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## Stop the Integration Principle?

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## **Abstract**

Lord Slynn of Hadley is probably not primarily known as an environmental lawyer. His contributions to the development of European environmental law are, however, considerable. On May 24, 1988, Slynn delivered his famous opinion in the so-called “Danish Bottles” case. In that case, the European Court of Justice (“ECJ”) held that a system requiring manufacturers and importers to market beer and soft drinks only in reusable containers (which had to be approved by a National Agency for the Protection of the Environment) was subject to what is now article 34 of the Treaty on the Functioning of the European Union (“TFEU”) since the Lisbon Treaty entered into force. The importance of this judgment is that it enabled and facilitated the integration of environmental considerations into the market freedoms of the European Community (later the European Union). This Essay, in memory of Lord Slynn of Hadley, is therefore devoted to the process of integrating environmental requirements in other areas.

# STOP THE INTEGRATION PRINCIPLE?

*Prof. Dr. Jan H. Jans\**

## INTRODUCTION

Lord Slynn of Hadley is probably not primarily known as an environmental lawyer.<sup>1</sup> His contributions to the development of European environmental law are, however, considerable. On May 24, 1988, Slynn delivered his famous opinion in the so-called “*Danish Bottles*” case.<sup>2</sup> In that case, the European Court of Justice (“ECJ” or “Court”) held that a system requiring manufacturers and importers to market beer and soft drinks only in reusable containers, which had to be approved by a National Agency for the Protection of the Environment, was subject to what is now, after the entry into force of the Lisbon Treaty,<sup>3</sup> article 34 of the Treaty on the Functioning of the European Union (“TFEU”).<sup>4</sup> The requirement implied a prohibition against the marketing of goods in containers other than ones which were returnable. The importation of foreign beer and soft drinks which were legitimately marketed in other Member States, but did not meet the requirements of Denmark, the country of importation, was thus not possible. Furthermore, the fact of having to establish a system for the return of containers meant that foreign

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1. Until 2007, however, he was President of the United Kingdom Environmental Law Association (“UKELA”). UKELA, UKELA Patrons, <http://www.ukela.org/rte.asp?id=95> (last visited Aug. 1, 2010).

2. Opinion of Advocate General Slynn, *Commission v. Denmark*, Case 302/86, [1988] E.C.R. 4619.

3. The Treaty of Lisbon, Dec. 13, 2007, 2007 O.J. C 306/1.

4. Article 34 reads: “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.” Consolidated Version of the Treaty on the Functioning of the European Union art. 34, 2008 O.J. C 115/47, at 61 [hereinafter TFEU]. The corresponding prior provision was article 28 of the Consolidated Version of the Treaty Establishing the European Community, 2006 O.J. C 321 E/37, at 52 [hereinafter EC Treaty].

manufacturers would be obliged to incur relatively high transport costs.

The basic question in this case was whether the Danish government could rely on “the need to protect the environment” in order to justify this trade restriction.<sup>5</sup> In *Cassis de Dijon*<sup>6</sup> and in subsequent cases, it was decided that, in the absence of common rules, obstacles to free movement within the European Community (“Community” or “EC”) resulting from disparities between the national laws must be accepted, in so far as such rules, applicable to domestic and imported products without distinction, may be recognized as being necessary in order to satisfy *mandatory requirements* recognized by Community law. This is known as the “rule of reason” exception.<sup>7</sup> In a well-balanced and nuanced opinion, Slynn came to the conclusion that “national measures taken for the protection of the environment are capable of constituting ‘mandatory requirements’ recognized by the judgment in *Cassis de Dijon* as limiting the application of article 30 of the [EEC] Treaty [now article 34 TFEU] in the absence of Community rules.”<sup>8</sup> The Court followed Slynn and added “protection of the environment” to its list of justifiable mandatory requirements.<sup>9</sup>

The importance of this judgment is that it enabled and facilitated the integration of environmental considerations into the market freedoms of the Community (later the European Union (“Union” or “EU”)). This Essay in memory of Lord Slynn of Hadley is therefore devoted to the process of integrating environmental requirements in other areas.

## I. *ON THE ORIGIN OF THE ENVIRONMENTAL INTEGRATION PRINCIPLE*

Article 11 TFEU reads: “Environmental protection requirements must be integrated into the definition and

5. Commission v. Denmark (*Danish Bottles*), Case 302/86, [1988] E.C.R. 4607, ¶¶ 11–12.

6. Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (*Cassis de Dijon*), Case 120/78, [1979] E.C.R. 649.

