

The Environmental Integration Principle: A Necessary Step Towards Policy Coherence for Sustainability

*Beate Sjøfjell*¹

1. INTRODUCTION

Article 11 in the Treaty on the Function of the European Union (TFEU) sets out that:

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*.²

The environmental integration that this rule mandates for the EU is arguably a necessary contribution to achieve policy coherence for sustainable development, or sustainability – as it currently often denoted. However, the mere existence of this provision is clearly not sufficient to achieve the environmental integration in all EU policies and activities, let alone policy coherence to facilitate global sustainability.

For the duty of environmental integration to make a significant contribution to achieving such policy coherence, the environmental integration must have a clearly defined goal. Including environmental concerns at some level or other, an attempted ‘greening’ of European policies, is insufficient. Article 11 TFEU sets out the goal as one of ‘promoting sustainable development’. This goal, of sustainability development, or sustainability, must be defined in light of natural science. This is necessary to mitigate the problem of sustainability being an extremely overused and broad concept with multiple definitions, and to reduce the danger of

¹ Professor Dr. Juris at the University of Oslo Faculty of Law; Professorial Research Fellow at Deakin University Law School. As the Project Coordinator of Sustainable Market Actors for Responsible Trade (SMART), with funding from the European Union’s Horizon 2020 research and innovation programme under Grant Agreement No 693642, I gratefully acknowledge its support. The views expressed in this chapter are my own and do not necessarily coincide with those of the European Union. I would like to thank Francesca Ippolito for her encouragement and guidance, without which this chapter would not have been completed.

² Emphasis added. The Treaty on the functioning of the European Union, last amended by the Treaty of Lisbon, OJ 2008 C115 (consolidated version), abbreviated TFEU. Julian Nowak, ‘The Sky is the Limit: On the Drafting of Article 11 TFEU’s integration obligations and its intended reach’, in Beate Sjøfjell and Anja Wiesbrock, *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge, 2015), Ch. 2, gives an introduction to the enhancement of the environmental integration rule over time and also sets out the Member States’ clear intention with the rule.

regulatory and policy capture. The reference to natural science is not to say that sustainability only has an environmental dimension; it clearly does not. However, the environmental literally must set the framework within which the balancing sustainability requires must take place. Section 2 draws on state-of-the-art natural science to flesh out what this means. Section 3 discusses the potential of Article 11 TFEU in that light, while Section 4 concludes with some reflections on how to realise the potential.

2. ENVIRONMENTAL INTEGRATION AND THE GOAL OF SUSTAINABLE DEVELOPMENT

Sustainable development is an overarching, global societal goal, encompassing the search for a balance between economic development, social justice and environmental protection. The ultimate objective is the achievement of the best possible world for all of humanity and the boundaries within which the balancing must take place is the preservation of our ecosystems as the very basis of our existence. We see indications of a global consensus through the adoption of the United Nations Sustainable Development Goals (SDGs).³ The European Union's follow up of the SDGs is particularly interesting, as it appears to have inspired a broadening of the former somewhat niche work on policy coherence for development to an emphasis on the cross-cutting nature of sustainability issues, as expressed in The New European Consensus on Development: 'Our World, Our Dignity, Our Future'.⁴

However, the SDGs do not draw up an analytical framework or suggest any order of priority, or discuss whether it is conceivable to achieve 'sustained, inclusive and sustainable economic growth'⁵ for all countries while mitigating the dire environmental issues, including biodiversity reduction and climate change.⁶ To understand what the goal of sustainability entails requires therefore a research-based understanding of what we are trying to achieve, the constraints on the achievement of our aims, and the relationship between them. Accordingly,

³ United Nations General Assembly resolution 70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, A/RES/70/1, (25 September 2015), available at: www.undocs.org/A/RES/70/1. More on the SDGs here: <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>

⁴ The New European Consensus on Development: 'Our World, Our Dignity, Our Future', Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission (2017/C 210/01).

⁵ United Nations Sustainable Development Goals, United Nations Resolution adopted by the General Assembly on 25 September 2015, A/RES/70/1 2015, § 70/1: *Transforming our world: the 2030 Agenda for Sustainable Development*, www.un.org/sustainabledevelopment/sustainable-development-goals/, Declaration item 9.

⁶ Ibid

in this new geological epoch that is suggested denoted the Anthropocene, as the era where human activity changes geological processes,⁷ we may define sustainable development as ‘development that meets the needs of the present while safeguarding Earth’s life-support system, on which the welfare of current and future generations depends’.⁸

The grand challenge of our time may be formulated as that of achieving a safe and just operating space for humanity: of securing the social foundation for humanity now and in the future while staying within planetary boundaries.⁹ If we are to achieve this, we cannot continue with incremental improvements; neither can we focus on whichever environmental or social challenges are given the most attention at any one time. The concept of planetary boundaries, state-of-the-art natural science,¹⁰ embodies this fundamental recognition of planet-level environmental dynamics presenting non-negotiable ecological limits, which should form the space within which all economic and social development is to take place.

Planetary boundaries as a term used for the limits of our planet is the result of the work of an international multidisciplinary group of environmental scientists, who in 2009 pooled their knowledge of different Earth system processes to inform the world about the space for sustainable action within planetary boundaries.¹¹ Their work reflects the growing scientific understanding that life and its physical environment co-evolve. This pioneering effort brought together evidence of rising and interconnected global risks in several different contexts where environmental processes are being changed by human activities. The planetary boundaries

⁷ Yadvinder Mahli, ‘The Concept of the Anthropocene’, (2017) 42 Annual Review of Environment and Resources, 77-104, doi.org/10.1146/annurev-environ-102016-060854. Last accessed 10 March 2018.

⁸ David Griggs and others, ‘Policy: Sustainable development goals for people and planet’, (21 March 2013) 495 Nature, 305–307 [doi:10.1038/495305a](https://doi.org/10.1038/495305a) Last accessed 10 March 2018. This is a step on from the famous definition of sustainable development as development that ‘meets the needs of the present without compromising the ability of the future generations to meet their own needs’ World Commission on Environment and Development *Our common future* (Oxford, Oxford University Press, 1987) 43.

