

University of Groningen

Addressing legal barriers to sustainability in the European Union

Squintani, Lorenzo

Published in:
 Grensoverstijgende rechtsbeoefening

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
 Publisher's PDF, also known as Version of record

Publication date:
 2021

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):
 Squintani, L. (2021). Addressing legal barriers to sustainability in the European Union. In K. de Graaf, B. Marseille, S. Pregal, R. Widershoven, & H. Winter (Eds.), *Grensoverstijgende rechtsbeoefening : Liber amicorum Jan Jans* (pp. 53-59). Paris.

Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

The publication may also be distributed here under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license. More information can be found on the University of Groningen website: <https://www.rug.nl/library/open-access/self-archiving-pure/taverne-amendment>.

Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

Grensoverstijgende rechtsbeoefening

Liber amicorum Jan Jans

Redactie

Kars de Graaf

Bert Marseille

Sacha Prechal

Rob Widdershoven

Heinrich Winter

Zutphen 2021



UITGEVERIJ *Paris*

Addressing legal barriers to sustainability in the European Union: About the relationship between the Integration and Attribution principles

Lorenzo Squintani^{*}

1 Introduction

As well known, the concept of sustainability comes in various shapes and understandings in literature.¹ Although generally speaking all definitions turns around the three pillars structure of sustainability: planet, people, and profit (the three 'Ps'),² and the intergenerational equity that needs to be achieved when balancing these three 'Ps',³ the relationship among these constituting pillars has been the object of theoretical debates for decades.⁴ Even if further differentiations are known in literature, the concept of sustainability is mostly distinguished in *strong* (also called ecological) and *weak* (also called environmental) sustainability.⁵ While under the former approach, the 'P' of planet has focal point in this understanding, under the weak sustainability understanding, the three 'P' are placed on an equal footage,⁶ which means that the environmental protection pillar is more strongly pursued under the strong sustainability understanding than under the weak sustainability one.

From a legal perspective, the mostly widespread definition of sustainability derives from the Brundland Report stating: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.⁷ The Brundland Report influenced the UN Conference on the Environment and Development held in Rio de Janeiro in 1992 and the therein established Rio

* Lorenzo Squintani, Former Ph.D. student of Jan Jans and Kars de Graaf; Professor of Energy Law, Faculty of Law, University of Groningen, l.squintani@rug.nl.

1. A Davison, 'Contesting sustainability in theory-practice: In praise of ambivalence' (2008) 22(2) *Journal of Media and Cultural Studies* 191.
2. D Gil-Doménech and J Berbegal-Mirabent, 'People, Planet, Profit', in: Satinder Dhiman and Joan Marques (eds), *Handbook of Engaged Sustainability* (Springer 2018) 1.
3. J David, 'Epilogue: Voices of the Future for Sustainability' in T Cottier, Shaheez Lalani and C Siziba (eds), *Intergenerational Equity: Environmental and Cultural Concerns* (Brill Nijhoff, World Trade Institute Advanced Studies, Vol 4, 2019) 215; S Gaines, 'The Energy Revolution as Sustainable Development' in L Squintani and H H B Vedder with M Reese and B Vanheusden (eds), *Sustainable Energy United in Diversity: Challenges and Approaches in Energy Transition in the EU* (European Environmental Law Forum Book Series, Vol 1, 2014) 10.
4. E Neumayer, *Weak versus Strong Sustainability: Exploring the Limits of Two Opposing Paradigms* (4th edn, Edward Edgar Publishing Limited 2013) 1.
5. K Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Ashgate Publishing Limited 2008) 68.
6. B Giddings, B Hopwood, and G O'Brien, 'Environment, Economy and Society: Fitting them together into Sustainable Development' (2002) 10 *Sustainable Development Wiley InterScience* 187-196, offering for a graphical visualization of these two different approaches to sustainability.
7. Report of the World Commission on Environment and Development, *Our Common Future* (OUP 1987) (hereafter: Brundtland Report), 41.