7. Cf. JAN. H. JANS & HANS H.B. VEDDER, *EUROPEAN ENVIRONMENTAL LAW* 245–50 (3d ed. 2007).

8. Opinion of Advocate General Slynn, *Danish Bottles*, Case 302/86, [1988] E.C.R. 4619, 4622.

9. *Danish Bottles*, [1988] E.C.R. 4607, ¶ 9.

implementation of the Union policies and activities, in particular with a view to promoting sustainable development.”<sup>10</sup> It goes beyond the scope of this Essay to comprehensively trace back the origin of this provision. It suffices to say that elements of it can already be found in Principle 13 of the 1972 Declaration of the United Nations Conference on the Human Environment (the so-called “Stockholm Declaration”):

In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population.<sup>11</sup>

One of the great achievements of the Stockholm Declaration is that it acknowledges the strong relation between environmental protection and economic development.

One must be aware that at that time in history, there was no European environmental policy at all. Moreover, the word “environment” was completely absent in the initial 1957 European Economic Community Treaty (“EEC Treaty”).<sup>12</sup> It cannot be a coincidence that in the early 1970’s, and more or less parallel to the Stockholm Declaration, matters changed.

In fact, the starting signal for the development of a European environmental policy was given in 1972, when the European Council Summit stressed the value of a European environmental policy and declared that “Economic expansion, which is not an end in itself, must as a priority help to attenuate the disparities in living conditions.”<sup>13</sup> Therefore, the European Council requested that the European institutions draw up an action program with a precise schedule before July 31, 1973.<sup>14</sup>

10. TFEU, *supra* note 4, art. 11, 2008 O.J. C 115, at 53. This replaces EC Treaty, *supra* note 4, art. 6, 2006 O.J. C 321 E, at 46.

11. U.N. Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, Declaration of the United Nations Conference on the Human Environment, Report of the United Nations Conference on the Human Environment, princ. 13, *Report of the United Nations Conference on the Human Environment*, at 3, 4, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

12. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

13. First Summit Conference of the Enlarged Community (Paris), Declaration, E.C. BULL., no. 10, at 15 (1972).

14. *Id.* at 20.

The Declaration of the Council of European Communities and of the Representatives of the Governments of the Members States meeting in the Council of November 22, 1973 on the programme of action of the European Communities on the environment reads, in part:

Whereas in particular, in accordance with Article 2 of the Treaty, the task of the European Economic Community is to promote throughout the Community a harmonious development of economic activities and a continuous and balanced expansion, which cannot be imagined in the absence of an effective campaign to combat pollution and nuisances or of an improvement in the quality of life and the protection of the environment.<sup>15</sup>

Although the term “environmental protection” was not as such found in the objectives enumerated in articles 2 and 3 of the EEC Treaty in those days,<sup>16</sup> the European Council’s Declaration in effect meant that, by an extensive interpretation of “economic expansion,” which was expressly included as an objective, environmental protection could become the subject of European decision-making. Henceforth, it integrated environmental protection requirements into economic development. The latter was to be regarded not only in quantitative terms, but also qualitatively.

The next important phase in “merging environment and economics”<sup>17</sup> in the European Economic Community (“EEC”) commenced on July 1, 1987, the date on which the changes to the EEC Treaty brought about by the Single European Act (“SEA”) came into force,<sup>18</sup> and continued until the Treaty on European Union (“Maastricht Treaty”) entered into force.<sup>19</sup>

15. Declaration of the Council of European Communities and of the Representatives of the Governments of the Members States meeting in the Council of 22 November 1973 on the Programme of Action of the European Communities on the Environment, Nov. 22, 1973, 1973 O.J. C 112/1.

16. EEC Treaty, *supra* note 12, arts. 2, 3, 298 U.N.T.S. 11.

17. U.N. World Comm’n on Env’t. and Dev., *Report of the European Commission on Environment and Development: Our Common Future*, at 60, The Secretary General, Development & International Economic Co-operation: Environment, Annex, U.N. Doc. A/42/427 (Aug. 4, 1987).

18. Single European Act, 1987 O.J. L 169/1, [1987] 2 C.M.L.R. 741, corrected by 1987 O.J. L 304/46 [hereinafter SEA] (amending EEC Treaty, *supra* note 12).