⁹ M Leach, K Raworth and J Rockström, ‘Between social and planetary boundaries: Navigating pathways in the safe and just pathway for humanity’, *World Social Science Report 2013: Changing Global Environments*, 84–90 (OECD, 2013), available at: www.worldsocialscience.org/activities/world-social-science-report/the-2013-report/. Last accessed 26 Jan. 2017.

¹⁰ J Rockström and others, ‘Planetary boundaries: exploring the safe operating space for humanity’, (2009) 14(2) Ecology and Society, www.ecologyandsociety.org/vol14/iss2/art32/ Last accessed 10 March 2018. Updated and revised in W Steffen and others., ‘Planetary Boundaries: Guiding human development on a changing planet’ (2015) 347(6223) Science, www.sciencemag.org/content/347/6223/1259855.abstract Last accessed 10 March 2018..

¹¹ Sarah Cornell, ‘Planetary Boundaries and Business: putting the operating into the Safe Operating Space for Humanity’ (draft paper on file with current author); see Rockström and others, and Steffen and others, n. 10 above.

framework flags a set of sustainability-critical issues. It gives a dashboard of issues where our collective humanity is changing the fundamental dynamics of the Earth system most profoundly.¹²

Through this work, it is estimated that humanity has already transgressed or is at risk of transgressing at least four of the currently identified nine planetary boundaries, including climate change, biosphere integrity, biogeochemical flows and land-system integrity.¹³ The planetary boundaries work is a continuous natural-science work-in-progress, as scientists gradually understand more of the complex interactions and feedback mechanisms in the global ecological systems.¹⁴ Planetary boundaries as a concept forms the rationale by which new boundaries may be identified and better quantifications or metrics adopted. In line with this, the conceptual framework for planetary boundaries itself proposes a strongly precautionary approach, by ‘setting the discrete boundary value at the lower and more conservative bound of the uncertainty range’.¹⁵

Sustainable development has a strong legal position among the ultimate objectives of the European Union, underpinned by the growing recognition in the EU of the inextricable entity of humanity, our natural environment and our economic system.¹⁶ That this requires a recognition of ecological limits may be found expressed in the EU’s Seventh Environment Action Programme ‘Living well, within the limits of our planet’, where this vision is formulated:

In 2050, we live well, within the planet’s ecological limits. Our prosperity and healthy environment stem from an innovative, circular economy where nothing is wasted and where natural resources are managed sustainably, and biodiversity is protected, valued and restored in ways that enhance our society’s resilience. Our low-carbon growth has

¹² Cornell, *ibid*

¹³ The other five being global freshwater use, ocean acidification, atmospheric aerosol loading, stratospheric ozone depletion, and novel entities such as nano particles and micro plastic; Steffen and others, n. 10 above.

¹⁴ See also T Häyhää and others, ‘From Planetary Boundaries to national fair shares of the global safe operating space — How can the scales be bridged?’ (2016) 40 *Global Environmental Change*, 60.

¹⁵ Rockström and others, n. 10 above.

¹⁶ Articles 3(3), 3(5) and 21(2)(d) and (f) of the consolidated Version of the Treaty on European Union [2008] OJ C115, hereinafter referred to as the EU Treaty (abbreviated TEU).

long been decoupled from resource use, setting the pace for a safe and sustainable global society.¹⁷

Implementing the natural science understanding of planetary boundaries into the interpretation of Article 11 TFEU has significance on three levels: firstly and most importantly, it brings to the forefront that there indeed are ecological limits, and that loosely attempting to ‘green’ EU policies is inadequate. Secondly, it highlights the complex interaction between planet-level environmental processes and that for example climate change, however topical (and difficult to mitigate), is only one aspect of the convergence of crises we are heading directly into. Thirdly, it continuously reminds us that state-of-the-art natural science must continue to inform our decisions on a work-in-progress-basis. For policy-makers it therefore should stress the unacceptability of ignorance in the face of these severe environmental risks and the necessity of a knowledge-based precautionary approach.

3. THE SUSTAINABILITY POTENTIAL OF ARTICLE 11 TFEU

The principle of sustainable development, with its core codified in the environmental integration rule in Article 11 TFEU,¹⁸ contains within itself a potential transformational effect through the duties it arguably sets out for the EU institutions and the rights, and emerging duties, for Member States. The full realization of its potential could have led to cross-sectorial discussions on necessary changes to achieve policy coherence for sustainability.

However, in practice this is only partially realised, as we shall see in this section. Notably, while there are significant decisions from the Court of Justice of the European Union, the Court has not taken upon itself clearly enough the role Article 11 TFEU bestows upon it: to be a guardian of the planetary boundaries. There are even some contradictory statements in the case-law. As regards policy-making, while we have seen some indications of plans for horizontal environmental integration, EU policy-making is still influenced by the

¹⁷ Environment Action Programme to 2020, 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’, OJ L 354, 28.12.2013, p. 171–200.

¹⁸ For an analysis of its predecessor, Article 6 of the EC Treaty, see Beate Sjøfjell, *Towards a Sustainable European Company Law* (Kluwer Law International, 2009), Sect.s 10.5 and 10.7. See also *inter alia* L. Krämer, ‘The Genesis of EC Environmental Principles’ in *Principles of European Environmental Law* (ed) R. Macrory (Groningen: Europa Law Publishing, 2004) 29–47. See Christina Voigt, ‘Article 11 TFEU in light of the principle of sustainable development in international law’, in Beate Sjøfjell and Anja Wiesbrock, *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge, 2015), Ch. 3, on sustainable development as a principle of international law, and its relevance for Article 11 TFEU.

compartmentalization that perpetuates the illusion that environmental protection can be left to environmental law, while other areas of law do not have to concern themselves with environmental protection. This section will elaborate on the potential of Article 11 TFEU for the transformation of the EU institutions' contribution to sustainability – and of the potential for the Member States.¹⁹

