

# The European Green Deal from an environmental protection perspective: the missing role of the environmental integration principle

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## 1 Introduction

The European Green Deal has been conceived by the new European Commission chaired by Ursula Von der Leyen as the reference plan to transform the European economy towards a sustainable future.<sup>1</sup> The transformation advocated by the Green Deal is based on several priority goals. Three of them seem to be particularly relevant for environmental protection. They include the decarbonisation target (calling for a carbon neutral Europe 2050), the circular economy challenge (calling for a shift from a linear to a circular approach to the economy), and the zero-pollution objective (calling for the need to assess and revise environmental law and policy, particularly for air, water and soil protection, with the aim to (allegedly) achieve a toxic-free environment).

The present contribution argues that the Green Deal, despite embracing the overall objective of promoting a green transition in the European Union, lacks a coherent approach and fails to integrate its several goals and objectives within a single and comprehensive policy and legal framework. This seems to emerge clearly if the Green Deal is assessed from an environmental protection perspective. On such a basis, the present contribution aims at exploring the possible role that the environmental integration principle, as enshrined in Article 11 TFEU may play in this context and, despite observing the negative present state of the environmental integration principle, it concludes with a proposal to give a renewed meaningful role to the principle in the future implementation of the Green Deal.

## 2 The lack of coherence of the Green Deal and the need for environmental integration

The European Green Deal, as already recalled above, has a very broad overall objective, which consists in the transformation of the European economy and in the promotion of a profound green transition, largely based on sustainable development and climate change policy objectives.

The Green Deal main objectives consist in a wide set of parallel and concurrent goals. However, given the variety of those goals, it is not easy to predict whether it will be possible to achieve all of them within the fixed time frame. Given the

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1. European Commission Communication, *The European Green Deal*, COM(2019) 640 final, 11 December 2019.

complex structure of the Green Deal, it is likely that the policies and activities foreseen will run parallel one another and it is not clear how a uniform and coherent approach may be ensured in the implementation of the different goals and related actions. In fact, by looking at the European Green Deal Commission's Communication and the related accompanying documents it seems to emerge a lack of coherence among the different goals. For the time being, the only common denominator seems to be represented by a 'loose' reference to sustainable development throughout the Green Deal architecture, but this is certainly not enough to promote a proper greening of EU policies, if a structured approach to environmental integration is missing.

Given these circumstances, a few questions arise on the implementation of the Green Deal. Firstly, given the loose coherence of the Green Deal and the lack of integration of its goals, why do the drafters of the Green Deal seem to have completely forgotten to consider the principle of environmental integration, as enshrined in Article 11 TFEU?<sup>2</sup> This is quite surprising, particularly since, at least in some accompanying and implementing documents to the Green Deal Communication,<sup>3</sup> the Article 191 TFEU environmental principles are recalled and restated, while no reference is ever made to the environmental integration principle. Secondly, what is the potential of the environmental integration principle in this context? Could it act as a tool which may provide a greater coherence to the Green Deal framework? To address and try to answer these questions, an analysis of the main features of the environmental integration principle seems to be necessary. This will be provided in the next chapter, with a specific reference to its main strengths and weaknesses and its evolutionary patterns experienced in the last two decades.

### **3 The main features of the environmental integration principle**

#### **3.1 The strengths and weaknesses of the environmental integration principle**

In order to envisage the possible role of the environmental integration principle in the context of the implementation of the Green Deal it is necessary to provide a brief introduction to the main features of the principle, as enshrined in Article 11 TFEU. The main features of the principle will be described by making reference, in particular, to the seminal analysis of the principle contained in Jan Jans' article '*Stop the integration principle?*' of 2011.<sup>4</sup> In such a context, Jan Jans identifies some strengths and weaknesses of the environmental integration principle that are worth recalling and commenting here.

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2. Article 11 TFEU: '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'.
  3. European Commission Communication, *Pathway to a Healthy Planet for All. EU Action Plan: Towards Zero Pollution for Air, Water and Soil*, COM(2021) 400 final, 12 May 2021.
  4. J Jans, 'Stop the Integration Principle?', (2011) 33(5) *Fordham International Law Journal* 1533-1547.