19. Treaty on European Union, July 29, 1992, 1992 O.J. C 191/1 [hereinafter Maastricht Treaty].

Although the case law of the ECJ had specifically dealt with environmental protection before then,<sup>20</sup> this phase was notable because, for the first time, the objectives of the environmental policy were enshrined in the EEC Treaty. The inclusion in the EEC Treaty of provisions designed specifically to protect the environment confirmed the Community's task in developing a European environmental policy. In particular, a new provision was inserted, EEC Treaty article 130r(2), which stated: "Environmental protection requirements shall be a component of the Community's other policies."<sup>21</sup> One could say, therefore, that the SEA gave birth to the integration principle as we now know it.

Further changes were brought about at the time the Maastricht Treaty came into force on November 1, 1993. The text of EEC Treaty article 130r(2) was changed to: "Environmental protection requirements must be integrated into the definition and implementation of other Community policies."<sup>22</sup> The changes brought by the Maastricht Treaty are obvious. First, the notion of "must be integrated" is much more forceful than the notion of "shall be a component." Second, the phrase "the definition and implementation" makes this duty broader than the mere reference to "other policies."

Even more important were changes made by the Treaty of Amsterdam in 1997.<sup>23</sup> The integration principle was "exported" from the environmental provisions in the EEC Treaty and promoted to a "general principle" of EC law. Article 6 of the (then) EC Treaty stated: "Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities

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20. See, e.g., *Procureur de la Republique v. Association de Défense des Brûleurs d'huiles Usagées (ADBHU)*, Case 240/83, [1985] E.C.R. 531.

21. EEC Treaty, *supra* note 12, 298 U.N.T.S. 11, amended by SEA, *supra* note 18, art. 130r(2), 1987 O.J. L 169/1, at 17, *reprinted as amended in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 207* (EC Off'l Pub. Off. 1987).

22. Maastricht Treaty, *supra* note 19, art. G(38), 1992 O.J. C 191/1, at 36-37; see also Consolidated Version of the Treaty Establishing the European Community art. 130r(2), 1992 O.J. C 224/1, at 52 [hereinafter EC Treaty 1992 Consolidated Version].

23. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1 [hereinafter Treaty of Amsterdam].

referred to in Article 3, in particular with a view to promoting sustainable development.”<sup>24</sup>

The general formulation makes it clear that the operation of the integration principle extends to the entire EC Treaty. Also new is the introduction of the clause “in particular with a view to promoting sustainable development.”<sup>25</sup> With respect to the latter, the Treaty of Amsterdam clarified the constitutional status of “sustainable development” in the European legal order. The text of article 2 of the EC Treaty as amended by Amsterdam read that the Community shall have as its task promoting a “harmonious, balanced and *sustainable development of economic activities*.”<sup>26</sup> This formulation was much more in line with internationally accepted practice in the environmental policy area than the “old” text, in which article 2 referred to “[the] promot[ion], throughout the Community, of a harmonious and balanced development of economic activities, *sustainable and non-inflationary growth respecting the environment*.”<sup>27</sup> “Sustainable growth” in the “old” article 2 of the EC Treaty was criticized as being a departure from the more usual formulation “sustainable development.”<sup>28</sup> From the point of view of environmental protection, the concept of “sustainable growth” seemed marginally weaker than that of “sustainable development.”

On each occasion that the EEC Treaty was amended, the integration principle was strengthened. Each round of revisions enhanced the profile and its impact. One could probably say that the integration principle in its Amsterdam version was at its peak. After the Treaty of Amsterdam, the legal status of the integration principle became blurred. First, confusion was brought about by the Charter of Fundamental Rights of the European Union (“Charter”), as signed and proclaimed by the Presidents of the European Parliament, the Council, and the European

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24. Consolidated Version of the Treaty Establishing the European Community art. 6, 1997 O.J. C 340/173, at 183 [hereinafter EC Treaty 1997 Consolidated Version].

25. Treaty of Amsterdam, *supra* note 23, art. 2(4), 1997 O.J. C 340, at 24 (emphasis added).

26. EC Treaty 1997 Consolidated Version, *supra* note 24, art. 2, 1997 O.J. C 340, at 181 (emphasis added).

27. EC Treaty 1992 Consolidated Version art. 2, 1992 O.J. C 224, at 2 (emphasis added).

28. *See, e.g.*, European Commission, Development—Environmental Integration, [http://ec.europa.eu/development/policies/9interventionareas/environment/integration/integrationhistory\\_ams\\_en.cfm](http://ec.europa.eu/development/policies/9interventionareas/environment/integration/integrationhistory_ams_en.cfm) (last visited Aug. 1, 2010).



