competing interests could be only founded, if the fundamental objective of sustainable development is interpreted in light of the concept of

⁴⁶ S Kingston, *Greening EU Competition Law and Policy* cit. 114

⁴⁷ V Barral and P-M Dupuy, ‘Principle 4’ cit. 164 adopting the same approach with regard to International Law.

⁴⁸ S Kingston, *Greening EU Competition Law and Policy* cit. 106 (and footnote 39 of the same page).

⁴⁹ D Misonne, ‘The Court of Justice of the European Union and the High Level of Environmental Protection: Transforming a Policy Objective into a Concept Amenable to Judicial Review’ in C Voigt, *International Judicial Practice on the Environment* (Cambridge University Press 2019) 219 ff.

⁵⁰ Case C-240/83 *Procureur de la République v ADBHU* ECLI:EU:C:1985:59 para. 13; case C-302/86 *Commission v Denmark* ECLI:EU:C:1988:421 para. 8. See also *Nomarchiaki Aftodioikisi Aitolokarnanias and others*, opinion of AG Kokott, cit. para. 238 with regard to the limits that the sustainability principle may set in the balancing process of competing interests.

⁵¹ N Nic Shuibhne, ‘Deconstructing and Reconstructing Article 7 TFEU’ in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* cit. 162.

⁵² Case C-161/04 *Austria v Parliament and the Council* ECLI:EU:C:2006:66, opinion of AG Geelhoed, para. 59; joined cases C-204/12 to C-208/12 *Essent Belgium NV* ECLI:EU:C:2013:294, opinion of AG Bot, para. 97.

⁵³ B de Witte, ‘Conclusions’ cit. 181.

the planetary boundaries,⁵⁴ as is persuasively suggested in the legal theory given the current climate crisis and other pressing environmental problems.⁵⁵

Finally, the specific characteristics of the environmental integration principle (strong wording both in art. 11 TFEU and art. 37 EUCFR) and its association with the fundamental objective of sustainable development can set normative limits to the so-called “reversed” integration. This “situation” can be the consequence of the proliferation of the integration clauses by means of the Lisbon Treaty and the introduction of the “super integration clause” of art. 7 TFEU. The concern here is that it may lead to the dilution of environmental standards, offsetting them against other interests or policy considerations or the lowering of the environmental standards, because everything has to be integrated into everything and the balancing process becomes difficult.⁵⁶ The thesis concerning the normative limits set to the “reversed” integration can also be supported by the argument that the lowering of the environmental standards as a result of the balancing process in the context of integrating various interests would also violate the obligation to achieve a high level of environmental protection (art. 191(2) TFEU).

III.4. THE FUNCTIONS OF THE PRINCIPLE

The environmental integration principle plays a critical role in *enabling* the EU institutions in their capacity to propose, adopt or modify legislation to pursue environmental objectives within the framework of other non-environmental policies, such as the internal market and the common agricultural policy. By qualifying the EU institutions to take legal measures for the protection of the environment whenever they exercise their legislative competence in furtherance of the respective EU policies, the principle leads to an extension of the limits of their competence which is governed by the principle of conferral (art. 5(1) and (2) TEU) (“the enabling function”).⁵⁷ This function is re-affirmed by the CJEU in certain cases in which the Court adopted the view that the environmental integration principle, also in its previous version (art. 6 EC), can justify the pursuit of environmental objectives by measures adopted under a legal basis other than art. 192 TFEU.⁵⁸ The provision

⁵⁴ The concept of the planetary boundaries attempts to identify certain non-negotiable ecological limits which should determine the space in which economic and social development has to take place, so that the earth system can safely operate. See J Rockström and others, ‘Planetary Boundaries: Exploring the Safe Operating Space for Humanity’ (2009) *Ecology and Society* 1-33 www.ecologyandsociety.org.

⁵⁵ B Sjøfjell, ‘The Environmental Integration Principle’ cit. 106 ff.; see also Ch Voigt, ‘Article 11 TFEU in light of the Principle of Sustainable Development in International Law’ in B Sjøfjell and A Wiesbrock (eds), *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge 2015) 31, 32 arguing that the core meaning of sustainable development concerns the conservation of life-sustaining process.

⁵⁶ J Jans, ‘Stop the Integration Principle?’ cit. 1546-1547.

⁵⁷ *Ibid.* 1540-1541; E Scotford, *Environmental Principles and the Evolution of Environmental Law* cit. 129; B de Witte, ‘Conclusions’ cit. 181, 182 with regard to all integration clauses.

⁵⁸ Case C-62/88 *Greece v Council* ECLI:EU:C:1990:153 paras 19-20; case C-300/89 *Commission v Council* ECLI:EU:C:1991:244 paras 22-24; case C-336/00 *Huber* ECLI:EU:C:2002:509 para. 36; case C-440/05 *Com-*

has played a role in determining the correct legal basis in the field of EU external action as well.⁵⁹ In addition to this, it was applied by the Court, in its previous version, to justify the expansion of the EU environmental competence in the field of criminal law through the adoption of secondary EU Law provisions, provided that their introduction was considered necessary to achieve effective environmental protection.⁶⁰

Furthermore, the environmental integration provision has been applied in the context of the interpretation of EU legal provisions other than those of environmental legislation in a manner that promotes the environmental objectives (the “guidance” function).⁶¹ The use of the principle as a tool for interpreting the various provisions outside the environmental field in an environmentally-friendly manner reflects the Court’s view according to which art. 11 TFEU emphasises the fundamental nature of the objective of environmental protection and its extension across EU policies and activities.⁶² A notable case in this context is the *Preussen Elektra* case in which the Court applied the integration principle in light of the priority objective of promoting the use of renewable energy sources in accordance with international climate change obligations in order to justify a discriminatory measure.⁶³ Moreover, the Court applied the environmental integration principle in order to justify the application of the precautionary principle, outside the environmental sphere, with the aim to protect public health.⁶⁴

The jurisprudence of the EU Courts has not always been consistent with regard to the application of the integration principle as a tool for the interpretation of key provisions in the field of EU Economic Law, such as State Aid Law. More particularly, the

mission v Council ECLI:EU:C:2007:625 para. 60; case C-411/06 *Commission v Parliament and Council* ECLI:EU:C:2009:518, opinion of AG Maduro, para. 17.

⁵⁹ Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore* ECLI:EU:C:2017:376 para. 146 in which the Court referred to the integration principle, in order to justify the fact that an International Trade Agreement, which was based on a legal basis other than art. 192 TFEU, pursues the objective of sustainable development; joined cases C-626/15 and C-659/16 *Commission v Council (Antarctic MPAs)* ECLI:EU:C:2018:925 paras 90-101, in which the Court ruled that art. 11 TFEU cannot justify the choice of a non-environmental legal basis for environmental measures, as the measures at stake were considered to be. See Ch Eckes, ‘Antarctica: Has the Court of Justice got Cold Feet?’ (3 December 2018) European Law Blog europeanlawblog.eu.