He identifies two main strengths, namely the enabling function and the guidance function of the principle. The enabling function refers to the possibility to make use of the integration principle to overcome the constraints placed upon EU institutions by the principle of conferral in order to promote environmental protection objectives when decisions are taken under the common commercial policy or in the framework of other policies, such as for instance agriculture, transport, energy, development aid, trade and external relations, internal market and competition policy, regional policy, and so on. This corresponds to the practice of EU institutions, and it is confirmed by the relevant CJEU case law.<sup>5</sup> Therefore, in Jan Jans's view, it can be argued that '*The environmental integration principle broadens the objectives of the other powers laid down in the TFEU and thus limits the role of the specific powers doctrine in environmental policy*'.<sup>6</sup>

On the other side, the guidance function refers to the possibility to interpret EU law, outside the specific environmental field, to promote environmental protection objectives. In this sense, the principle of integration has played an important role to induce the Court of Justice to include, in the *Danish Bottles* case, environmental protection among the list of mandatory requirements, as foreseen by the *Cassis de Dijon* jurisprudence, which may invoked by Member States in order to justify national measures aimed at protecting important environmental interests, despite their possible restrictive effect on the free movement of goods within the European internal market.<sup>7</sup> Similarly, the principle of integration has prompted the Court of Justice to justify the application of the precautionary principle, outside the specific environmental sphere, in order to promote public health.<sup>8</sup> On the basis of this two examples, in Jan Jans's view: '*one could say that the environmental integration principle played a key role in the transformation of a customs union initially called the European Economic Community into a political entity now called the European Union*'.<sup>9</sup>

Beside these two main strengths, Jan Jans highlights three weaknesses of the principle. The first one refers to the circumstance where Article 11 TFEU calls for the integration of '*environmental protection requirements*' into the other EU policies, but it does not clarify '*what precisely has to be integrated and in what strength*'. Jan Jans argues that this wording might refer to the environmental policy objectives contained in Article 191(1) TFEU, the environmental principles listed in Article 191(2) TFEU as well as the environmental policy aspects referred to in Article 191(3) TFEU. In my opinion too, this seems to be the correct interpretation of the very general expression '*environmental protection requirements*'.<sup>10</sup>

The second weakness underlined by Jan Jans refers to question whether it is possible to argue for the existence of a legal hierarchy based upon the integration principle,

5. Case C-513/99 (*Concordia Bus Finland Oy Ab/Helsingin Kaupunki*), [2002] ECR I-7213; Case C-17/90 (*Pinaud Wieger Spedition GmbH/Bundesanstalt für den Güterfernverkehr*), [1991] ECR I-5253; Case C-62/88 (*Greece/Council*), [1990] ECR I-1527.
6. Cf Jans (n 4), 1541.
7. Case C-302/86 (*Commission/Denmark (Danish Bottles case)*), [1988] ECR 4619; see also Case C-379/98 (*PreussenElektra AG/Schleswig AG*), [2001] ECR I-2099.
8. Joined Cases T-74, 76, 83, 85, 132, 137, 141/00 (*Artegodaan GmbH/Commission*), [2002] ECR II-4945, § 183.
9. Cf Jans (n 4), 1541.
10. *Ibid.*, 1541-1542.

according to which environmental considerations should be given some priority over other possible conflicting interests. On such an issue, Jan Jans argues that the text of the TFEU does not support a priority being given to environmental protection requirements. In fact, Article 11 TFEU wording seems to be meant to make sure that environmental considerations are taken into account in the definition and implementation of all EU policies, but it does not give an *a priori* indication on how conflicts between environmental protection goals and other possible conflicting objectives should be resolved. In this case too, I am convinced that this is the correct interpretation of the Article 11 TFEU provision.<sup>11</sup>

The third and final weakness highlighted by Jan Jans refers to the justiciability of the integration principle. The question refers to the possibility that the actions of the various EU institutions involved in the decision-making processes, such as the European Parliament, the Council or the European Commission, may be reviewed by the Court of Justice for an alleged violation of the environmental integration principle. In this respect, Jan Jans recalls the *Bettati* case,<sup>12</sup> in which the Court of Justice admitted in principle the possibility to review an EU measure on the basis of the integration principle. However, as he correctly recalls, the Court also emphasised the wide discretionary power that EU institutions enjoy in shaping their environmental policy, by balancing between environmental requirements vis a vis other possibly conflicting interests. In practice, therefore, a judicial review by the Court of Justice based on the principle of integration might be limited solely to situations whether the EU institutions have committed a ‘*manifest error of appraisal*’.<sup>13</sup>

### 3.2 The environmental integration principle after the Lisbon Treaty

The Lisbon Treaty brought three very relevant changes with respect to the functioning of the environmental integration principle. As noted by Jan Jans, those changes did not concern the text of the environmental integration principle itself, as enshrined in Article 11 TFEU, which remained substantially the same with respect to the previous Article 6 TCE. However, those changes contributed, in different ways, to weaken the environmental integration principle.