Commission (“Commission”) at the European Council meeting in Nice on December 7, 2000.<sup>29</sup> This Charter, as such of a non-binding character at that time, also contained an integration principle. Article 37 of the Charter states: “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.”<sup>30</sup>

The text of the Charter differs in a couple of aspects from the Amsterdam version. First, it refers only to Union policies and not to “policies and activities.”<sup>31</sup> Second, it does not explicitly require integration as regards “the definition and implementation” of Union policies,<sup>32</sup> thus rendering more uncertain its status vis-à-vis Member States. Third, integration is, according to the Charter, to be ensured in accordance with the principle of sustainable development, as opposed to “with a view to promote sustainable development.”<sup>33</sup> Whatever the consequences of these differences might be, the damage done by article 37 of the Charter, if any, seems to be limited.

A first serious attack on the integration principle was made during the discussions in the Convention on the Future of Europe, under the chairmanship of Valéry Giscard d’Estaing, which resulted from the text of the Draft Treaty Establishing a Constitution for Europe (“Draft Treaty”), issued on June 20, 2003.<sup>34</sup> “For the environmental movement, these early drafts [of the proposed constitution] came as a nasty surprise. They caused widespread consternation, due to the manner in which they proposed a rolling back of the European Union’s environmental

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29. Charter of Fundamental Rights of the European Union, Dec. 7, 2000, 2000 O.J. C 364/1 [hereinafter Charter of Fundamental Rights].

30. *Id.* art. 37, at 16.

31. Compare Charter of Fundamental Rights, *supra* note 29, art. 37, 2000 O.J. C 364, at 17, with EC Treaty 1997 Consolidated Version, *supra* note 24, art. 6, 1997 O.J. C 340, at 183.

32. Compare Charter of Fundamental Rights, *supra* note 29, art. 37, 2000 O.J. C 364, at 17 with EC Treaty 1997 Consolidated Version, *supra* note 24, art. 6, 1997 O.J. C 340, at 183.

33. Compare Charter of Fundamental Rights, *supra* note 29, art. 37, 2000 O.J. C 364, at 17, with EC Treaty 1997 Consolidated Version, *supra* note 24, art. 6, 1997 O.J. C 340, at 183.

34. See generally Jan H. Jans & Joanne Scott, *The Convention on the Future of Europe: An Environmental Perspective*, 15 J. ENVTL. L. 323, 323 (2003).

dimension.”<sup>35</sup> One of the most disconcerting elements of these early drafts was the exclusion (or, at the very least, the downgrading) of the integration principle as a *general* principle of EC law. “The exclusion of the environmental integration obligation from the opening part of the proposed constitutional treaty led to disagreement between environmental activists and environmental academics. While all bemoaned its apparent fate, there was no consensus on how to proceed in the face of this adversity.”<sup>36</sup> However, in the final version of the Draft Treaty, the integration principle was added, more or less on the final days of the Convention’s deliberations, to Title I, Part III: “Clauses of General Application.”<sup>37</sup> Indeed, this was something of a victory for the environmental movement at that time.

## II. *STRENGTHS AND WEAKNESSES OF THE INTEGRATION PRINCIPLE*

In general, one can say that the implications of the integration principle have been immense, at the political, administrative, and judicial level. Some major strengths will be discussed first. The so-called “enabling function”<sup>38</sup> is arguably the most important legal consequence of the integration principle. According to article 5(1) Treaty on European Union (“TEU post-Lisbon”), the limits of Union competences are governed by the so-called “principle of conferral.”<sup>39</sup> Under that principle, “the Union 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.”<sup>40</sup> The basic legal question, therefore, is whether the Union has any competence to take legally binding measures to ensure that protection of the environment is at least taken into consideration, even when

35. *Id.* at 324.

36. *Id.* at 326.

37. Draft Treaty establishing a Constitution for Europe art. III-4, 2004 O.J. C 310/1 (never ratified).

38. See, e.g., Gerd Winter, *Environmental Principles in Community Law*, in *THE EUROPEAN CONVENTION AND THE FUTURE OF EUROPEAN ENVIRONMENTAL LAW 3* (Jan H. Jans ed., 2003).