⁶⁰ Case C-176/03 *Commission v Council* ECLI:EU:C:2005:542 paras 42, 48-51.

⁶¹ J Jans, ‘Stop the Integration Principle?’ cit. 1541.

⁶² *Commission v Council* cit. para. 42; case C-320/03 *Commission v Austria* ECLI:EU:C:2005:684 para. 73; case C-549/15 *E.ON Biofor Sverige AB* ECLI:EU:C:2017:490 para. 48; case C-513/99 *Concordia Bus Finland* ECLI:EU:C:2002:495 para. 57, where the Court applied the integration principle, in order to justify the use of environmental protection requirements in the public procurement procedure.

⁶³ Case C-379/98 *Preussen Elektra* ECLI:EU:C:2001:160 paras 73-76. In this direction see also case C-573/12, *Ålands Vindkraft AB* ECLI:EU:C:2014:2037 paras 77-80; *E.ON Biofor Sverige AB* cit. paras 64-70.

⁶⁴ Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00, T-141/00 *Artegoda* ECLI:EU:T:2002:283 para. 183; T-229/04 *Sweden v Commission* ECLI:EU:T:2007:217 para. 262; case T-817/14 *Zoofachhandel Züpke and others v Commission* ECLI:EU:T:2016:157 para. 51. See E Scotford, *Environmental Principles and the Evolution of Environmental Law* cit. 145-146.

General Court ruled in certain cases with reference to its jurisprudence in the *BUPA* case⁶⁵ that the Commission does not have the obligation to assess the compatibility of state aid with EU environmental legislation, because environmental protection does not constitute *per se* an objective of the internal market.⁶⁶ This thesis was reversed by the CJEU in its judgment in the case *Commission v Austria*. The Court based its reasoning on the environmental integration principle alongside art. 37 EUCFR, art. 194(1) TFEU and the EU rules on environmental protection. The Court came then to the conclusion that a positive obligation is established for the Commission to check whether the activity for which aid is granted, complies with EU environmental legislation when assessing whether state aid is intended to “facilitate the development of an economic activity”, as required by art. 107(3)(c) TFEU. In the case that the Commission finds an infringement of the EU rules on environmental protection, it has to declare the aid incompatible with the internal market without any further examination.⁶⁷

The preceding analysis with regard to the application of the environmental integration principle in the jurisprudence of the EU Courts in the field of State Aid law leads to the conclusion that despite its contribution, the respective jurisprudence cannot ensure the effective implementation of the principle in a consistent manner in various sectoral policies. This “limited” contribution can be attributed not only to the punctual nature of the jurisprudence, but also to the so far insufficient determination of the substantive content of the principle, also in association with the objective of sustainable development, that may pave the way for diverging interpretations. It is also of relevance that the review exercised by the EU Courts is limited to ascertaining whether there is a manifest error of appraisal regarding the application of the principle, as they recognize that the EU organs enjoy a wide margin of discretion in pursuing environmental objectives by balancing different requirements and interests.⁶⁸ In this context, it is questionable to which extent it can be subject of review whether the incorporation of environmental parameters into a certain measure is sufficient not only for preventing the occurrence of “significant” environmental harm but also for promoting sustainability.

⁶⁵ Case T-289/03 *BUPA and others v Commission* ECLI:EU:T:2008:29 para. 314.

⁶⁶ Case T-57/11 *Castelnuovo Energia v Commission* ECLI:EU:T:2014:1021 paras 187-191; case T-356/15 *Austria v Commission* ECLI:EU:T:2018:439 paras 514-518. It is worth noting that this jurisprudential stance is contrary to the CJEU judgment in the *Nuovo Agricast* Case. Case C-390/06 *Nuovo Agricast Srl* ECLI:EU:C:2008:224 paras 50-51.

⁶⁷ *Austria v Commission* cit. paras 41-47 and 100. See S Kingston, ‘State Aid and the European Green Deal: The Implications of Case C-594/18P *Austria v European Commission* (Hinkley Point C)’ (19 March 2021) UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 6/2021 ssrn.com.

⁶⁸ Case C-341/95 *Gianni Bettati v Safety Hi-Tech Srl* ECLI:EU:C:1998:353 paras 34-35 and 53; *Austria v Parliament and the Council*, opinion of AG Geelhoed, cit. para. 59; *E.ON Biofor Sverige AB* cit. paras 50, 64-70.

III.5. THE INSUFFICIENT OPERATIONALISATION OF THE ENVIRONMENTAL INTEGRATION PRINCIPLE BEFORE THE ADOPTION OF THE EUROPEAN GREEN DEAL

The legal obligation imposed on the EU institutions to incorporate environmental parameters into the definition and implementation of EU sectoral policies and activities requires that a coherent and systematic strategy and the necessary institutional arrangements for pursuing environmental integration are adopted. As the analysis of the integration of environmental considerations into the sectoral policies is mainly a subject of a monograph, only a few remarks will be made with regard to the operationalization of the environmental integration principle before the adoption of the EU Green Deal. Already in 1993, the Commission announced measures for facilitating environmental integration, which included, *inter alia*, the elaboration of an environmental impact assessment for legislative proposals and the introduction of an explanatory memorandum illustrating the environmental considerations of each proposed measure. The vast majority of the above-mentioned measures was abandoned.⁶⁹ The Cardiff process which constituted an institutionalised effort to promote environmental integration on the basis of a decision of the European Council that asked the various Council formations to integrate environmental considerations into their activities, failed to deliver fully its expectations, as was admitted by the Commission.⁷⁰

Furthermore, the promotion and improvement of environmental integration was identified as a central objective in the successive Environment Action Programmes since the adoption of the 4th Environment Action Programme.⁷¹ Policy integration, which has been recognized as a guiding principle of the EU Sustainable Development Strategies, is, to some extent, promoted by the use of the tool of Impact Assessment, which has to be applied to the Commission Initiatives that have far-reaching consequences. The instrument encompasses the analysis of the potential impacts of the various policy

⁶⁹ Communication (COM) 785/5 from the Commission of 3 June 1993 concerning the integration of environmental policy considerations into other policies. See also L Krämer, 'Giving a Voice to the Environment by Challenging the Practice of Integrating Environmental Requirements into other EU Policies' cit. 84-85, 98.

⁷⁰ Communication COM(2004) 394 final Commission Working Document of 1 June 2004 on Integrating environmental considerations into other policy areas: a stocktaking of the Cardiff process, p. 31.

