

Giving a voice to the environment

by challenging the practice of integrating environmental requirements into other EU policies

Article 11 of the Treaty on the Functioning of the European Union (TFEU) states: “*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*”. This provision which is probably the most important environmental provision in the whole Lisbon Treaty, raises considerable implementation problems, for lawyers, policy-makers and administrations.

In a first section, the provision of Article 11 TFEU will be interpreted, following its wording, history, objective and purpose, and its relationship with other EU provisions. A second section will discuss the practice of EU institutions in dealing with Article 11 and explore ways to improve its application.

1. Article 11 in EU law

(a) Article 11 requires the integration of environmental protection requirements into all Union policies and activities. As there are numerous sectors of EU policy which might be affected¹, this contribution will not try to discuss the integration into the different specific policies. Indeed, a presentation of all the different parts of EU’s policies would require the writing of a book². Suffice it here to mention that “policies and activities” also include nuclear energy, because the EU has, since the entry into force of the Lisbon Treaties, a (shared) competence in matters of energy policy (Article 194 TFEU). Nuclear energy is part of energy issues in general, and the objectives of Article 194 TFEU cannot be pursued without taking into consideration nuclear energy and its contribution to the achievement of its objectives³.

The wording of Article 11 TFEU establishes a requirement (“must be”). It does not invite the addressees to deploy best efforts (“shall aim to”⁴) to reach integration, or to consider (“shall be taken into account”⁵; “shall take care”⁶) the integration of environmental requirements. Rather, the instruction given by the Treaty is absolute and clear.

¹ The EU website http://europa.eu/pol/index_en.htm lists, apart from the environment, 31 policy areas, where the EU is active. In 28 of these, environmental requirements play or should play a role. These are: Agriculture; Budget; Competition; Consumers; Culture; Development and cooperation; Education, training, youth; Employment and social affairs; Energy; Enlargement; Enterprise; External relations; External trade; Fight against fraud; Food safety; Foreign and security policy; Humanitarian aid; Human rights; Information society; Institutional affairs; Internal market; Justice; Maritime affairs and fisheries; Public health; Regional policy; Research and innovation; Taxation; and Transport.

² The best book on the market which I found, is Nele Dhondt: *Integration of environmental protection into other EC policies*. Groningen 2003. However, even this book limits itself to detailed discussions of Agriculture, energy and transport.

³ The Court of Justice had recognised that the EU had competence, under the Euratom Treaty, for environmental matters, see Court of Justice, case C-29/99 Commission v. Council, ECR 2002, p.I-11221, paragraphs 102-104. This did not prevent, though, the Council to mention, in Directive 2009/71 establishing a framework for the nuclear safety of nuclear installations, OJ 2009, L 172 p.18, exclusively the protection of workers and the public, but not of the environment; the environment was only mentioned in Recital 5 of that Directive.

⁴ This wording is used in Article 8 TFEU on gender equality and Article 10 TFEU on discrimination.

⁵ Wording used in Article 12 TFEU on consumer protection.

⁶ Wording used in Article 14 TFEU on services in the general interest.

The Term “integrated” is not defined, neither in Article 11 TFEU nor in any other provision of the Lisbon Treaty. This is surprising, as the *raison d’être* of the European Union (TEU) is the integration. In view of this, Recital 1 of the Treaty on European Union speaks of the “process of European integration”. Recital 6 mentions the desire “to deepen” the solidarity between the European peoples, Recital 7 of the wish to “enhance further” the functioning of the EU institutions, Recital 8 of “strengthening” of economies, Recital 9 of the determination “to promote” economic and social progress. The term “promote” appears three times in Article 3 TEU which deals with the EU’s objectives.

All this language which expresses movement and not a static situation, shows that integration is a process of moving closer to the general or specific aims of the TEU. As regards Article 11 TFEU, its declared aim is “to promote sustainable development”. Obviously, the provision is based on the concept that sustainable development presupposes a process of bringing environmental requirements closer to EU policies and activities. The decisive point is that “integration” is not a single, isolated action, but that it is a continuous *process*; in this, integrating environmental requirements is not different from integrating the EU Member States into a European Union, or integrating immigrants into the running and the daily life of their host society.