39. Consolidated Version of the Treaty on European Union art. 5(1), 2008 O.J. C 115/13, at 18 [hereinafter TEU post-Lisbon]. The “enabling function” is also known as the “specific powers doctrine.”

40. *Id.* art. 5(2), 2008 O.J. C 115, at 18.

commercial policy is involved or when other decisions are being taken, for example in the fields of agriculture, transport, energy, development aid, trade and external relations, internal market and competition policy, regional policy, etc.? The answer is yes! The case law of the ECJ demonstrates that environmental objectives can be pursued, for instance, in the context of the common commercial policy, internal market policy, and public procurement.<sup>41</sup> 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.

Perhaps equally important is the following legal consequence. In my opinion, European law can—and indeed must—be interpreted in the light of the environmental objectives of the TFEU, even with respect to areas outside the environmental field. One could call this the “guidance function” of the integration principle. For example, it has emerged as an important factor in justifying the application of the precautionary principle outside of the environmental sphere.<sup>42</sup> Furthermore, with respect to the provisions on the free movement of goods, the principle has been key in justifying recourse to the *Cassis de Dijon* mandatory requirements, which now includes environmental protection, to justify a directly discriminatory barrier to trade.<sup>43</sup> In general, 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.

Of course, there are a few known weaknesses of the environmental integration principle. It is still not clear what precisely has to be integrated and in what strength. Article 11 TFEU (article 6 EC Treaty) refers to “[e]nvironmental

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41. See, e.g., *Concordia Bus Finland Oy Ab v. Helsingin Kaupunki*, Case C-513/99, [2002] E.C.R. I-7213; *Pinaud Wieger Spedition GmbH v. Bundesanstalt für den Güterfernverkehr*, Case C-17/90, [1991] E.C.R. I-5253; *Greece v. Council*, Case C-62/88, [1990] E.C.R. I-1527.

42. In particular, the “guidance function” of the integration principle can be seen in relation to the protection of public health. See *Artogodan GmbH v. Commission*, Joined Cases T-74, 76, 83, 85, 132, 137, 141/00, [2002] E.C.R. II-4945, ¶ 183.

43. See *PreussenElektra AG v. Schleswag AG*, Case C-379/98, [2001] E.C.R. I-2099.

protection requirements.”<sup>44</sup> What should this be taken to mean? Certainly, it would seem to include the environment policy objectives of article 191(1) TFEU.<sup>45</sup> It also seems likely that it includes the principles referred to in article 191(2) TFEU, such as the precautionary principle and the principle that preventive action should be taken.<sup>46</sup> And finally, integration of the environment policy aspects referred to in article 191(3) TFEU should not a priori be excluded, though it is true that the TFEU does not state that these aspects have to be integrated, but only that they should be taken into account.<sup>47</sup> There are a few studies on how “environmental protection requirements” have been integrated in practice. Two studies can be mentioned in particular: first, Vedder’s study on integrating environmental considerations in European competition law<sup>48</sup> and, second, Dhondt’s treatise with respect to issues in agriculture, transport, and energy.<sup>49</sup> While Vedder concluded that the model of integration is being applied in parts of European competition law and that, in those areas, competition policy towards environmental restrictions of competition actually increases the chances that competition for protecting the environment develops,<sup>50</sup> Dhondt’s study made many “integration failures” visible in the domains of her research.<sup>51</sup>

The next weakness concerns legal hierarchy. Does the integration principle imply that the EU’s environmental policy has been given some measure of priority over other European policy areas? Probably, it has not; at least if by “priority” it is meant that, in the event of a conflict with other policy areas, environmental policy has a certain added value from a legal point of view. The text of the TFEU does not support such a conclusion.<sup>52</sup> The integration principle is designed to ensure that

44. TFEU, *supra* note 4, art. 11, 2008 O.J. C 115, at 53; EC Treaty, *supra* note 4, art. 6, 2006 O.J. C 321 E, at 42.

45. TFEU, *supra* note 4, art. 191(1), 2008 O.J. C 115, at 132.

46. *Id.* art. 191(2), 2008 O.J. C 115, at 132.

47. *Id.* art. 191(3), 2008 O.J. C 115, at 133.