3.1 Article 11 TFEU and the EU institutions

The *European Council* is an important political institution, an institutionalisation of the former summits,²⁰ which is to 'provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof'.²¹ The overview here concentrates on the main institutions of the EU²² and those that, as opposed to the European Council, have the core legal decision-making powers.²³ Suffice it to say therefore that the legal obligations flowing from the environmental integration rule apply to the European Council as they do to the other institutions, i.e. within the realm of its competence. Although the European Council has been a driving force for the recognition of sustainable development as an overarching objective of the European Union,²⁴ the Council can undoubtedly do more to ensure that the overarching objective of a sustainable development is not lost sight of in the day-to-day politics and practice of the European Union.²⁵ Illustrative are for example the March 2014 conclusions of the European Council, where the focus on 'Climate and energy' seems to be driven more by geopolitical reasons for ensuring energy security than the threat of global warming, and where sustainable development is not mentioned at all.²⁶ Similarly, the June 2017 conclusions illustrate the lack

¹⁹ This section draws on Beate Sjøfjell, 'The legal significance of Article 11 TFEU for EU institutions and Member States', in Beate Sjøfjell and Anja Wiesbrock, *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge, 2015), Ch. 4.

²⁰ See Art. 13(1) and Art. 15 TEU.

²¹ Art. 15(1) TEU.

²² The Council, the Commission, the European Parliament and the Court of Justice of the European Union; delimiting against, for reasons of space and time, the also important EU institutions of the European Central Bank and the Court of Auditors (Art. 13(1) TEU).

²³ Although the Treaties give the European Council competence in exceptional cases, see Art. 48 TEU and e.g. Art. 48(2) and 82(3) TFEU, the European Council has no general legislative powers, Art. 15(1) TEU.

²⁴ As early as from the Presidency Conclusions of the European Council, Rhodes, 2–3 December 1988 (DOC/88/10).

²⁵ That the European Council had to amend its Lisbon Agenda may serve to illustrate its lack of proper focus: In 2001 the European Council stated that sustainable development is a 'fundamental objective under the Treaties', agreed on a strategy for sustainable development and expressly added an environmental dimension to the Lisbon agenda; Presidency Conclusions of the Gothenburg European Council 15–16 June 2001 (SN 200/1/01 Rev 1) paras. 1 and 19-21.

²⁶ 'A coherent European energy and climate policy must ensure affordable energy prices, industrial competitiveness, security of supply and achievement of our climate and environmental objectives', Conclusions of the European Council, Brussels, 20-21 March 2014 (EUCO 7/14). 7. Although meeting the "ambitious"

of attention paid to other planetary boundaries through an overly narrow focus on climate change and the significance of the Paris Agreement for modernising EU industry and economy, although mention is made of the broader New European Consensus on Development.²⁷

The three main institutions of the Union legislator: The Council, the Commission and the Parliament must ‘act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them’.²⁸ The overarching objectives are however so broad, that they only very rarely will hinder new initiatives from the European Union.²⁹ The converse is of special interest for environmental protection. With reference to the environmental protection objective and the environmental integration rule (now in Article 11 TFEU) the Court of Justice found that the EU law-maker can also adopt secondary law provisions within the area of criminal law, when necessary to ensure an effective environmental protection.³⁰ The Court has also established that the environmental integration rule has the following implication: Environmental protection measures can be validly adopted under any legal basis of the Treaties, as long the relevant requirements of that basis otherwise are fulfilled.³¹

The EU law-maker also has a duty to actively promote the objectives and to strike a balance between them, and under certain circumstances a duty to undertake specific action.³² The Council has a policy-making and coordinating function in the EU law system, and holds legislative functions,³³ with the aim of advancing the objectives of the European Union.³⁴ The Council has a central position in the legislative process. The Commission normally has the

targets of reduction of greenhouse gas emissions are discussed and the international climate negotiations emphasize and renewable energy is emphasized, the context of ‘renewable and other indigenous’ energy sources gives the impression that the European Council is focused more on energy security in the current geopolitical situation, rather than combating global warming; see e.g. the discussion of import of natural gas from North America to Europe.

²⁷ Conclusions of the European Council, Brussels, 22-23 June 2017 (EUCO 8/17).

²⁸ Art. 13(2) TEU; cp. Ex Art. 5 EC. See also Art. 3(6) TEU.

²⁹ The division of labour in accordance with the principle of subsidiarity may on the other hand affect the competence of the EU institutions to put forward initiatives in certain areas, see Art. 5 TEU. That is not a topic for this chapter.

³⁰ See C-176/03 *Commission v. Council* [2005] ECR I-7879, ECLI:EU:C:2005:542 and C-440/05 *Commission v. Council* [2007] ECR I-9097, ECLI:EU:C:2007:625 .

³¹ See C-62/88 *Greece v. Council (Chernobyl I)* [1990] ECR I-1527, ECLI:EU:C:1990:153, C-300/89 *Commission v. Council (Titanium Dioxide)* [1991] ECR I-2867, ECLI:EU:C:1991:244, C-440/05 *Commission v. Council* [2007] ECR I-9097, ECLI:EU:C:2007:625.

³² See Sjøfjell, ‘The Legal Significance of Article 11 TFEU for EU Institutions and Member States’.

³³ And also budgetary functions, both together with the Parliament.

³⁴ Art. 16(1) and 13(1)-(2) TEU.

right of proposal, though – the Council can only rarely adopt legislative measures without prior proposals from the Commission.³⁵ The Commission is thus, with the aim of promoting ‘the general interest of the Union’ and of ensuring ‘the application of the Treaties’, to participate in the EU law-making process.³⁶ The EU Parliament has through a remarkable development³⁷ been given an ever larger role in the EU law-making process.³⁸

On all the various levels, the duty to seek a balance and promote a sustainable development is relevant. The duty applies to the chosen approach and the scope of the preparatory work in connection with new secondary legislation. To achieve integration of environmental protection requirements with the aim of sustainability in the secondary legislation, it should be included in the very first planning phase. That this is a part of the duty is clear from the wording of Article 11 TFEU: Environmental protection requirements are to be integrated into the ‘definition and implementation of’ policies and activities. Article 11 TFEU, taken seriously, thereby requires action in general for the law-making institutions to ensure the integration of environmental protection requirements in legislative processes that are initiated for other reasons. Especially for the Commission, which has direct competence to propose new legislative initiatives,³⁹ the rule then also entails a duty to act specifically to promote a sustainable development – i.e. to take action where action otherwise would not have been taken (and not only to include environmental considerations in legislative initiatives planned for other reasons). The European Parliament is also subject to this rule, within its competence to request that the Commission ‘submit any appropriate proposal on matters on which it considers that a Union act is required *for the purpose of implementing the Treaties*’.⁴⁰

Although the legal bases set out a competence to act and not a duty to act expressly, the competence interpreted in light of the overarching objectives and particularly Article 11 TFEU entails that the institutions must use their competence where necessary. The Parliament

³⁵ See Art. 289 TFEU and the ordinary legislative procedure as set out in Art. 294 TFEU. Note also the Council’s competence to ‘request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals’, Art. 241 TFEU.