⁷¹ Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment (1987-1992), 2.3.1-2.3.38; Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development - A European Community programme of policy and action in relation to the environment and sustainable development, paras. 18-30; Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, arts 3(3) and (7); Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', Annex-Priority Objective 7, paras 85-89.

options in various fields, including their environmental impact.⁷² Much depends, though, on the quality of the impact assessments⁷³ and the role assigned to them in the policy formulation and the legislative process.

Subsequently, while some progress in promoting environmental integration in certain sectors (such as in energy and agriculture) has been achieved, it cannot be regarded as satisfactory, as even in the 6th and 7th Environment Action Programmes respectively the need to pursue further integration was recognized.⁷⁴ Moreover, the principle has had so far limited application in the core fields of EU Economic Law, such as Competition Law.⁷⁵ This can be attributed not only to the contextual ambiguity accompanying the “sustainable development” as an EU fundamental objective to which the integration duty is inextricably linked, but also to the strong protection of the economic goals provided by the EU Treaties.⁷⁶

IV. ASSESSING THE CONTRIBUTION OF THE ENVIRONMENTAL INTEGRATION PRINCIPLE TO THE FUNDAMENTAL OBJECTIVE OF SUSTAINABLE DEVELOPMENT IN LIGHT OF NEW DEVELOPMENTS

IV.1. THE EUROPEAN GREEN DEAL AND THE ENVIRONMENTAL INTEGRATION PRINCIPLE: INTRODUCTION

The EGD is the new EU growth strategy that aims to respond to the urgent, complex and inter-linked environmental and climate realities, which are so significant that they are regarded as “this generation’s defining task”, by fostering the EU’s transformation by 2050 to “a fair and prosperous society, with a modern resource-efficient and competitive economy”.⁷⁷ Its central goal for the transformation⁷⁸ of the EU economy to an economic model decoupled from its ecological footprint can be achieved via a set of transformative policies in eight areas identified critical for enabling this transition.⁷⁹ The implementation of this set of wide-ranging transformative policies requires not only new legislative and policy interventions covering the whole political spectrum, but also the effective implementation of the existing legislation relevant to enable the afore-

⁷² SRW van Hees, ‘Sustainable Development in the EU: Redefining and Operationalizing the Concept’ (2014) *Utrecht Law Review* 66-68.

⁷³ L Krämer, ‘Giving a Voice to the Environment by Challenging the Practice of Integrating Environmental Requirements into other EU Policies’ cit. 94.

⁷⁴ Arts 3(3) and (7) of Decision No 1600/2002/EC cit.; para. 85 of Decision No 1386/2013/EU cit.

⁷⁵ M Gassler, ‘Sustainability, the Green Deal and Art 101 TFEU: Where We Are and Where We Could Go’ (2021) *Journal of European Competition Law and Practice* 430 ff.

⁷⁶ S Kingston, *Greening EU Competition Law and Policy* cit. 106.

⁷⁷ Communication COM(2019) 640 final cit. 2.

⁷⁸ There is no broadly accepted definition about the distinction between the terms of “transformation” and “transition” in the academic literature, which seem to be identical.

⁷⁹ Communication COM(2019) 640 final cit. Annex.

described fundamental transition. Subsequently, the EGD is a multi-faceted regulatory project with a long-term perspective.⁸⁰ The achievement of the objectives of this multi-faceted project requires significant flows of public and private investment.⁸¹

A central component of the EGD is the goal of climate neutrality, which has to be achieved by 2050 and is a cross-cutting objective, because it requires the adoption of significant legislative initiatives and policy measures in various economic sectors and systems (energy, transport, agriculture). It can also require the adoption of innovative legal instruments, such as the carbon border adjustment mechanism to avoid carbon leakage.⁸² Another central component concerns the preservation and restoration of the eco-systems, which sets, at least, in symbolic terms the frame for the re-definition of the human-nature relationship in the sense that it implies the acknowledgement that ecological integrity can place limits to the economic activities.⁸³

Moreover, due to the fundamental nature of this transition to sustainability in the medium and long term, the active public involvement in the respective processes is required. In this context, the EU Climate Pact is an innovative mechanism, which aims to support grassroots initiatives on climate change and environmental protection.⁸⁴ In addition, the EGD takes into account the social dimension of the transition to sustainability by requiring that the transition should be “just” and inclusive, so that “no one is left behind”.⁸⁵ In conclusion, the EGD can be viewed not only as a strategy aiming to introduce a new growth model as a response to the pressing environmental realities, but also as an endeavour to re-orientate the mission of the EU integration process towards a sustainable direction by placing environmental and sustainability considerations at the heart of the integration process. It can also be seen as a vision for the EU’s future.⁸⁶

The Communication on the EGD does not make any reference to the environmental principles set forth in art. 191(2) TFEU or to the environmental integration principle as such.⁸⁷ Despite the lack of an explicit reference to the environmental integration princi-

⁸⁰ E Chiti, ‘Managing the Ecological Transition of the EU: The European Green Deal as a Regulatory Process’ (2022) CMLRev 25 ff.

⁸¹ Communication COM(2019) 640 final cit. 15; A Sikora, ‘European Green Deal: Legal and Financial Challenges of the Climate Change’ (2021) ERA Forum 681, 690 ff.

⁸² J Jendroška, M Reese and L Squintani, ‘Towards a New Legal Framework for Sustainability Under the European Green Deal’ (2021) *Opolskie Studia Administracyjno-Prawne* 87, 102 ff.; E Chiti, ‘Managing the Ecological Transition of the EU’ cit. 27.

⁸³ E Chiti, ‘Managing the Ecological Transition of the EU’ cit. 35; L Krämer, ‘Planning for Climate and the Environment: The EU Green Deal’ (10 July 2020) *Journal for European Environmental & Planning Law* 267, 293.

⁸⁴ J van Zeben, ‘The European Green Deal: The Future of a Polycentric Europe?’ (2020) *ELJ* 300, 308.

⁸⁵ Communication COM(2019) 640 final cit. 2.

⁸⁶ E Chiti, ‘Managing the Ecological Transition of the EU’ cit. 26.