48. HANS VEDDER, *COMPETITION LAW AND ENVIRONMENTAL PROTECTION IN EUROPE; TOWARDS SUSTAINABILITY?* (2003).

49. NELE DHONDT, *INTEGRATION OF ENVIRONMENTAL PROTECTION INTO OTHER EC POLICIES; LEGAL THEORY AND PRACTICE* (2003).

50. VEDDER, *supra* note 48, at 78–79.

51. DHONDT, *supra* note 49, at 442–44.

52. TFEU, *supra* note 4, arts. 191–93, 2008 O.J. C 115, at 132–34.

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.

A final weakness to be mentioned concerns the justiciability of the principle. Can the legitimacy of actions of the Council, European Parliament, and Commission be reviewed by the Court in the light of the principle? Can the validity of a directive or regulation, for example in the field of transport or agriculture, be questioned on the grounds that the decision has infringed upon essential environmental requirements? The case law of the ECJ shows that, in principle, such a review is possible. In the *Bettati* case, in which the lawfulness of Ozone Regulation 3093/94 was disputed, the Court was prepared to examine the compatibility of a measure with the environmental objectives and principles of the EC Treaty.<sup>53</sup> The ECJ noted, however, that the Union's institutions have wide discretionary powers as to how they shape their environmental policy, and will have to balance the relative importance of the environmental objectives and other Union objectives as they proceed.<sup>54</sup> Judicial review by the Court is therefore limited to the question of whether the Union legislator committed "a manifest error of appraisal."<sup>55</sup>

### III. *THE ENVIRONMENTAL INTEGRATION PRINCIPLE POST-LISBON*

The current version of the environmental integration principle in article 11 TFEU reads: "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."<sup>56</sup> Compared to the Amsterdam version, there are no changes in the text as such. However, the integration principle no longer has the

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53. *Bettati v. Safety Hi-Tech Srl*, Case C-341/95, [1998] E.C.R. I-4355, ¶¶ 17–18.

54. *Id.* ¶¶ 32–35.

55. *Id.* ¶ 35.

56. TFEU, *supra* note 4, art. 11, 2008 O.J. C 115, at 53.

special status of a “general principle of EC law.”<sup>57</sup> Above, there were references to discussions in the Convention on the Future of Europe and some of the earlier drafts on a Treaty establishing a Constitution for Europe where the integration principle was downgraded to “just a principle.”<sup>58</sup> It looks, and surprisingly this time without any serious public debate, that the initial victory of maintaining its special status in the final text of the Constitutional Treaty was celebrated too soon. Instead, the environmental integration principle according to Title II of the TFEU has, together with some other integration principles, become a provision “[h]aving [g]eneral [a]pplication.”<sup>59</sup> It could be argued that the *legal* significance of such a downgrading is rather limited, if any. But from a policy point of view, the symbolism of such a downgrading could prove to be of great importance. Future developments will tell whether or not that is true.

From a legal point of view, it is probably more important that according to the new article 6 of the TEU post-Lisbon, the Charter “shall have the same legal value as the Treaties.”<sup>60</sup> From a non-binding declaration, the Charter became a document with the same legal status and hierarchy as the TEU post-Lisbon and the TFEU. That triggers the question of what might be the legal consequences of the differences between article 11 TFEU on the one hand and article 37 of the Charter on the other. 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.

The following could prove to be even more important. At the time the environmental integration principle was inserted in the EEC Treaty by the SEA,<sup>61</sup> it was the only integration principle in the EC Treaty. This exclusivity alone made the principle significant. Nowadays, the environmental integration principle is only one among many other integration principles. One could even say that the Lisbon Treaty caused a true proliferation of

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57. *See supra* note 24 and accompanying text.

58. *See supra* notes 34–37 and accompanying text.

59. TFEU, *supra* note 4, arts. 7–17, 2008 O.J. C 115, at 53–55.

60. TEU post-Lisbon, *supra* note 39, art. 6(1), 2008 O.J. C 115, at 19.

61. *See supra* note 18 and accompanying text.

integration principles. According to article 7 TFEU, 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.”<sup>62</sup> Article 8 TFEU requires that the Union “[i]n all its activities . . . shall aim to eliminate inequalities, and to promote equality, between men and women.”<sup>63</sup> Article 9 TFEU states: “In defining and implementing its policies and activities, the Union *shall take into account* requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.”<sup>64</sup>

This is followed by article 10 TFEU: “In defining and implementing its policies and activities, the Union *shall aim to combat* discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”<sup>65</sup> Furthermore, “[c]onsumer protection requirements *shall be taken into account* in defining and implementing other Union policies and activities”<sup>66</sup> according to article 12 TFEU. Finally, article 13 TFEU requires that “*full regard*” is being paid to the welfare requirements of animals.<sup>67</sup> The result is a genuine melting pot: everything has to be taken into account with everything!