³⁶ Art. 17(1) TEU, cp. ex 211 EC. The Commission of course also has a number of other duties, see further below.

³⁷ See pre-Lisbon P. J. G. Kapteyn and P. VerLoren van Themaat *The law of the European Union and the European Communities* (4th rev. edn., Alphen aan den Rijn: Kluwer Law International, 2008), 207.

³⁸ Through the codetermination procedure in ex Art 251 EC, now the ordinary legislative procedure in Art. 294 TFEU, see also Art. 14(1) TEU. In addition, the Parliament has a general competence to discuss any EU relevant issue, adopt resolutions thereto and ask the Member States to act thereupon.

³⁹ See the ordinary legislative procedure in Art. 294(1) TFEU.

⁴⁰ Art. 225 TFEU (emphasis added), ex Art. 192(2).

must therefore request that new proposals are submitted by the Commission where necessary to promote the overarching aim of a sustainable development, and the Commission must submit such proposals, whether or not it is requested to do so by the Parliament.

It follows logically, then, that the duty to act also will be a specific duty to undertake specific action in certain circumstances.⁴¹ It is clear that *business as usual* is a very certain path towards a very uncertain future, continuing on the same track cannot then be in compliance with Article 11 TFEU and the obligation to promote a sustainable development.⁴²

Article 11 TFEU applies also for the institutions that play a role in the legislative process after a proposal has been put forward, that is the Council, the Parliament, the Commission and the Conciliation Committee, as the case may be.⁴³

This gives rise to the questions whether the environmental integration duty is procedural or substantive. When the Parliament is to decide whether to approve, reject or suggest amendments in the legislative proposal, a procedural requirement could entail that it was sufficient for the Parliament to check whether environmental concerns had been considered in the making of the proposal. The environmental integration rule's emphasis of the goal of sustainable development combined with the position of sustainable development as an overarching goal,⁴⁴ which the institutions have a duty to act to achieve, indicates a substantive duty to carry out the integration necessary to achieve a sustainable development. The non-negotiable ecological limits which must be respected if sustainable development is to be achieved, supports the argument.⁴⁵

Article 11 TFEU is further relevant for the choice of rules and the formulation of the rules, which would require ex ante thorough impact assessments. Not implemented properly, the principle of sustainable development – instead of making environmental law less marginal –

⁴¹ For a discussion of what this entails for the EU's regulation of business, see Beate Sjøfjell, 'Corporate Governance for Sustainability: the Necessary Reform of EU Company Law', in Beate Sjøfjell and Anja Wiesbrock, *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge, 2015), Ch. 6.

⁴² See e.g. Will Steffen, Johan Rockström Robert Costanza, 'How Defining Planetary Boundaries Can Transform Our Approach to Growth' 2011 2/3 Solutions <https://thesolutionsjournal.com/node/935>. Last accessed 8 February 2018.

⁴³ Art. 294 TFEU.

⁴⁴ Art. 3 TEU.

⁴⁵ See also Christina Voigt, 'Article 11 TFEU in light of the principle of sustainable development in international law'.

may serve to ‘subsume environmental considerations’ and ‘perpetuate an approach’ to economic activities that encourages environmental problems.⁴⁶

Each institution, when carrying out its tasks according to the treaties, has an independent obligation to ensure that the environmental integration duty is carried out and that sufficient action is taken to promote a sustainable development. Indubitably this is demanding. In some cases this will entail that the whole idea of a secondary legislative initiative needs to be reassessed. Correctly implemented this integration could prevent more ‘path-dependent’ results, and maybe – for a while – lead to fewer legislative proposals and more discussions on a higher level, and thereby better preparatory work.

The Court of Justice of the European Union, including the Court of Justice, the General Court and specialised courts, is the guardian of EU law.⁴⁷ When the Court deals with Treaty infringement cases against a Member State, reviews the legality of legislative acts by the other EU institutions, handles actions against other EU institutions for infringement of the Treaty through passivity and gives preliminary rulings concerning the interpretation of the treaties and of secondary legislation,⁴⁸ the Court must as a matter of law itself comply with the environmental integration rule and ensure that the other EU institutions⁴⁹ do the same.

The Court of Justice has shown in its practice, employing a dynamic, contextual and teleological method, that it is capable of taking the objectives of the Treaties seriously. Even before inclusion as such in the Treaties, the Court elevated environmental protection from a position of neglect to one of the ‘essential objectives’ of the European Union.⁵⁰ Based on its case law and the position of environmental protection as an objective, the Court in 1988 declared environmental protection to be a mandatory requirement, i.e. an objective that may justify restrictions on free movement.⁵¹ *PreussenElektra* is a landmark case in its acceptance of discriminatory measures, with reference to the environmental integration rule and its

⁴⁶ P. Sands *Principles of international environmental law* (Cambridge, Cambridge University Press, 2003) 9.

⁴⁷ Art. 19(1) TEU, including the Court of Justice, the General Court and specialised courts.

⁴⁸ Especially Articles 258-260, 262, 265 and 267 TFEU, see ex Articles 226, 230, 232 and 234 EC.

⁴⁹ And the Member States, as far as applicable, see below, Section 3.2.