⁸⁷ A Sikora, ‘European Green Deal’ cit. 689; M Montini, ‘The European Green Deal from an Environmental Protection Perspective: The Missing Role of the Environmental Integration Principle’ in K de Graaf and others (eds), *Grensoverstijgende rechtsbeoefening: Liber Amicorum Jan Jans* (Uitgeverij 2021) 97-98.

ple, the EGD Communication devotes a specific section to the need for “mainstreaming sustainability in all EU policies”.⁸⁸ In this context, the “green finance and investment” and the “greening of the national budgets” are singled out as areas in which action should be taken. Furthermore, research and innovation and education and training are fields that are identified as critical for the mainstreaming of the sustainability considerations with the aim to achieve the objectives of the EGD.⁸⁹ In this section, a new principle is also introduced, namely the “no harm principle”, according to which an explanatory memorandum is attached to each legislative proposal or executive act which would demonstrate that they live up to a green oath to “do no harm”.⁹⁰ The principle is however defined in rather ambiguous and programmatic terms, so that the question is raised whether it can be legally enforceable before the courts and be easily reconciled with the EU constitutional framework and in specific with the EU substantive constitution.⁹¹ It has been further developed in the form of the “do not significant harm” principle in certain EU legal instruments.⁹² The relationship between the environmental integration principle and the “do no (significant) harm” principle cannot be easily defined, as while the former sets a positive obligation for the EU institutions to incorporate environmental considerations into other sectoral policies, the latter sets merely a negative test, according to which an activity must not harm any of the set environmental objectives.⁹³ In any case, there is a common element between the two principles: the avoidance of (significant) environmental harm by the proposed policy or decision through an ex-ante examination at an early stage.

IV.2. THE IMPLEMENTATION OF THE ENVIRONMENTAL INTEGRATION PRINCIPLE IN EU ENERGY AND CLIMATE POLICY IN ALIGNMENT WITH THE EGD OBJECTIVES

Although the environmental integration principle is not mentioned as such in the EGD, it is implemented by it as well as by the legislative and policy initiatives that have been adopted to achieve its objectives. In the fields of EU energy and climate policies, the EGD

⁸⁸ Communication COM(2019) 640 final cit. 15.

⁸⁹ *Ibid.* 15-18.

⁹⁰ *Ibid.* 19(2)(2)(5). See also M Onida, ‘The “do not (significantly) harm” Principle’ in K de Graaf and others (eds), *Grensoverschrijvende rechtsbeoefening* cit. 45; E Chiti, ‘Managing the Ecological Transition of the EU’ cit. 36-37.

⁹¹ A Sikora, ‘European Green Deal’ cit. 689.

⁹² Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation 2019/1088; Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilient Facility; Regulation (EU) 2021/1229 of the European Parliament and of the Council of 14 July 2021 on the public sector loan facility under the Just Transition Mechanism.

⁹³ M Onida, ‘The “do not (significantly) harm” Principle’ cit. 45 ff.

further promotes the integrative approach adopted 15 years ago,⁹⁴ namely the incorporation of environmental and climate concerns in energy policies and the contextual link between energy and climate policies. In addition to the above, the central objective of climate neutrality to be achieved by 2050 set out in the EU Climate Law⁹⁵ is closely associated with the decarbonization of the energy system, while it is also a cross-cutting objective in the sense that it presupposes significant action in the vast majority of economic sectors. The afore-mentioned integrative approach also characterises the draft legislative measures that were proposed in order to achieve the intermediate target that is set in the EU Climate Law, according to which the binding Union 2030 climate target shall be that of a domestic reduction of net greenhouse gas emissions by at least 55 per cent compared to 1990 levels (art. 4(1)).⁹⁶ The proposals set in the “Fit for 55” legislative package can be classified in four categories. In the first category, measures that impose obligations to MS and concern mainly the revision of the existing Directives, such as the Energy Efficiency Directive, are included. The second category contains measures that impose obligations on economic operators, such as the Proposal for the Regulation on the use of renewable and low carbon fuels in maritime transport, while in the third category the measures included aim to alleviate the social impacts of the energy transition process (e.g. the Social Climate Fund). Finally, the fourth category includes measures that aim to protect EU industry (e.g. the carbon border adjustment mechanism).⁹⁷

The new element with regard to the integrative approach of the EU Energy and Climate policies, which was introduced by the EGD and was further strengthened by the “Fit for 55” Package and the Repower EU Action Plan,⁹⁸ lies in the enhanced EU interference into the MS’ energy mix, with the aim to achieve the EU climate and environmental objectives. As it is persuasively argued in legal scholarship,⁹⁹ this interference was facilitated by the CJEU’s restrictive determination of the scope of the energy specific competence limita-

⁹⁴ Communication COM(2007) 1 final from the Commission to the European Council and the European Parliament of 10 January 2007 ‘An energy policy for Europe’ {SEC(2007) 12.

⁹⁵ Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 (‘European Climate Law’).

⁹⁶ Communication COM(2021) 550 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 14 July 2021 ‘Fit for 55’: delivering the EU’s 2030 Climate Target on the way to climate neutrality.

⁹⁷ Editorial Comments, ‘The European Climate Law: Making the social market economy fit for 55?’ (2021) CMLRev 1321 ff.

⁹⁸ After Russia’s invasion of Ukraine, the EU Commission presented the REpower EU Action Plan which aims to promote energy saving, the acceleration of the transition to clean energy and the diversification of energy supplies. See Communication COM(2022) 230 final from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 18 May 2022 ‘REPowerEU Plan’, p. 6.

⁹⁹ J van Zeben, L de Almeida and M Alessandrini, ‘Stress Testing the European Green Deal: The “securitization” of Energy, Food and Climate’ (July 2022) EU Law Live Weekend Edition 5.

tion, as set in art. 192(2)(c) TFEU.¹⁰⁰ More specifically, the afore-mentioned limitation is mainly procedural in nature in the sense that when the EU exercises its competence on environmental issues and these issues significantly affect the sovereignty of a MS over its choice of mix of energy sources and the general structure of its energy supply, the EU can only legislate by making use of the special legislative procedure that requires unanimity in the Council.¹⁰¹ The Court interpreted this limitation to the EU environmental competence in light of the EU environmental and climate objectives, so that it arrived at the conclusion that the legal basis of art. 192(2)(c) TFEU can be applied “only if it follows from the aim and content of the measure that the primary outcome sought by that measure is significantly to affect a Member State’s choice between different energy sources and the general structure of the energy supply of that Member State”.¹⁰²

The Ruling has direct implications for the determination of the scope of MS’ sovereignty to choose and exploit their energy sources, because, if it is applied by analogy to art. 194(2) TFEU,¹⁰³ the EU’s competence in the energy sector can be limited only if the aim, content and primary outcome of a legal measure directly affects MS’ sovereignty over their energy sources in the sense of prohibiting the use of a concrete energy source.¹⁰⁴

In this context, the Proposal for the revision of the Renewable Energy Directive sets an increased target of 40 per cent of total energy consumption to be generated by renewable energy sources (RES) by 2030,¹⁰⁵ which is further raised to 45 per cent by the the

¹⁰⁰ Art. 192(2)(c) TFEU reads as follows: “By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 114, the Council acting unanimously in accordance with a special legislative procedure [...], shall adopt: a) [...] b) [...] c) measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply”.