#### IV. HOW TO ASSESS THE POST-LISBON PROLIFERATION?

Above it was argued that one of the weaknesses of the pre-Lisbon version of the integration principle was the limited justiciability of it. It was also argued that the requirement to integrate environmental considerations does not imply that environmental considerations have some sort of legal priority compared to other genuine policy objectives and considerations.

It is the author’s opinion that these weaknesses will become even more apparent now that the Lisbon Treaty is in force. The already difficult task of the European legislator to balance sometimes conflicting interests has become even more complex.

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62. TFEU, *supra* note 4, art. 7, 2008 O.J. C 115, at 53.

63. *Id.* art. 8, 2008 O.J. C 115, at 53.

64. *Id.* art. 9, 2008 O.J. C 115, at 53 (emphasis added).

65. *Id.* art. 10, 2008 O.J. C 115, at 53 (emphasis added).

66. *Id.* art. 12, 2008 O.J. C 115, at 54 (emphasis added).

67. *Id.* art. 13, 2008 O.J. C 115, at 54 (emphasis added).

It is my prediction that the ECJ will show even more deference to the EU's political institutions than before in this balancing act and will become even more reluctant to reach the conclusion that the European legislator committed "a manifest error of appraisal."<sup>68</sup> The case law of the ECJ in the context of, for instance, the common agricultural policy demonstrates the reluctance of the Court to intervene in matters where the Union legislator has to weigh various objectives against each other.<sup>69</sup> The Court acknowledges that the Union institutions have wide discretionary powers when harmonizing policy in relation to the various objectives contained in article 39 TFEU (increasing productivity, ensuring a fair standard of living for the agricultural community, stabilizing markets, assuring the stability of supplies, and ensuring supplies reach consumers at reasonable prices).<sup>70</sup> One or more of these objectives may (temporarily) be given priority, as long as the policy does not become so focused on a single objective that the attainment of other objectives is made impossible. Only rarely will the Court find that these discretionary powers have been exceeded.

Another consequence of the Lisbon proliferation has to do with the principle of conferral, by which "the Union 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,"<sup>71</sup> has an important role in the debate of division of powers between the Union and its Member States. It means that the competences not conferred upon the Union in the treaties remain with the Member States. The requirement to balance multiple objectives, according to the multiplicity of integration principles, makes it more difficult to draw a clear line between Union and Member State competences. The blurrier the objectives become, the blurrier the division of powers between Union and Member States are.

A third negative consequence of this proliferation of integration principles could be called the "minestrone effect." Like the mixture of ingredients in minestrone, decision-making on the basis of multiple integration principles could result in

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68. See *supra* note 55 and accompanying text.

69. See JANS & VEDDER, *supra* note 7, at 18.

70. See *supra* note 54 and accompanying text.

71. See *supra* notes 39–40 and accompanying text.



measures where the component elements are still visible, but not as sharply and clearly as before. There is, therefore, an inherent danger that under the disguise of integration, certain environmental standards will be diluted or offset against other interests and policy considerations. As an ultimate consequence, it might result in what could be called “reversed integration,” 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.

#### V. *A NEW APPROACH TOWARDS AN ENVIRONMENTAL INTEGRATION PRINCIPLE?*

Although not perfect, the “old” environmental integration principle served its purpose in merging environmental considerations with other policies. However, the proliferation of integration principles brought about by the Lisbon Treaty has resulted in the weakening of the current environmental integration principle and could, ultimately, even act as a “Trojan horse” and lead to a weakening, or even a downgrading, of environmental standards. It is the author’s opinion that the Lisbon Treaty made us aware that an environmental integration principle is only to serve its purpose if it has a certain exclusivity and not if it is just one of the many different integration principles.

Above was stated 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.

Gordon Slynn showed us in his opinion in the *Danish Bottles* case that a balancing of interests between the free movement of goods and environmental protection raises difficult and sensitive issues. That was the case on May 24, 1988 and still is today.