⁵⁰ Case 240/83 *ADBHU* [1985] ECR, ECLI:EU:C:1985:59 531 para. 13. E.g. Jacobs ‘The Role of the European Court of Justice’ [2006] *Journal of Environmental Law* 185-205 and Sjäfjell *Towards a Sustainable European Company Law* Sect. 10.5.

⁵¹ Case 302/86 *Commission v. Denmark* [1988] ECR 4607, ECLI:EU:C:1985:59 para 8-9. See also J. Scott *EC Environmental Law* (London, Longman, 1998) 67-68, J. H. Jans *European Environmental Law* (2nd rev. edn., Groningen, Europa Law Publishing, 2000) 247-248 and 258-262, and Krämer *EC Environmental Law* (6th edn., London, Sweet & Maxwell, 2007) 105-106.

significance for priority objectives in accordance with international climate change obligations.⁵²

The overarching objectives have proven to form a framework for EU law and the Court has shown that the objectives require balance.⁵³ The environmental integration rule, now in Article 11 TFEU, has been emphasised and accorded significance in a number of cases before the Court, also before the rule was strengthened and moved to the elevated position in then Article 6 of the EC Treaty. The overarching objective of environmental protection and the environmental integration rule have formed an important part of the Court's reasoning in the cases where the Court expanded the framework of EU law (at least in comparison to what many perceived as the limits of EU law at the time), by finding that the EU law-maker is competent to include requirements of criminal penalties in secondary legislation where necessary to achieve an effective environmental protection.⁵⁴ In its quest for a balance between the overarching objectives, the Court has shown a number of times that environmental protection may substantiate restrictions on free movement.⁵⁵

Taking Article 11 TFEU seriously, the Court should to a greater extent and also *ex officio* focus on what the objective of sustainable development and the reference thereto in Article 11 TFEU entails with regard to a duty to integrate environmental protection in all EU law areas – also in areas where environmental concerns traditionally have not been even considered. *Concordia Bus* is a now quite dated case which gave hope for the future direction of the case-law of the Court, as the Court of Justice here, in a traditionally economic area emphasised the objective of environmental protection with reference to the environmental integration rule, and indirectly initiated a revision of relevant secondary legislation.⁵⁶

There is also a need to clarify the confusion that has arisen on the level of the General Court. In *Castelnou Energía v Commission* the Court concluded that there was not a duty to assess

⁵² C-379/98 *PreussenElektra* [2001] ECR I-2099, ECLI:EU:C:2001:160.

⁵³ See the overview of case-law in Sjøfjell *Towards a Sustainable European Company Law* Sect. 10.1.3.4.

⁵⁴ C-176/03 *Commission v. Council* [2005] ECR I-7879, ECLI:EU:C:2005:542 and C-440/05 *Commission v. Council* [2007] ECR I-9097, ECLI:EU:C:2007:625; F. Jacobs 'The Role of the European Court of Justice in the Protection of the Environment' [2006] *Journal of Environmental Law* 185–205.

⁵⁵ See briefly below.

⁵⁶ See C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, ECLI:EU:C:2002:495. See Anja Wiesbrock, 'An Obligation for Sustainable Procurement? Gauging the Potential Impact of Article 11 TFEU on Public Contracting in the EU' (2013) 40/2 *Legal Issues of Economic Integration* 105–132, and Beate Sjøfjell and Anja Wiesbrock, *Sustainable Public Procurement under EU Law: A New Role for the State as Shareholder* (Cambridge University Press, 2015).

the environmental impacts of decisions made in other areas.⁵⁷ This ignores Article 11 TFEU and the overarching of the EU set out in Articles 2 and 3 TEU, and is not in line with the Court of Justice decision, for example, in *Nuova Agricast*.⁵⁸

There potential for the use of Article 11 TFEU, taken seriously, in the Court is apparent. If a well-founded case against a legislative act, based on non-compliance with the environmental integration rule, is brought before the Court sufficiently early, the secondary legislation may – and shall, as a matter of EU Treaty law – be declared void.⁵⁹ More specifically, this entails that secondary legislation may be declared void if – which would the simplest variety – the environmental integration duty has not even been considered,⁶⁰ or – and more difficult, except in the obvious cases of violation – where the environmental integration duty has been considered, but where the environmental integration, as a matter of substance, has not been carried out properly.⁶¹

Where the Court cannot or will not declare the secondary legislation to be void (for example because the action is brought too late or the Court finds the integration effort too difficult to assess or within the legislative margin of appreciation), the integration rule and the duty to seek a balance between the relevant objectives are of significance as Treaty-based principles for the interpretation of the secondary legislation, and as guidelines for the discretion exercised by the EU institution or a Member State, as the case may be.

The EU institutions that have the competence to bring a case before the Court of Justice obviously have as a part of their mandate to ensure, in this manner, compliance with the environmental integration rule. This brings us to the Commission as a supervisory body.

⁵⁷ T-57/11 *Castelnou Energía v Commission*, ECLI:EU:T:2014:1021.

⁵⁸ C-67/09 P *Nuova Agricast Srl and Cofra Srl v Commission*, ECLI:EU:C:2010:607, see further J. Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press, 2016), Ch. 4.

⁵⁹ Art. 264 TFEU.

⁶⁰ As the case is with the Takeover Directive, see Sjøfjell *Towards a Sustainable European Company Law* Sect. 18.3.2.

⁶¹ Discussed also by Krämer *EC Environmental Law 22–23*, Dhondt *Integration of Environmental Protection into other EC policies: Legal Theory and Practice* (Groningen, Europa Law Publishing, 2003) 484–485, and J. H. Jans *European Environmental Law* 21.