This preliminary conclusion shows the failure of the EU approach which was linked to the so-called Cardiff- process: following a request from the European Council at their meeting in Cardiff in June 1998, for eight different sectors of EU policy documents were elaborated by the Commission which established a strategy, how to integrate environmental requirements into these policies⁷. These documents were discussed one time in Council - and then the whole procedure stopped⁸. The institutions did not see or did not want to see that the integration requirement implies a continuous process. Of course, such a process may be brought to a halt for policy reasons; however, this means that the requirement of Article 11 TFEU is no longer complied with.

“Environmental protection requirements” is again not defined. Obviously, it refers to the environmental chapter, Articles 191 to 193 TFEU. These requirements include thus the objectives of EU environmental policy, laid down in Article 191(1) TFEU which aim at preserving, protecting and improving⁹ the quality of the environment and to aim at a high level of protection. Furthermore, “requirements” include the specific principles of environmental policy, laid down in Article 191(2) TFEU (precaution and prevention, the rectification of environmental impairment at source and the polluter-pays principle). Indeed, it is not imaginable that these principles should apply in the environmental sector, but not in agriculture, transport or energy. With regard to agriculture, the Court of Justice has already recognised the application of the precautionary principle¹⁰. Finally, also the aspects of Article 191(3) TFEU are environmental requirements.

⁷ See Commission, COM(98)716 and COM(99)640 (transport), COM(98/571 (energy), COM(99/22 and COM(2000)20 (agriculture, COM(99)263 (internal market), COM(99)36 and COM(2000)264 (development), COM(2001)143 (fisheries), COM(2000) 576 (economic questions), and SEC (2002) 271 (external affairs).

⁸ The concluding document was Commission, COM(2004) 394.

⁹ “Improving” again refers to a change of the existing degree of protection, not just to the maintenance of the status quo.

¹⁰ Court of Justice, case C-180/96 *United Kingdom v. Commission*, ECR 1998, p.I-2265 paragraphs 99s.; see also General Court, case T-74-76/00, *Artogodan a.o v. Commission*, ECR 2002, p.II-327 paragraph 184.

Article 11 TFEU does not indicate, who must integrate environmental requirements¹¹. However, as the TEU imposes obligations on EU institutions and on Member States, it can be safely stated that the EU institutions shall have to integrate environmental requirements. When EU Member States implement EU policies and activities, they might also have to respect Article 11. Other institutions are not visible.

It follows thus from the wording of Article 11 TFEU that the EU institutions are under an obligation to continuously strive towards preserving and protecting the environment at a high level, and improving its quality, when they elaborate or implement EU policies and activities.

(b) The integration requirement was an essential element of EU environmental policy, long before a section on the environment was inserted into the Treaty. Indeed, the First EU Environmental Action Programme of 1973¹² stated:

“Effects on the environment should be taken into account at the earliest possible stage in all the planning and decision-making processes. The environment cannot be considered as external surroundings by which man is harassed and assailed; it must be considered as an essential factor in the organization and promotion of human progress. It is therefore necessary to evaluate the effects on the quality of life and on the natural environment of any measure that is adopted or contemplated at national or Community level and which is liable to affect these factors”.

This statement which goes back to a joint declaration of the EU environmental ministers of October 1972, constitutes the origin of the provisions on integrating environmental requirements into other policies. At the same time, it was one of Europe’s contributions to the global discussion on the environment. Indeed, the UN Stockholm Declaration on the Human Environment of 1972 did not contain any integration requirement¹³. Only the UN Rio Declaration on Environment and Development of 1992 included an integration formula, though in a rather soft form and formulated as a principle¹⁴.

An integration provision was first inserted into the EC Treaty in 1987, in Article 130r (1), with a wording which is slightly different from the present text: *“Environmental protection requirements shall be a component of the Community’s other policies”*. During the discussions of the Maastricht Treaty on European Union, fear was expressed that such a wording might be directly applicable (“direct effect”)¹⁵. Therefore, Article 130r was amended to read: *“environmental protection*

¹¹ See on this Richard Macrory: *The legal duty of environmental integration: commitment and obligation or enforceable right?* in Richard Macrory: *Regulation, enforcement and governance in environmental law*. Oxford 2010, p.567.

¹² OJ 1973, C 112 p.1

¹³ Jan Jans, *Stop the integration principle?* Fordham International Law Journal 2010, p.1533, is of the opinion that Principle 13 of the Stockholm Declaration already contains an integration requirement. I do not share this opinion. Principle 13 reads: *“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 the development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population”*.