Declaration which anchored sustainability to, most notably,⁸ Principle 3 stating that '[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'. Later summits enriched the legal understanding of sustainability with the Millennium Development Goals, first, and the Sustainable Development Goals, nowadays.⁹

Turning to the European Union (EU), sustainability entered the EU constitutional framework with the Maastricht Treaty first, and was arguably brought more in line with the international understanding thereof with the Amsterdam Treaty.¹⁰ Nowadays, the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) refers to sustainable development in the Preamble, and, most relevantly from the perspective of this contribution, in combination with the principle of integration (Article 11 TFEU).¹¹ Although the legal relevance of this anchoring is debated in literature,¹² it shows that sustainability occupies a prominent place in the objectives of the European Union.¹³ Moreover, there are no doubts that the principle of integration plays an important role in the achievement of sustainability under EU law.¹⁴

Today, the European Green Deal¹⁵ poses even greater emphasis on the EU quest to a sustainable society, then seen so far. As further detailed out in another contribution,¹⁶ the European Green Deal is a comprehensive initiative aiming at reshaping the functioning of the European Union towards sustainable development. It is, however, centered on actions based on secondary law, without hinting at changes in the constitutional framework.¹⁷

This consideration leads to the question central to this contribution, namely the extent by which the EU constitutional framework stimulates or constrains the quest to sustainability as proposed in its Green Deal. Most notably, this contribution will address one aspect of the primary law framework which Jan Jans magisterially depicted in his work 'Stop the Integration Principle', the integration of environmental protection with other policy objectives.¹⁸ After a brief account of Jans' work,

8. See also the relevance of Principle 4, embodying the integration principle: 'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'.
9. J Jendroška, M Reese and L Squintani, 'Towards a New Legal Framework for Sustainability under the European Green Deal' (2021) 19(1) *Opolskie Studia Administracyjno-Prawne*: 83-112.
10. Jans and Vedder 2012:7. cf Jendroška 2020: 997.
11. Sustainable development is also referred to in conjunction with the external action of the EU, Article 3(5) and 21(2)(f) TEU and it is also referred to in Article 37 of the Charter of Fundamental Rights of the European Union.
12. Jendroška, Reese and Squintani, supra. See also L Kramer, *EU Environmental Law* (7th edn, London: Sweet and Maxwell 2011) 10-11.
13. J H Jans and H H B Vedder, *European Environmental Law*, Groningen: Europa Law Publishing 2012, 11.
14. Jendroška, Reese and Squintani, supra.
15. Commission Communication: The European Green Deal, COM (2019) 640.
16. Jendroška, Reese and Squintani, supra.
17. Ibidem.
18. J H Jans, 'Stop the Integration Principle?' (2011) *Fordham International Law Journal* 33, 3; Available at SSRN <<https://ssrn.com/abstract=1681323>> or <<http://dx.doi.org/10.2139/ssrn.1681323>> last accessed June 2021.

I will discuss the relationship between the principle of integration and the principle of attribution and show by means of concrete examples that their relationship does not allow for the pursuing of sustainability, regardless of whether it is understood in terms of strong or weak sustainability.

2 Stop the Integration Principle?

Written in honor of Lord Slynn of Hadley,¹⁹ Jans used the technique that arguably characterizes his academic work the most, that of the ‘broad strokes’ to focus on the main components of a legal argument, without obfuscating it with too many details. After a concise but elucidative account of the history of the integration principle under the EU primary framework, Jans sets out the two main legal functions of this principle under EU law. First, under the *enabling* function,²⁰ which focuses on the power of the Union to undertake action, the integration principle interacts with the principle of attribution by empowering the EU to pursue environmental objectives in the context of non-environmental policy areas, such as in the context of the common commercial policy, internal market policy, and public procurement. Second, under the *guidance* function, focusing on the interpretation of the law, the integration principle requires to interpret EU law in the light of the environmental objectives of the TFEU, even with respect to areas outside the environmental field. Jans then continues enumerating the shortcomings of the integration principle, from lack of clarity and the lack of hierarchical priority, to potential lack of enforceability.