The Commission has a number of tasks and a wide competence to ‘promote the general interest of the Union’.⁶² Article 11 TFEU is relevant for the Commission as a legislative body, as discussed above, and of course very much so in the Commission’s control function, i.e. its task of overseeing the application of EU law, which it is to carry out to ‘ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them’.⁶³ The Commission is a key player, together with the Court,⁶⁴ in safeguarding the Treaties, ensuring their correct application and moving EU law forward, through its Treaty-given competence and because of its independence in relation to the Member States.⁶⁵

In practice, the Commission has often been the applicant bringing cases against Member States before the Court in the cases where the Court of Justice subsequently has ruled in favour of the Member States in determining that the objective of environmental protection, with reference to the environmental protection rule, has justified Member State restrictions of free movement. On the other hand, the Commission has also brought actions against Member States in a number of cases where Member States were in violation of their duty to protect the environment (concerning lack of proper implementation of secondary legislation aiming to protect the environment).⁶⁶

In a proper search for a balance between the overarching objectives, the Commission’s approach should integrate an understanding of the necessity of working to stay within planetary boundaries to achieve the EU’s overarching goals. As is the case with the Court,⁶⁷ the Commission also fails in the *ex officio* application of the environmental integration rule in non-environment cases, i.e. in policy areas where environmental interests traditionally are not considered, and where environmental protection and sustainable development as Treaty-based objectives and the environmental integration rule in Article 11 TFEU actually require integration. In this respect, the Commission fails in its duty to ensure the application of the Treaties.

⁶² In addition to the important legislative and control functions, the Commission is to ‘execute the budget and manage programmes’, have ‘coordinating, executive and management functions’, represent the Union externally (with the exception especially of the common foreign and security policy), and ‘initiate the Union’s annual and multiannual programming with a view to achieving interinstitutional agreements’, see now Art. 17(1) and (2) TEU. Pre-Lisbon, see P. J. G. Kapteyn and P. VerLoren van Themaat *The law of the European Union and the European Communities*, 193 seq.

⁶³ Art. 17(1) TEU.

⁶⁴ That is, ‘under the control of the Court of Justice of the European Union’, Art. 17(2) TEU.

⁶⁵ Art. 17(3) TEU.

⁶⁶ See Sjäffjell *Towards a Sustainable European Company Law* Sect. 10.9.3.3.

⁶⁷ Sect. 4.2. above.

3.2 Article 11 TFEU and the Member States of the EU

The Court of Justice has declared that the overarching objectives of the Treaties,⁶⁸ in themselves and seen in isolation, neither impose legal obligations on Member States nor confer rights on individuals.⁶⁹ Correspondingly, it is clear that Article 11 TFEU does not directly address the Member States. It should be just as clear however, that the obligations for the EU institutions indirectly may entail both duties and rights for the Member States. The scope of these duties and rights is the topic of this section.

The duty of loyalty and cooperation in Article 4(3) TEU⁷⁰ is an important part of the basis for the argument that the Member States have duties that flow from the overarching objectives and the principle-based rules of the Treaties, beyond those duties that follow directly and narrowly from the provisions of the Treaties and the secondary legislation. Already in the 1970s, the Court of Justice found that the Member States had duties based on the predecessor of Article 4(3) TEU.⁷¹ Article 4(3) TEU (and its predecessors) refers to the ‘attainment of the Union’s objectives’ and similar phrases,⁷² entailing that the obligations of the Member States have developed and will continue to develop in pace with the scope and the legal significance of the overarching objectives of the European Union, as set out in the Treaties.⁷³

The obligations (and the rights) for the Member States apply on all levels and to all their institutions: the legislative bodies, administrative and supervisory authorities and courts, although it will vary from institution to institution which duty (or right) is the most relevant to discuss.

This topic may be discussed as an issue concerning implementation of secondary legislation, but it is also significant for the interpretation of the Member States’ obligations flowing directly from the Treaties.

⁶⁸ In then Art. 2 EC, now Art. 3 TEU.

⁶⁹ Case 126/86 *Zaera* [1987] ECR 3697, ECLI:EU:C:1987:395 para 10 and 11. See also C-339/89 *Alsthom Atlantique* [1991] ECR I-107, ECLI:EU:C:1991:28 para 8–9, Joined cases C-72/91 and C-73/91 *Firma Sloman Neptun Schiffahrts* [1993] ECR I-887, ECLI:EU:C:1993:97 para. 28 and C-293/03 *Gregorio My v. Office national des pensions* [2004] ECR I-12013, ECLI:EU:C:2004:821 para. 29.

⁷⁰ Ex Art. 10(2) EF, before that: Art. 5 EC.

⁷¹ Then Art. 5 EC, later: Art. 10(2) EC.

⁷² Art. 4(3) third paragraph.

⁷³ See P. J. G. Kapteyn and P. VerLoren van Themaat *The law of the European Union and the European Communities* 153.

Secondary legislation must be interpreted in light of the Treaties, which are to be understood as a coherent system.⁷⁴ This may be seen as one of the most profoundly important constitutional principles of EU law, supported inter alia by (now) Article 4(3) TEU.⁷⁵ Research into the significance of the overarching objectives of EU law strengthens this argument.⁷⁶

Member States accordingly have the right and the duty to follow the principle of sustainable development, as codified in the environmental integration rule, in their interpretation, implementation and application of EU law.⁷⁷ Member States should be obligated to comply with the environmental integration rule also when the EU institutions have not expressly fulfilled their duty according to the rule. Each institution of the EU and each Member State are obligated to do what they can to ‘assist each other in carrying out tasks which flow from the Treaties’ and refrain from doing anything that may ‘jeopardise the attainment of the Union’s objectives’.⁷⁸ The principle of loyalty requires cooperation, but it also entails that one party’s failure cannot be used to justify another party’s failure. This has primarily been expressed concerning the relationship between the Member States, but arguably the same must apply between the Member States and the EU institutions. The Court of Justice has used the predecessors of Article 4(3) TEU as a basis to develop a number of constitutional principles and a finely knit web of obligations to act, to cooperate and to be loyal for both the Member States and the EU institutions.⁷⁹ Even though the duty of cooperation originally was interpreted in such a way to entail that a Member State has violated EU law if the Member State was under a sufficiently clear and precise obligation to do something and did nothing, this has developed into a more general obligation in pace with the Court of Justice’s development of its understanding of (now) Article 4(3) TEU.⁸⁰ As is apparent from the wording of the provision itself, the loyalty is not owed to the EU institutions, but to the Treaties and the overarching objectives.

⁷⁴ See e.g. the Court's reasoning in *Albany*, and see also Art. 13(1) TEU.