¹⁰¹ K Huhta, ‘The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of the EU Competences in the Energy Sector’ (2021) ICLQ 991, 998-999; J Jans and HB Vedder, *European Environmental Law* cit. 62-63.

¹⁰² Case C-5/16 *Poland v Parliament and Council* ECLI:EU:C:2018:483 paras 43-44 and 46. See also case C-5/16 *Poland v Parliament and Council* ECLI:EU:C:2017:925, opinion of AG Mengozzi, para. 25: “As a derogation, Article 192(2)(c) TFEU is to be interpreted strictly, especially since an efficient modern environment policy cannot ignore energy questions”.

¹⁰³ Energy policy is a shared competence (art. 4(2)(i) TFEU). Art. 194(2) TFEU states that measures adopted in the context of the EU Competence on energy policy shall not affect a Member State’s right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to art. 192(2)(c) TFEU. See K Huhta, ‘The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of the EU Competences in the Energy Sector’ cit. 1001 ff.

¹⁰⁴ K Huhta, ‘The Scope of State Sovereignty under Article 194(2) TFEU and the Evolution of the EU Competences in the Energy Sector’ cit. 1008.

¹⁰⁵ Communication COM(2021) 557 final Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 of the European Parliament and of the Council, Regulation (EU) 2018/1999 of the European Parliament and of the Council and Directive 98/70/EC of the European Parliament and of the Council as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652 of 14 July 2021.

REPower EU plan legislative proposal.¹⁰⁶ Furthermore, the proposed Directive sets specific sub-targets for renewable energy use in transportation, heating and cooling, buildings and industry, introduces an updating of the sustainability criteria for bio-energy and sets out goals for the traceability and certification of renewable fuels, including green hydrogen and its derivatives. A further step in enabling energy transition by further limiting MS' choices with regard to their energy mixes constitutes the Gas Decarbonization Strategy which aims to reform the common rules for the internal market in natural gas in order to facilitate the uptake of renewable and low-carbon gases, including hydrogen.¹⁰⁷

Finally, another intervention is the proposed revision of the Energy Efficiency Directive, which enshrines the “energy efficiency first” principle which is underpinned by an integrative approach, in the sense that it requires that energy efficiency solutions should be taken into account in planning, policy and investment decisions in all sectors that have an impact on energy demand (art. 3). The proposal also sets the Union’s ambitious binding energy efficiency target for final and primary energy consumption, which is further raised by the REPower EU plan legislative proposal and presupposes that MS set national contributions in their National Energy and Climate Plans.¹⁰⁸

IV.3. THE IMPLEMENTATION OF THE ENVIRONMENTAL INTEGRATION PRINCIPLE IN SELECTIVE FIELDS OF EU POLICY IN ALIGNMENT WITH THE EGD OBJECTIVES

The environmental integration principle is implemented through the modification of the EU Industrial Policy, which aims to align with the objectives of the EGD. In particular, a critical component of the EU “Circular Economy Action Plan”¹⁰⁹ is the Sustainable Product Policy Initiative, which aims to foster resource efficiency, circularity, and climate neutrality in industrial production chains.¹¹⁰ The objectives of this Initiative are to be achieved through

¹⁰⁶ Communication COM(2022) 222 final Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources, Directive 2010/31/EU on the energy performance of buildings and Directive 2012/27/EU on energy efficiency of 18 May 2022.

¹⁰⁷ Communication (COM)2021 803 final Proposal for a Directive of the European Parliament and of the Council of 15 December 2021 on common rules for the internal markets in renewable and natural gases and in hydrogen; Communication COM(2021) 804 final Proposal for a Regulation of the European Parliament and of the Council of 15 December 2021 on internal markets for renewable and natural gases and in hydrogen, (recast); see J van Zeben, L de Almeida and M Alessandrini, ‘Stress Testing the European Green Deal’ cit. 6.

¹⁰⁸ Proposal COM(2021) 558 final for a Directive of the European Parliament and of the Council of 14 July 2021 on energy efficiency (recast); Proposal COM (2022) 222 final cit. 24 (art. 3 amendment to the Directive 2012/27).

¹⁰⁹ Communication COM(2020) 98 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 March 2020 ‘A new Circular Economy Action Plan, for a cleaner and more competitive Europe’.

¹¹⁰ Communication COM(2022) 140 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 30 March 2022 on making sustainable products the norm.

certain legislative initiatives that set environmental sustainability standards for products at the EU level. A key Initiative is the Proposal for a Regulation on ecodesign for sustainable products, which establishes the framework for setting ecodesign requirements for specific categories of products with the aim to improve their circularity and other sustainability aspects.¹¹¹ The proposed Regulation broadens the scope of the existing eco-design Directive (2009/125/EC) both in terms of products and their sustainability requirements. The product aspects to which eco-design requirements relate concern, among others, the durability, the reusability, the reparability and presence of substances of concern (art. 1). The eco-design requirements will apply either to a specific product group or to more product groups that share sufficient common characteristics (arts 4 and 5). The proposed Regulation will apply along with product specific rules in the cases where specific circumstances justify targeted regulatory intervention, such as the Proposal for the revision of the construction products Regulation and the proposed batteries Regulation.¹¹²

The proposed regulatory instruments constitute significant regulatory interventions in the sense of incorporating sustainability considerations in the production cycle through mandatory regulatory requirements and can, thus, contribute substantially to the transition towards a sustainable production model.¹¹³ It remains to be seen to what extent the “strong” regulatory intervention foreseen in the respective Proposals will also characterise the final form of the respective legislative instruments, also due to the possible reaction of the industrial sectors that will be affected in financial terms.

The Commission also introduced a Proposal for a Directive for empowering citizens to a green transition, which includes targeted amendments to existing consumer protection Directives in order to enable consumers to make informed choices and to tackle unfair commercial practices that mislead consumers from sustainable consumption choices.¹¹⁴ This proposal contributes to the implementation of the environmental integration principle in the EU Consumer Law.

Another EU policy field in which the relevant initiatives foreseen in the EGD or associated with the objective of climate neutrality, are underpinned by an integrative approach

¹¹¹ Proposal COM(2022) 142 final for a Regulation of the European Parliament and of the Council of 30 March 2022 establishing a framework for setting eco-design requirements for sustainable products and repealing Directive 2009/125/EC.

¹¹² Proposal COM(2022) 144 final for a Regulation of the European Parliament and the Council of 30 March 2022 laying down harmonized conditions for the marketing of construction products, amending Regulation (EU) 2019/1020 and repealing Regulation (EU) 305/2011; Proposal COM(2020) 798 final for a Regulation of the European Parliament and of the Council of 10 December 2020 concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/2020.