The reader is rapidly, but informatively, brought to the core Jans’ argument, namely that the post-Lisbon proliferation of integration principles visible under Articles 7 to 12 of the TFEU,²¹ leads to a genuine melting pot: everything has to be taken into account with everything! In light of the dangers of such a ‘minestrone’, in which nothing is truly integrated with nothing, for the relevance of environmental protection under the Treaties, Jans concludes that the Lisbon Treaty can act as a Trojan horse, weakening or even downgrading environmental standards, thus leading to ‘reversed integration’.

The rest of this contribution will show that the same danger holds true also from the perspective of sustainability.

3 (Reverse) Integration and Attribution in light of Sustainability

A causal reader could consider the post-Lisbon minestrone a trigger to achieve sustainability, at least in its weak understanding. Indeed, it could be argued that by reverting the integration of environmental law into other policy areas to foster

19. Former President of the United Kingdom Environmental Law Association (UKELA), <<http://www.ukela.org/rte.asp?id=95>> (last accessed June 2021) and Advocate General of the Court of Justice of the European Union.

20. G Winter, ‘Environmental Principles in Community Law’, in: J H Jans (ed), *The European Convention and the Future of European Environmental Law* (Groningen European Law Publishing, 2003) 3.

21. With most importantly from the perspective of this contribution, with Article 7 stating that the Union shall ‘ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers’.

the integration of ‘everything with everything else’, the equalitarian integration between the three ‘Ps’ postulated under the weak sustainability theories can be better achieved than when looking at EU law primarily from the perspective of environment protection. This section will show that this impression would be wrong. Reverse integration, as explained by Jans, actually means that nothing is truly integrated with nothing.

This truth becomes apparent when we consider that on the one hand, Article 11 TFEU does not ensure the embedment of strong sustainability under the EU constitutional framework. As discussed by Jans, Article 11 does not provide a clear standard to determine what the formula ‘must be integrated into’ actually means. To quote:

The integration principle is designed to ensure that protection of the environment is at least taken into consideration, even when commercial or other policy decisions are being made. However, the manner in which potential and actual conflicts between protection of the environment and, for example, how the functioning of the internal market should be resolved cannot be inferred from the integration principle as such.²²

From a legal perspective, this means that sustainable development can be pursued when adopting measures on a legal basis non focusing on environmental protection, as confirmed by the Court of Justice in, among others, Opinion 2/15.²³ Yet, Article 11 TFEU does not provide guidance as to the relevance that environment goals, and more broadly sustainable development, should have under such measures. Striking down a directive due to a breach of Article 11 TFEU, although not theoretically impossible, would require a manifest error of appraisal on the side of the EU legislature,²⁴ which has never occurred as to today. Article 11 TFEU does therefore fail to sustain both weak and strong sustainability.

On the other hand, as already stated elsewhere,²⁵ Article 7 TFEU makes the integration of all EU objectives, including sustainable development, conditional upon the fulfilment of the principle of attribution. Under Article 5(2) TEU, attribution means that the EU shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. This means that a legal basis under the Treaties is necessary for the EU to act and that the Union action based on a given legal basis shall be aiming at achieving the goals set out in that legal basis. The case law of the Court of Justice concerning this principle made abundantly clear that this requirements means that a Union act must mainly aim at attaining the EU goal enshrined in the chosen legal basis in

22. Jans, ‘Stop the Integration Principle?’, *supra*, 1542-3.

23. Opinion 2/15 on the Free Trade Agreement between the European Union and the Republic of Singapore, of 16 May 2017, ECLI:EU:C:2017:376, para 146.