⁷⁵ See J. Temple Lang ‘The Development by the Court of Justice of the Duties of Cooperation of National Authorities and Community Institutions under Article 10 EC’ [2007-2008] *Fordham International Law Journal* 1483-1532 at 1483.

⁷⁶ Sjäfjell *Towards a Sustainable European Company Law*.

⁷⁷ See *ibid.* Sect. 18.3.2.

⁷⁸ Art. 4(3) TEU.

⁷⁹ See Temple Lang ‘The Development by the Court of Justice’.

⁸⁰ K. Lenaerts and P. Van Nuffel *Constitutional law of the European Union* ((R. Bray ed, 2nd edn, London, Sweet & Maxwell, 2005) 117 and Temple Lang ‘The Development by the Court of Justice’.

Accordingly, the Member States' institutions must as far as possible, and in all relevant areas, interpret national law in light of the objectives and the wording of secondary legislation, and in general, in a way that is in accordance with EU law requirements.⁸¹ Further, the Treaties themselves require that the Member States institutions must interpret and apply secondary legislation in light of the objectives and obligations flowing from the Treaties. This has often been expressed in cases concerning free movement and arguably the same principles apply to other Treaty obligations meant to promote the same overarching objectives. The Member States therefore have both a duty to implement, interpret and apply EU law rules in light of the Treaty. More specifically, there is a legal foundation for the establishment of a right and a duty to act in accordance with the environmental integration rule as far as possible, within the framework of the treaties and of the secondary legislation.

For national legislators this means that the (other) general Treaty rules and the secondary legislation must be implemented in an as environmentally-friendly way as possible, aiming to promote sustainable development. All Member State institutions (on state and local level) must interpret national law (as far as relevant) in light of the rules flowing from the Treaties themselves. The Treaty rules themselves must be interpreted and understood in light of EU law's own general and constitutional principles, including the principle of sustainable development as codified in Article 11 TFEU – also where the EU institutions have failed to do so in a proper manner. This applies correspondingly to administrative authorities' implementation and application of the law (whether in the form of administrative regulations or administrative decisions) and national supervisory authorities' control in light of EU law rules.

The national courts are, as we know, all – within their areas of competence – EU law courts, with a right and a duty to apply all relevant EU law rules in each case, regardless of whether these rules have been the subject of arguments presented by the parties in the case.⁸²

The environmental integration rule, and its links to the overarching objective of the EU as well as to international climate change obligations, may be seen as broadening the Member States' scope of action, compared to the perceived scope if the rule and its possibilities are not

⁸¹ Lenaerts and Van Nuffel *Constitutional law*, 119.

⁸² Reflecting the principle of Roman law: *Juva novit curia*. See also Temple Lang 'The Development by the Court of Justice', 1532 and 1507.

properly considered. The basis for justification also indicates the direction in which the broader scope of action may be applied – it is the objective of the environmental dimension of sustainable development that provides a (perhaps) broader basis for justifying restrictions, and the Member State initiative must therefore contribute to that overarching objective. Member States may on another basis, in national law, EU law or international law (or politically or even morally), be obligated to use this possibility.

This is of significance for the legislator, for the public administration and for the courts of the Member States, and emphasises the importance of understanding EU law rules in their full context.

When the EU institutions have violated Article 11 TFEU by adopting secondary legislation without considering or properly implementing necessary environmental protection requirements, a Member State may and should then bring action for ‘infringement of the Treaties’ within the two-month deadline,⁸³ whereupon the Court may declare the secondary legislation to be void. Probably stipulating a duty in the strongest sense and on a general basis for Member States to do this would be too strict, as that would make the Member States responsible for their own infringement if they did not realise that the environmental integration rule had been violated before the two months had passed. However, based on for example a Member State’s Constitutional duties to protect the environment, it may be a duty where that Member State that *is* aware of the Article 11 TFEU violation, to either bring the case before the Court or at least refuse to implement or apply the relevant secondary legislation or other rule of EU law. Certainly, each Member State has a right to do so. That will lead to conflict – to infringement cases being brought before the Court of Justice – but in conflict lies the possibility for a change in a positive direction.

We may also ask whether the Member States are obligated to bring action against an EU institution that does not do enough to promote a sustainable development.⁸⁴ Again, certainly the Member States have a right to do so – and may be obligated to do so, based on other legal arguments.

⁸³ Art. 261 TFEU.

⁸⁴ Art. 263 TFEU.

The discussion above gives rise to the general question of whether the Member States have a duty to act – on national level – to promote sustainable development through the integration of environmental protection requirements in all areas, if the EU institutions do not take sufficient action.⁸⁵

There is EU case-law going back to the 1980s, with the predecessors of Article 4(3) TEU as a point of departure, that indicates that a Member State is obligated to take initiative to achieve an EU law objective. This is also in areas where the entire policy area is within the competence of the EU law, and when an EU institution fails to do what it should. In such cases, the Member State must act in cooperation with the EU institutions.⁸⁶ In the further line of cases, the Court emphasised that the Member States have a duty of action in the form of conservation measures where this is in the common interest.⁸⁷ The foundation was that the conservation of the fish stock in question was a clearly accepted EU law objective, and that there was ‘clear scientific advice’ indicating that the measures (stop fishing of a certain type of fish) should be adopted.⁸⁸

This is directly relevant for the situation today where transgressing the core planetary boundaries of climate change and biodiversity may jeopardise the EU law objective of a sustainable development. If there is ‘clear scientific advice’ that a certain measure must be adopted or stopped to achieve the objective, the argument could be made that the Member States individually have a duty to act, based on Articles 3 and 4(3) TEU and Article 11 TFEU. However, to stipulate a duty in accordance with Article 4(3) TEU, the context must be a strengthening of an already existing Treaty obligation. Article 4(3) TEU has not been perceived as providing a basis for establishing completely new duties where there is no Treaty-based (or secondary law-based) obligation to start with.⁸⁹ When the Court of Justice has declared that the general objectives of the EU do not in themselves give duties for the Member States, it is difficult to argue that Article 4(3) gives sufficient basis to declare that the

⁸⁵ Whether in violation of the Treaties or due to the limits imposed by the principle of subsidiarity.