¹¹³ L Krämer, ‘Planning for Climate and the Environment’ cit. 280 characterizing rightly the adopted approach as “revolutionary”.

¹¹⁴ Proposal COM(2022) 143 final for a Directive of the European Parliament and the Council of 30 March 2022 amending Directives 2005/29/EC and 2011/83/ EU as regards empowering consumers for the green transition through better protection against unfair practices and better information.

to environmental and climate protection is the transport sector, as their main aim is to facilitate the transition to sustainable transport and to contribute to the reduction of transport emissions. In particular, along with the adoption of the “Sustainable and Smart Mobility Strategy”,¹¹⁵ certain legislative initiatives are introduced in the “Fit for 55” package. These Initiatives include the revision of the Emissions Trading Directive, in order to cover emissions from the shipping sector and to contribute to more ambitious emission reduction targets in the aviation sector, the establishment of a separate emission trading system to include emissions from buildings and road transport fuels, the revision of the Alternative Fuels Infrastructure Directive and the revision of the Regulation setting CO₂ emission standards for cars and vans towards stricter standards.¹¹⁶ Furthermore, a second wave of Initiatives are adopted, which include, among others, the revision of the Regulation for the trans-European Transport Network (TEN-T) to contribute to the objectives of the EGD¹¹⁷ and the revision of Directive 2010/40/EU on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport.¹¹⁸ The implementation of the proposed measures, if adopted, will require fundamental changes in the transport system, which will also raise issues concerning universal access to transport services and the capacity of low-income citizens to use their private cars for basic transportation needs.

The Common Agricultural Policy (CAP) is another policy field which must be significantly transformed in order to align with the EGD environmental objectives and the objective of climate neutrality, as the agricultural sector is responsible for a significant percentage of greenhouse gas emissions and also contributes to biodiversity loss. Moreover, despite the incorporation of certain green elements in the 2014-2021 CAP and the spending for climate action, the respective measures have not been effective in achieving concrete results, such as emission reductions.¹¹⁹

The “Farm to Fork Strategy”, which was adopted as envisaged in the EGD, recognised the need for a fundamental transition in our food system, so that it can reconcile human needs with environmental protection. To this end, the Strategy sets objectives and regulatory and non-regulatory actions, which concern the reduction of the use of

¹¹⁵ Communication COM(2020) 789 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 9 December 2020 ‘Sustainable and Smart Mobility Strategy – putting European Transport on Track for the future’.

¹¹⁶ Communication COM(2021) 550 final cit. 6-9.

¹¹⁷ Proposal COM(2021) 812 final for a Regulation of the European Parliament and of the Council of 14 December 2021 on Union guidelines for the development of the trans-European transport network, amending Regulation (EU) 2021/1153 and Regulation (EU) No 913/2010 and repealing Regulation (EU) 1315/2013.

¹¹⁸ Proposal COM(2021) 813 final for a Directive of the European Parliament and of the Council of 14 December 2021 amending Directive 2010/40/EU on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport.

¹¹⁹ Special Report 16/2021 of the European Court of Auditors of 21 June 2021 ‘Common Agricultural Policy and climate: Half of EU Climate Spending but farm emissions are not decreasing’.

chemical pesticides, fertilisers and antibiotics, a decrease of nutrient loss, an increase in organic farming and the protection of biodiversity.¹²⁰

To promote a sustainable transition of EU agricultural policy, the CAP was recently reformed for the period 2023-2027 and aims to also achieve environmental, biodiversity and climate objectives. An element that characterises the new CAP is that MS are given substantial flexibility to pursue the CAP objectives in a manner which is most appropriate in their national and regional context through the adoption of the national CAP Strategic Plans.¹²¹ Although, it cannot be extensively analysed in the context of this *Article* whether the new CAP sufficiently integrates environmental and climate concerns, an initial conclusion of the analysis of the reformed CAP is that the integration of environmental considerations is rather weak. More specifically, the provisions of the CAP Regulations do not set any quantitative EU targets or any obligation for the MS to set legally binding targets regarding the use of pesticides, fertilisers and antibiotics as well as the percentage of the organic farming, so that the lack of ambitious targets in the CAP strategic Plans cannot be a reason for their rejection by the Commission.¹²²

Furthermore, the conditionality rules laid out in the CAP Strategic Plans Regulation (art. 12 and Annex III), which consist of the statutory requirements for environmental and climate protection and the standards for Good Agricultural and Environmental Condition of land (GAEC) and have to be respected by farmers as a condition to receive direct payments, are also rather weak. This is due to the fact that the conditionality rules do not include requirements of the EU Environmental legislation which are important for promoting sustainability, such as arts 10, 11 and 12 of the 92/43 Habitats Directive and art. 14 of the 2009/128 Directive on Integrated Pesticide Management, while other requirements are “watered down” or diluted compared to the initial Commission Proposal.¹²³

Finally, eco-schemes constitute a novel instrument that is introduced by the new CAP with the aim to reward farmers who manage their land in an environmental and climate-friendly manner. MS enjoy, though, a rather wide margin of discretion to their design (art. 31 of the 2021/2115 Regulation), as the Regulation sets a vaguely formulat-

¹²⁰ Communication COM(2020) 381 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20 May 2020 ‘A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system’.

¹²¹ Regulation (EU) 2021/2115 of the European Parliament and of the Council of 2 December 2021 establishing rules on support for Strategic Plans to be drawn up by Member States under the common agricultural policy (CAP strategic plans) and financed by the European Agricultural Guarantee Fund and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013. See also J van Zeven, L de Almeida and M Alessandrini, ‘Stress Testing the European Green Deal’ cit. 9.

¹²² Birdlife International, EEB and Greenpeace, ‘Does the new CAP measure up? NGOs assessment against 10 tests for a Green Deal- compatible EU Farming Policy’ www.greenpeace.org.

¹²³ WWF, ‘Conditionality: The Cornerstone of a Greener Common Agricultural Policy’ wwf.eu.awsassets.panda.org; F Bas-Defosse, ‘What is Left for Environment and Climate in the New CAP?’ (30 June 2021) Institute European Environmental Policy ieep.eu.

ed obligation that the schemes cover at least two “areas of action” for the climate, environment and animal welfare. Therefore, it is worth asking whether the designed schemes are capable of ensuring a transition to sustainable farming and of achieving measurable results in this direction.¹²⁴

In conclusion, the weak environmental requirements of the new CAP in conjunction with the discretion given to MS in the elaboration of the national Strategic Plans cannot create the necessary conditions for achieving the ambitious environmental goals of the Farm to Fork Strategy.¹²⁵

IV.4. EU FINANCIAL INSTRUMENTS AND THE ENVIRONMENTAL INTEGRATION PRINCIPLE

Another field key to the transformation of the EU economy towards climate neutrality is sustainable finance, as significant investments both from the public (EU budget and other funding mechanisms) and the private sector would be required.¹²⁶ The notion of “sustainable finance” is a key aspect of the EGD and presupposes the implementation of the environmental integration principle, as it refers to the process of taking due account of climate, environmental and social considerations in the investment decision-making, leading to increased investments in long-term and sustainable activities.¹²⁷ In this context, the Europe Sustainable Investment Plan which is the investment pillar of the EGD,¹²⁸ lays out the roadmap for the mobilisation of at least one trillion euro of sustainable investments, such as investments to address climate crisis and biodiversity loss over the next decade, by funds provided under the EU 2021-2027 Multiannual Financial Framework (MFF) and other public (Next Generation EU) and private funds.