The first major change concerns the status of the environmental integration principle within the TFEU. As a legacy of the discussion which surrounded the (never ratified) Treaty Establishing a Constitution for Europe of 2003, the environmental integration principle was downgraded from the previous status of a ‘general principle of EC Law’ to a principle included in the ‘clauses of general application’. This unfortunate involution of the status of the environmental integration principle was confirmed and retained by the Lisbon Treaty and finally included in the text of the TFEU.<sup>14</sup>

The second major change introduced by the Lisbon Treaty consists in what could be called the ‘relativisation’ of the environmental integration principle. This was

11. Cf Jans (n 4), 1542-1543.

12. Case C-341/95 (*Bettati/Safety Hi-Tech Srl*), [1998] ECR I-4355, § 17-18.

13. Cf Jans (n 4), 1543.

14. Cf Jans (n 4), 1539-1540 and 1543-1544.

caused by the proliferation of other integration clauses and requirements throughout the TFEU. In fact, specific duties of integration, alongside the environmental integration, are now foreseen by several other TFEU provisions, with regard for instance to labour and social protection (Article 9 TFEU), non-discrimination (Article 10 TFEU), consumer protection (Article 12 TFEU) and animal welfare (Article 13 TFEU). As Jan Jans correctly points out, *'the result is a genuine melting pot: everything has to be taken into account with everything!'*<sup>15</sup> This proliferation of integration requirements, therefore, might have the effect of reducing the relevance of the environmental protection requirements. Since everything must be integrated with almost everything else, in practice also the environmental integration duty might become meaningless.

Moreover, the proliferation of the integration requirements may also have a more worrisome effect for environmental protection. This is what is called by Jan Jans the 'minestrone effect.' According to the author, as it happens in the 'minestrone', when many ingredients are mixed together in the same soup, thus causing a very confusing effect as to the recognisability of each single ingredient used in the preparation of the soup, likewise in the decision-making processes post-Lisbon, the presence of many integration duties may cause *'an inherent danger that under the disguise of integration, certain environmental standards will be diluted or offset against other interests and policy considerations'*.<sup>16</sup> This may lead, ultimately, to what the author calls the 'reversed integration' phenomenon, that is *'a process by which certain environmental standards, such as environmental quality standards or emission standards, are lowered as a consequence of the requirement that other than environmental interests are to be taken into account'*.<sup>17</sup>

The third major change concerns the relationship between Article 11 TFEU and Article 37 of the European Charter of Fundamental Rights.<sup>18</sup> As it is well known, according to Article 6 TEU, as modified by the Lisbon Treaty, the Charter *'shall have the same legal value as the Treaties'*. This is a major modification with respect to the previous non-binding nature of the Charter and triggers the question of the need to reconcile the differences existing between the two above mentioned provisions. The problem arises from the circumstance that both provisions contain an environmental integration clause. However, at least three differences may be spotted when comparing their texts, as noted by Jan Jans.<sup>19</sup> To these three differences, a fourth one, should be added, in my view.

The first difference regards the scope of the integration effort. In fact, Article 37 of the Charter prescribes the environmental integration duty with respect to the *'policies of the Union'* rather than to the *'Union policies and activities'* mentioned in Article 11 TFEU.

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15. Cf Jans (n 4), 1545.

16. Ibid, 1546-1547.

17. Ibid, 1547.

18. Article 37 of the Charter prescribed that *'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'*.

19. J. Jans, *Stop the Integration Principle?*, cit., p. 1539.

The second difference concerns the qualification of the integration required: whereas Article 11 TFEU commands the integration with respect to the ‘*definition and implementation*’ of the Union policies and activities, such qualification is missing in Article 37 of the Charter, thus making more uncertain the status of the principle.

The third difference deals with the relationship of the environmental integration with the principle of sustainable development. Whereas Article 11 TFEU commands that an environmental integration is conducted ‘*with a view to achieve sustainable development*’, thereby conferring to the integration principle a sort of free mandate to act as a tool to promote the operationalisation of sustainable development, with a certain degree of discretion, the text of Article 37 of the Charter prescribes that integration ought to be pursued ‘*in accordance with the principle of sustainable development*’, thereby implying a sort of subordination of the environmental integration effort to the sustainable development requirements.

Beside the above mentioned three differences, in my view, a fourth one may be added. It concerns the precise content of the environmental integration required. In fact, whereas Article 11 TFEU does not circumscribe or limit in any way the type and breadth of the environmental integration which may be pursued, by referring the wide notion ‘*environmental protection requirements*’, quite on the contrary Article 37 of the Charter seems to limit the scope of the environmental integration by limiting its exercise with regard to the promotion of ‘*a high level of environmental protection and the improvement of the quality of the environment*’. Such a notion seems to be much more vague and much more limited at the same time. Therefore, it may have the consequence that the environmental integration duty stemming in Article 37 of the Charter has no teeth compared to the Article 11 TFEU version.