⁸⁶ See Case 13/83 *Parliament v. Council* [1985] ECR, ECLI:EU:C:1985:220 1513 and Temple Lang ‘The Development by the Court of Justice’.

⁸⁷ Lenaerts and Van Nuffel *Constitutional law* 120, with reference to Case 32/79 ECLI:EU:C:1980:189 concerning marine conservation measures, quote from para 15: ‘In such a situation, it was for the Member States, as regards the maritime zones within their jurisdiction, to take the necessary conservation measures *in the common interest* and in accordance with both the substantive and the procedural rules arising from Community law’ (emphasis added).

⁸⁸ *Ibid*

⁸⁹ Temple Lang ‘The Development by the Court of Justice’.

Member States individually must adopt measures to achieve the overarching objectives in accordance with Article 3 TEU.

On the other hand, it follows directly from Article 4(3) EU that the Member States must refrain from doing anything that will jeopardise the achievement of the objectives of the EU. This gives rise to the question whether it nevertheless will be an infringement of the Treaties to adopt or allow new national measures that will, for example, dramatically increase climate gas emissions. Arguably, this is the case when we include in the equation the environmental integration rule in Article 11 TFEU as a link in the chain between the general objectives of Article 3 TEU and the obligation to act, to cooperate and to be loyal in Article 4(3) TEU. At the end of the day, and especially in terms of an enforceable obligation, the answer will depend on whether the necessary action to promote the objective (or refrain from jeopardising the achievement of the objective) can be spelled out concretely enough for a court to feel comfortably in calling it an obligation.

4. REALISING THE POTENTIAL OF ARTICLE 11 TFEU

Undoubtedly, the situation today is nowhere near a true integration in all sectors.⁹⁰ Article 11 TFEU, setting out a clear duty to integrate environmental protection requirements in all policies and activities of the EU, with the aim of achieving sustainability development, is often ignored. However, lack of true integration does not constitute an argument against the existence of these legal duties set out here, rather it show the necessity of spelling them out clearly and repeating the message until it gets through.

Not everything that has been put forward as obligations flowing from Article 11 TFEU in this chapter, can be substantiated, directly or fully, with reference to case-law from the Court of Justice (although some of the obligations can). Legal science will not contribute to developing the law, or can only with much difficulty do so, if our perspective is only to be retrospective. If we are to contribute to solving the challenges of today and of the future, we as legal

⁹⁰ A situation which has been pointed out also by earlier contributions, see L. Krämer *EC Environmental Law* (6th edn., London, Sweet & Maxwell, 2007) 396–400 and 402–410 and N. Dhondt *Integration of Environmental Protection into other EC policies: Legal Theory and Practice* (Groningen, Europa Law Publishing, 2003) 479–480. For a more recent analysis, see Julian Nowag, *Environmental Integration in Competition and Free-Movement Laws* (Oxford University Press, 2016).

scholars cannot primarily base ourselves on retrospective, static understanding of the law. It is our responsibility to look forward.

The EU legal method is teleological and dynamic. Although much is left to be desired still also on EU law level, EU law may provide a greater opportunity for a way forward than many a national legal system through the EU law focus on the overarching objectives and the dynamic interpretation of the legal requirements flowing from them. Through the implementation of EU secondary legislation and the recognition of the significance of EU Treaty law, the supranational level of EU law may influence national legal method and thereby lead to greater awareness of the significance of overarching international and supranational goals. This may in turn influence the national methodologies of law, leading to a greater significance being attached also on national level to overarching objectives. Many Member States today have the protection of the environment and even the goal of a sustainable development included in their constitutions. Through the influence of EU law methodology, these objectives may be given greater weight. The constitutional objectives of environmental protection and sustainability may be interpreted in the light of the overarching objective of a sustainable development and a high level of environmental protection in the EU Treaties, while the Treaty objectives themselves may be seen as strengthened through the recognition of these objectives being common to the constitutions of many Member States.

The supranational level of EU law may on several levels function to make national law disciplines comply with and work towards the sustainable development objective and the principle of a sustainable development that flow from international treaties, provided that EU law follows up on the requirements within its own system. Taking its own environmental integration rule seriously, EU law has the potential of taking the lead globally and turning the trend of short-term growth mania into a reflective, long-term sustainable development.

There are some positive indications of a broader understanding of these issues in the EU.⁹¹

The 2015 adoption of the SDGs and the EU's follow up in form of The New European Consensus for Development in 2017, may be a platform for change.⁹² With its shift from policy coherence for development towards the cross-cutting integration of the SDGs, the EU

⁹¹ See e.g. Eléonore Maitre Ekern, 'Towards an integrated product regulatory framework based on life-cycle thinking', in Beate Sjøfjell and Anja Wiesbrock, *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge, 2015), Ch. 8.

⁹² See notes 3 and 4 above.

has the chance of implementing the systematic and comprehensive integration that is necessary to achieve the global sustainability goals.

Article 11 TFEU may prove to be key in achieving the fundamental transformation away from a fossil fuel-based with its linear business models towards a renewables-based, circular and just economy within planetary boundaries. To realise the potential of Article 11 TFEU requires recognition that ‘business as usual’ is not an alternative, that path-dependency is an explanation, not an excuse, that incremental improvement may be a dangerous deflection device, and that the achievement of policy coherence for sustainability must be sought. This intrinsically demands that Article 11 TFEU, as the EU’s codification of the core of the principle of sustainable development becomes a part of a broader recognition of a general principle of sustainable development as a guideline for all policies. The realisation of this potential requires concerted efforts on several levels, where sustainability-oriented civil society, business and finance, policy makers, media, as well as academia, must engage in new and unprecedented ways.

We face a convergence of crises. We are on the brink of several types of disasters, and yet, if we grasp this occasion and use this opportunity to all work together in a different way is to complete the jigsaw puzzle of sustainability, we can be the generation that leads humanity away from its destructive trajectory and onto a sustainable path towards a better world for us all. Taking seriously the EU’s environmental integration rule with its aim of achieving sustainability, may be one small but crucial step towards this goal.