Furthermore, due account of the fact that the transition to a climate neutral economy will have economic and social justice implications especially for those regions that rely on fossil fuel extraction and treatment and for highly carbon intensive industries is taken. As a result, the Just Transition Mechanism (JTM) was established in order to alleviate the impact of the transition in the regions and on the citizens most affected by it. The first pillar of the Mechanism is the Just Transition Fund (JTF), which is established as a new Struc-

¹²⁴ WWF, EEB and Birdlife International, ‘Will CAP eco-schemes be worth their name?’ (November 2021) www.birdlife.org.

¹²⁵ After the war in Ukraine, it is expected that the elements of the CAP Strategic Plans that enable food security will be strengthened probably at the expense of the achievement of the CAP environmental goals. See J van Zeven, L de Almeida and M Alessandrini, ‘Stress Testing the European Green Deal’ cit. 10.

¹²⁶ Communication from the Commission, The European Green Deal, cit. 15-17; A Sikora, ‘European Green Deal’ cit. 693.

¹²⁷ Communication COM(2021) 390 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 6 July 2021 ‘Strategy for financing the transition to a sustainable economy’, p. 1 fn. 4.

¹²⁸ Communication COM(2020) 21 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 14 January 2020 ‘Sustainable Europe Investment Plan, European Green Deal Investment Plan’.

tural Fund and provides financial support in the form of grants to the afore-mentioned regions and citizens.¹²⁹ Access to funding is conditional upon the adoption of the climate neutrality objective by the MS (art. 7 of JTF Regulation) and the approval of the Territorial Just Transition Plans (TJTP) which have to be elaborated by the MS and are approved by the Commission (art. 11 of JTF Regulation). The second pillar of the JTM is part of the InvestEU Programme¹³⁰ and supports financial investments of the private and public sector entities that serve the just transition purposes and are in line with the eligibility criteria of the InvestEU Programme, by providing an EU budget guarantee in order to partially cover the risk in financing and investment operations. The third pillar of JTM concerns the establishment of a Public Sector Loan Facility which facilitates the financing of public sector investments that address the development needs of the territories included in the TJTPs and do not generate sufficient streams of revenues to cover their investment costs.¹³¹ Except for the possibility of financing projects that promote sustainability *per se*, such as investments in renewable energy and green and sustainable mobility through the respective pillars of the JTM, the environmental integration principle is implemented, to some extent, through the adoption of the “do no significant harm” principle as one of the horizontal principles that has to be respected in the preparation, evaluation, implementation and monitoring of the eligible projects in the Public Loan Sector Facility Regulation (art. 4(3)). It is also implemented through the exclusion from financing of certain unsustainable investments, which are set in art. 9 of JTF Regulation.¹³² The JTF Regulation does not enshrine, though, the “do no significant harm” principle as a horizontal principle which should be respected in the elaboration of TJTPs with the aim to avoid unintended effects of the eligible projects to climate.¹³³

Another critical instrument that strongly promotes the integration of environmental parameters in the financial sector is the Taxonomy Regulation,¹³⁴ as it sets a clearly defined common framework of criteria and standards on the basis of which it can be determined whether an economic activity pursued within the EU can be qualified as environmentally sustainable. The Regulation harmonises, thus, the criteria for

¹²⁹ Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund.

¹³⁰ Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017.

¹³¹ Regulation (EU) 2021/1229 cit.

¹³² The activities that cannot be financed, are the following: *i*) the decommissioning or the construction of nuclear power stations *ii*) the manufacturing, processing and marketing of tobacco and tobacco products *iii*) the undertakings in difficulty and *iv*) the investments related to the production, processing, transport, distribution, storage or combustion of fossil fuels.

¹³³ Opinion No 5/2020 of the European Court of Auditors of 20 July 2020 on the Commission's 2020/0006 (COD) proposal for a Regulation of the European Parliament and the Council establishing the Just Transition Fund, COM (2020) 22 final and COM (2020) 460 final.

¹³⁴ Regulation (EU) 2020/852 cit.

“sustainable investment” at the EU level, which has to be facilitated for the achievement of the EU environmental and climate objectives. The Regulation applies to measures adopted by the MS or by the Union that set out requirements for financial market participants or issuers in terms of financial products or corporate bonds offered as environmentally sustainable, to the financial market participants that make the financial products available and to undertakings subject to the obligation to publish a non-financial statement or a consolidated non-financial statement pursuant to art. 19(a) or art. 29(a) of Directive 2013/34/EU (art. 1 of the Regulation). Furthermore, the framework set out by the Regulation provides a benchmark for the evaluation of any economic activity that can also be used for other purposes (e.g. planning, regulatory).¹³⁵

The qualification of an economic activity as environmentally sustainable requires passing a double test. The first test is a positive one in the sense that the activity tested must contribute substantially to one or more of the environmental objectives that are set out in art. 9 of the Regulation and cover climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, the transition to circular economy, pollution prevention and control and the protection and restoration of biodiversity and ecosystems. In addition to the above, the positive test encompasses compliance with certain minimum social safeguards, as required by art. 18 of the Regulation. The negative test concerns respect of the “do no significant harm” principle set out in art. 17 of the Regulation which requires that the activity does not harm any of the environmental objectives set out in art. 9.¹³⁶ Compliance with the technical screening criteria that determine how a specific economic activity qualifies as substantially contributing to the environmental objectives of art. 9 and whether it does not cause significant harm to one or more of these objectives is also necessary for the qualification of an activity as environmentally sustainable. These screening criteria are set in delegated acts issued by the Commission.¹³⁷ In conclusion, the EU Taxonomy Regulation, as complemented by the Delegated Acts, sets a common classification system of what an environmentally sustainable activity is at the EU level, which will make sustainable investments across EU MS comparable, and contributes to the re-orientation of investments towards a climate friendly economy as well as strengthens investors’ trust in sustainable financial products.¹³⁸ However, the inclusion of the nuclear energy and natural gas-fired power plants as “green activities”

¹³⁵ J Jendroška, M Reese and L Squintani, ‘Towards a New Legal Framework for Sustainability Under the European Green Deal’ cit. 98.