24. Case C-341/95 (*Bettati/Safety Hi-Tech Srl*), [1998] ECR I-4355, para 53.

25. L Squintani and B Vanheusden, ‘Reconciling Conflicting Values: A Call for Research on Instruments to Achieve Quasi-Sustainability’, in: B Vanheusden and L Squintani (eds), *EU Environmental and Planning Law Aspects of Large-Scale Projects* (Intersentia 2016) 385-394.

order to comply with the principle of attribution.²⁶ The goals indicated in a legal basis dictates the content of the act adopted thereupon.²⁷ Moreover, the theological interpretation approach followed by the Court of Justice also means that the aim pursued under the used legal basis also influences the interpretation of the content of the adopted act by the Court of Justice.²⁸

Accordingly, the principle of attribution creates a hierarchical relationship between the three 'P's of the sustainability paradigm. No such hierarchy is visible under the weak sustainability approach. Even under the strong sustainability approach, the hierarchical understanding of the relationship between the three 'P's places environmental protection on the top. Attribution, however, does not place environmental protection on the top, except for when the EU action is based on Article 192 TFEU, as shown in the following examples concerning the relationship between the enabling and guidance functions of the integration principle with the principle of attribution.

As regards the enabling function of the principle of integration in conjunction with the attribution principle, the Mercosur agreement, which is under negotiation at the moment of writing this contribution,²⁹ shows how the attribution principle can have counter beneficial effects on the integration of environmental protection in trade agreements. As extensively discussed by Krämer,³⁰ the sustainability development chapter in the text of the agreement as made available at the moment of writing this contribution³¹ can be considered a sort of window dressing exercise, without any substantive environmental content. Interestingly from the perspective of this contribution, this state of affairs can be seen as a consequence of the already mentioned Opinion 2/15 in which the Court of Justice concluded that trade agreements fall under the exclusive competences of the EU even when they include sustainability chapters, as long as such a chapter limits itself to mentioning existing international commitments and leave environmental protection to each agreement party.³² As we can see, even if the integration principle requires to integrate environmental concerns into trade agreements, the attribution principle actually allows, or even stimulates, to limit such integration to a window dressing exercise, by no means spurring a weak or strong understanding of the sustainability paradigm.

26. See eg Case C-300/89 (*Commission/Council of the European Communities*), ECLI:EU:C:1991:244 and Joined Cases C-164/97 and C-165/97 (*European Parliament/Council of the European Communities*), ECLI:EU:C:1999:99.

27. See eg Case C-376/98 (*Federal Republic of Germany/European Parliament and Council of the European Union*), ECLI:EU:C:2000:544.

28. See eg Joined Cases C-418/97 and C-419/97 (*ARCO Chemie*), ECLI:EU:C:2000:318, paras 39 and 40. See also the various contributions in M Peeters and M Eliantonio, *Research Handbook on EU Environmental Law* (Cheltenham: Edward Elgar Publishing 2020), focusing on the Court of Justice approach to EU environmental law.

29. See Commission's site: <<https://ec.europa.eu/trade/policy/in-focus/eu-mercosur-association-agreement/>> accessed June 2021).

30. L Krämer, 'A Lost Opportunity? The Environment and the EU – Mercosur Trade Agreement' (2021) *Journal for European Environmental & Planning Law* 18, 143-163.

31. European Commission site: <<https://ec.europa.eu/trade/policy/in-focus/eu-mercosur-association-agreement/>> last accessed June 2021.

32. CJEU, Opinion 2/15 concerning the free trade agreement with Singapore, ECLI:EU:C:2017:376, para 166.

As regards the guidance function of the integration principle in conjunction with the attribution principle, two post-Lisbon examples about the meaning of Article 101 TFEU give prove of the fallacy of the EU constitutional framework when looked at from the perspective of sustainability. Without aiming at engaging with this complex subject matter to the extent it deserves,³³ Article 101 TFEU concerns the prohibition of agreements, decisions and concerted practices that by object or effect restrict competition. Breaches can however be justified if the conditions posed under Article 101(3) TFEU are met. In particular, this provision requires that a fair share of the benefits created by a breach of Article 101(1) TFEU shall be passed on to the consumers. In light of the integration principle, Article 101(3) TFEU can surely be interpreted so as to consider environmental benefits as benefits passed on to the consumers.³⁴ However, teleological interpretation in light of the attribution principle and the economic interest centric nature of competition law restricts the room of interpretation available in this regard.