The differences spotted between the two environmental integration clauses, as enshrined in Article 11 TFEU and Article 37 of the Charter, may be problematic for at least two reasons. The first one refers to the lack of legal certainty when it comes to the interpretation and application of the environmental integration principle post-Lisbon. The second one concerns the more limited outreach that the Article 37 version of the principle seems to have. In fact, as noted by Jan Jans, ‘*as the obligation contained in Article 37 of the Charter seems to be more limited than the one in Article 11 TFEU, an interpretation of Article 11 TFEU in line with the Charter may result in a further downgrading*’.<sup>20</sup>

#### 4 **Conclusion: a residual hope for the environmental integration principle?**

This analysis leads in my view to a sad conclusion on the role of the environmental integration principle in the current Green Deal scenario. In fact, ten years after the entry into force of the Lisbon Treaty, not only the environmental integration principle has been downgraded and diluted as prophesied by Jan Jans in his 2011 seminal article, but even more worryingly it seems to have been forgotten both in the definition and the implementation of the Green Deal. This is confirmed by the

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20. Cf Jans (n 4), 1544.

fact that not only the principle is never mentioned in the 2019 European Commission's Communication which launched the Green Deal, but it is also (at least so far) not considered in the subsequent implementing documents, strategies, and actions.

In this sense, considering the recent opportunity (allegedly) offered by Green Deal to 'green' all EU policies, my conclusion on the state of the environmental integration principle in EU law ten years after the entry into force of the Lisbon Treaty might be even sadder than the already sad one reached by Jan Jans in its 2011 article, when he noted that '*on each occasion that the founding treaties were amended, the environmental integration principle was strengthened. The Lisbon Treaty brought an end to that pattern. That is a rather sad conclusion*'.<sup>21</sup> Ten years later, it seems to emerge that not only since Lisbon the environmental integration principle has stopped being strengthened over time and has started instead a declining path, but meanwhile it has almost been forgotten by EU institutions.

To conclude with a small residual hope for the future, it may be said that a possibility of new life for the environmental integration principle might come from a new reading of its relationship with the principle of sustainable development, as recently argued by Beate Sjøfjell.<sup>22</sup> According to such a view, the fact that the Article 11 TFEU duty to integrate environmental protection requirements in all EU policies and activities is often ignored '*does not constitute an argument against the existence of these legal duties set out here*'.<sup>23</sup>

In her view, the environmental integration duty required by Article 11 TFEU '*is arguably a necessary contribution to achieve policy coherence for sustainable development*'.<sup>24</sup> However, to achieve such an integration objective, '*the environmental integration must have a clearly defined goal*'.<sup>25</sup> She argues to this respect that: '*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"*'.<sup>26</sup> Therefore, the way to give the environmental integration duty a renewed stronger role is to anchor it firmly to the purpose of promoting sustainable development, as mandated by Article 11 TFEU.

More specifically, to properly enforce the environmental integration principle, Beate Sjøfjell proposes a teleological interpretation which may enhance its role of an operational tool to promote long term sustainable development and achieve, in the shorter term, the UN SDGs in a systematic and comprehensive way. In this way '*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*

21. Cf Jans (n 4), 1547.

22. B Sjøfjell, *The Environmental Integration Principle: A Necessary Step Towards Policy Coherence for Sustainability*, Preprint, 2018, of chapter published in *The EU and the Proliferation of Integration Principles under the Lisbon Treaty*, F Ippolito, ME Bartolino & M Condinanzi (eds), Routledge, 2019, Electronic copy available at: <https://ssrn.com/abstract=3294910>.

23. Cf Sjøfjell (n 22), 19-20.

24. Ibid, 1.

25. Ibid.

26. Ibid.

*and just economy within planetary boundaries*'.<sup>27</sup> On such a basis, she concludes 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'.<sup>28</sup>

The proposal just recalled above which aims to give a renewed more meaningful role to the environmental integration principle by linking it firmly to the overall objective of '*promoting sustainable development*' resembles closely a similar proposal which I made elsewhere not long ago.<sup>29</sup> In that occasion, I argued, along a similar line of reasoning of the one proposed by Beate Sjøfjell, that the environmental integration principle enshrined in Article 11 TFEU might become a key operational tool to provide a greater coherence to the whole EU action, not only by integrating environmental requirements into all EU policies and activities, but doing that with a view to promote sustainable development as well climate change objectives, within a single comprehensive scenario.<sup>30</sup> In this way, the environmental integration principle could improve the coherence of the green transition advocated by the European Green Deal, by providing a reference framework which may guide all actions required for its implementation.

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27. Cf Sjøfjell (n 22), 21.

28. Ibid.

29. M Montini, *The Principle of Integration*, in: L. Kramer & E. Orlando, *Principles of Environmental Law* (Edward Elgar Publishing, 2018) 139-149.

30. Ibid, 146-148.