¹³⁶ M Onida, ‘The “do not (significantly) harm” Principle’ cit. 47.

¹³⁷ European Commission, *EU Taxonomy for Sustainable Activities: What the EU is doing to Create an EU-wide Classification System for Sustainable Activities* finance.ec.europa.eu.

¹³⁸ Recital 11, 12, 13 of Regulation (EU) 2020/852 cit.; see also Ch Gortsos, ‘The Taxonomy Regulation: More Important than just as an Element of the Capital Markets Union’ (16 December 2020) EBI Working Paper Series 2020 ssrn.com.

under strict conditions in the Complementary Delegated Regulation¹³⁹ highlighted the ways in which the difficulties associated with the transition to climate neutrality, also due to different national characteristics and the energy choices of MS, can result in legal rules that endanger the consistency and the effectiveness of the legal regime in terms of achieving the respective objectives.¹⁴⁰

Finally, another financial instrument that promotes the environmental integration principle is the Recovery and Resilience Facility Regulation¹⁴¹ which aims to provide MS with direct and wide-ranging financial support in the form of loans or grants to deal with the economic and social consequences of the COVID 19 pandemic. Access to funding presupposes that MS submit National Recovery and Resilience Plans (NRRPs) that set out the reforms and investments that have to be completed by 2026 and that are approved by the Commission. The measures included in the NRRPs should cover six areas of European relevance structured in six pillars, one of which is green transition, so that they contribute to the achievement of the Union's 2030 climate targets and to the objective of climate neutrality (arts 3(a) and 4(1)). It is notable that the "do no significant harm" principle is one of the two horizontal principles against which each reform and public policy investment outlined in NRRPs should be examined (art. 5 (2)). Furthermore, the Regulation requires that MS provide an explanation of how each NRRP ensures that no measure included by it causes significant harm to the environmental objectives within the meaning of art. 17 of the Taxonomy Regulation as well as a qualitative explanation on how the respective measures are expected to contribute to green transition, the latter including biodiversity (art. 18(4)(d) and (e)). The Commission also examines compliance with the "do not significant harm" principle and the contribution of the NRRP to the green transition prior to its approval (art. 19(3)(d)).¹⁴²

V. CONCLUSIONS

The first conclusion that arises from the analysis above is that the environmental integration principle has not only a procedural, but also a substantive meaning in EU Law. This is due to its linkage with the fundamental objective of sustainable development, as, otherwise, it cannot contribute to the achievement of the afore-mentioned objective.

¹³⁹ Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities.

¹⁴⁰ It is worth noting that Austria challenged the Delegated Regulation 2022/1214 before the CJEU claiming, among others, that nuclear energy violates the "do no significant harm" principle, which is a central principle of the EU Taxonomy Regulation, as it is demonstrated by accidents, such as Chernobyl or Fukushima. See M Williams and K Abnett, 'Austria seeks Allies for Legal Challenge to EU Green Investment Rules' (10 October 2022) Reuters www.reuters.com.

¹⁴¹ Regulation (EU) 2021/241 cit.

¹⁴² M Onida, 'The "do not (significantly) harm" Principle' cit. 58 ff.

Moreover, its substantive component has been reinforced after the adoption of the EGD and the accompanying Initiatives. More specifically, although the principle is not explicitly mentioned in the respective legislative and policy instruments, it is implemented by them, to some extent, in substantive terms (Sections IV.2-IV.4). This is due to the fact that the achievement of the EU Environmental and Climate Objectives presupposes the “greening” of the legislative frameworks regulating various sectors.

The second conclusion that may be drawn is that the regulative context of the environmental integration principle in substantive terms often cannot be clearly delineated. This is meant in the sense that the extent of incorporation of environmental considerations in the respective legislative instruments may depend on compromises in the framework of the legislative procedure or on the specific characteristics of each regulatory field. The concrete and measurable EU environmental and climate objectives can contribute, to a certain extent, to the delineation of the contours of the substantive component of the environmental integration principle in its application in various fields, because such an application is associated with the achievement of the afore-mentioned objectives. In addition to the above, the “do no significant harm” principle which is enshrined in certain financial instruments, also facilitates the determination of the substantive component of the principle, because its content coincides with it to a certain extent. Moreover, the re-orientation of the fundamental objective of “sustainable development” in light of ecological limits can resolve the existing ambiguities associated with its content and can substantially facilitate the determination of the exact contours of the substantive component of the environmental integration principle.

The third conclusion that arises is that the extent of the incorporation of environmental considerations into the respective legal instruments and the safeguards that these include against “significant harm” constitute an important factor for assessing their capacity to contribute to the achievement of the central objective of climate neutrality and the specific objectives set for each sector.¹⁴³ Their effectiveness will also be determined by the extent to which the objectives aimed by them can be judicially enforced.¹⁴⁴

The fourth conclusion is that the level of implementation of the environmental integration principle in various EU law fields shall lay the groundwork for conflicts between the regulatory instruments aiming at achieving the ambitious EU environmental and climate objectives and the provisions of the EU Economic Constitution or those of the secondary legislation.¹⁴⁵ These conflicts cannot be easily resolved, because, as it has been already mentioned, the EU Treaties provide a strong

¹⁴³ E Chiti, ‘Managing the Ecological Transition of the EU’ cit. 42-43 concerning the effectiveness requirement of the regulatory instruments provided for achieving the EGD objectives.

¹⁴⁴ A Sikora, ‘European Green Deal’ cit. 684.

¹⁴⁵ E Chiti, ‘Managing the Ecological Transition of the EU’ cit. 37.

protection to economic interests.¹⁴⁶ In this context, the limits of the implementation of the substantive component of the environmental integration principle and of the ambitious objectives of EGD in the current framework are demonstrated.

The fifth and last conclusion is that the greening of all areas of law in substantive terms is a large, if not the largest, normative challenge of our times.¹⁴⁷ Importantly, it also demonstrates the role that the law can and, in fact, should play to reshape behaviours and (production) models in order to achieve fundamental objectives through the necessary transformations. The EU is taking the lead in this process by making concrete efforts at the regulatory and policy level. The question that is left open is whether the envisaged re-orientation of the EU integration process towards sustainability can be achieved within the current regulatory system or whether reforms of EU Primary Law may be deemed necessary.

¹⁴⁶ *Ibid.* 36-37.

¹⁴⁷ LJ Kotzé and D French, 'Staying Within the Planet's "Safe Operating Space"? Law and the Planetary Boundaries' in LJ Kotzé and D French (eds), *Research Handbook on Law, Governance and Planetary Boundaries* (Edward Elgar 2021) 8.