In its guidance document about this provisions, the European Commission states that the net effect of the agreement must at least be neutral from the point of view of those consumers *directly* or *likely* affected by the agreement.³⁵ In light of this guidance, the Dutch Competition Authority, where Jan Jans served as member of the (external) Advisory Committee on Objection for many years, remained close to the economic centric goal of competition law in its decision concerning an agreement between farmers, butchers, and supermarkets aiming at ensuring that as by 2020 consumers could only purchase ‘more’ sustainably produced chicken meat – at a higher price – than that sold on the Dutch market at the moment of the agreement.³⁶ After a series of economic considerations, the Dutch Competition Authority concluded that the benefits achieved by the agreement were not sufficiently passed on to the consumers and thus that the breach of Article 101(1) TFEU was not justified under Article 101(3) TFEU. Similarly, the Dutch Competition Authority concluded that an agreement aiming at the closure of five coal fired power plants in the Netherlands, aiming at reducing CO₂ emissions from this country, breached Article 101(1) TFEU and was not justified under Article 101(3) TFEU as the climate benefits were no sufficiently passed on to those consumers directly or likely affected by the agreement.³⁷

33. For more systematic work see, most notably, H Vedder, *Competition Law and Environmental Protection in Europe; Towards Sustainability?* (Groningen: Europa Law Publishing 2003).

34. As occurred eg in Commission Decision 2000/475/EC relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (CECED Decision) [2000] OJ L187/47.

35. Commission Communication Notice Guidelines on the application of Article 81(3) of the Treaty (Commission Guidelines) [2004] OJ C 101/97.

36. Netherlands Authority for Consumers and Markets (ACM) 13.0195.66 Sustainability Arrangements concerning the ‘Chicken of Tomorrow’ (Chicken of Tomorrow Case) (ref: ACM/DM/2014/206028).

37. Netherlands Authority for Consumers and Markets (ACM), Notitie ACM over sluiting 5 kolencentrales in SER Energieakkoord, September 2013, available at <<https://www.acm.nl/nl/publicaties/publicatie/12033/Notitie-ACM-over-sluiting-5-kolencentrales-in-SER-Energieakkoord>> last accessed June 2021.

4 **Conclusions**

Jan Jans greatly contributed to the understanding of the legal meaning of many EU environmental law concepts, including the integration principle. His contribution ‘Stop the Integration Principle’ brought to the forefront the potential shortcomings introduced with the Lisbon Treaty and the addition of several ‘integration principles’ into the EU constitutional framework for the protection of the environment in Europe.

This contribution underlines how the integration principle, as such, and in combination with the principle of attribution, fails to support the EU quest towards sustainability, fully. The concrete examples provided in this contribution have shown how the principle of attribution affected both the enabling function and the guidance function of the integration principle. Accordingly, it is imperative to discuss about the need of amending the Treaties so as to support sustainability, truly. Without a proper primary law framework, reforms and efforts undertaken by means of secondary law, such as those envisaged under the European Green Deal, run the risk of not being able to achieve sustainability, regardless of whether it is understood in terms of weak or strong sustainability. The content of the EU action, as shown by the Mercosur agreement example, or the interpretation of the action, as shown by the competition law examples from the Netherlands, could indeed see a legal, yet insufficient integration of environmental protection into the adopted actions.

To quote the Stop-the-Integration-Principle article one last time: ‘That is a rather sad conclusion’.

On a personal note, it is equally sad to know that my academic father has retired. Last year, also due to the Corona crisis and related lockdowns, we barely saw each other despite working at the same faculty and sharing so many common academic interests. Yet, it always comforted me the knowledge that I could (digitally) ‘walk’ into his ‘room’, as I did so many times during my Ph.D., to ask for advice. I will never thank him enough for all the support he gave me over the last 13 years. It has been an honor and a privilege to work with him! It is a responsibility to keep up with his academic legacy.