¹⁴ Rio Declaration on Environment and Development, Principle 4: *“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”*. One should add the word “economic” before the term “development”, in order to see its applicability to industrialised countries.

¹⁵ As to the direct effect see, for example, Court of Justice, case C-240/09 *Lesoochranárske zoskupenie*, judgment of 8 March 2011: *“a provision... must be regarded as directly applicable, when the provision contains*

requirements must be integrated into the definition and implementation of other Community policies”.

In preparation of the discussions of the Amsterdam Treaty Amendment, the Commission had suggested to insert a clause equivalent to Article 130r into the Treaty chapters on agriculture, transport and competition. However, the Intergovernmental Conference thought that this would duplicate the integration clause too often. Thus, it removed it from Article 130r (the present Article 191 TFEU) and put as Article 6 into the introductory chapter of the EC Treaty which applied to all sectors of EU policy. At the same time it added, at the request of Sweden, the mentioning of sustainable development. The Lisbon Treaties did not bring any substantive amendments to the provision.

It follows from this evolution that the authors of the EU Treaty deliberately drafted the integration requirement in a way that it applied to all EU policies and activities. In order to clarify this further, they even placed it at its present position in the TFEU, in the chapter with the title: “Provisions having general application”.

(c) Article 11 TFEU obviously has a double objective: on the one hand, it endeavours to ensure that environmental protection is given sufficient attention and consideration, whenever the Union pursues one of its policies or activities. Thus, it is a provision with the objective to reach the objectives of EU environmental policy which are laid down in Article 191 TFEU. On the other hand, it aims to promote sustainable development. Sustainable development is also mentioned in the fundamental provision of Article 3(3) TEU; there it is stated that sustainable development is “based on”, amongst others, “*a high level of protection and improvement of the quality of the environment*”. Seen in this context, Article 11 TFEU appears to mean that in order to reach sustainable development, environmental requirements must be integrated into other EU policies. Or, expressed differently, sustainable development can only be reached when environmental requirements are integrated into other policies. If this is not the case, the “basis”, the foundation on which sustainable development is to be grounded, is not solid. In short: no sustainable development without the integration of environmental requirements into the other EU policies.

(d) Looking at the context of Article 11 TFEU with other provisions, the close relationship with Article 3(3) TEU was already mentioned. As sustainable development is one of the Union’s principal objectives, and this objective must be “based” on environmental protection, the consequence can only be that environmental protection must be taken care of and promoted, whenever the EU acts. This relationship in Article 3 TEU between environmental protection and sustainable development, which was taken up in Article 11 TFEU, is not made with the requirement of Article 8 TFEU (integrating gender equality), Article 9 TFEU (social issues), Article 10 (discrimination) or Article 12 TFEU (consumer protection). Not only is the wording of the integration requirement in these provisions less decisive, they do not either refer to sustainable development. Nor does Article 3 TEU state that sustainable development is based on gender equality, social protection, consumer protection or absence of discrimination.

a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measures”.

A similar pattern of drafting was made in Article 37 of the Charter of Fundamental Rights¹⁶ which 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”.

Here again, the instruction is clear and unambiguous (“must”). And the provision repeats the close relationship between the integration requirement and sustainable development¹⁷; such a relationship is not established for gender equality, consumer protection, social issues or absence of discrimination – which are all mentioned in the Charter¹⁸. In Article 37, the reference to two fundamental principles of EU environmental policy – a high level of protection and the improvement of environmental policy – is even more direct and explicit than in Article 11 TFEU. The content of Article 37 is, in substance, that the other EU policies should also pursue the objectives of high environmental standards and the improvement of environmental quality.

The obligation of Article 37 lies on the EU institutions; it need not be discussed here, whether the provision also imposes an obligation on the administrations of Member States.

It follows from this that the EU institutions, offices and bodies have the obligation to make sure that a high level of environmental protection and an improvement of the quality of the environment is ensured. As Article 6(1) TEU stipulates that the provisions of the Charter have the same legal value as the EU Treaties, this obligation is legally binding.

The wording of Articles 11 TFEU and 37 of the Charter, the history of Article 11, its purpose and its relation of with other provisions point thus out that the integration requirement needs to be made operational, if the EU aims to work towards sustainable development. A sustainable development cannot be reached, unless the requirements of environmental protection policy are included in the elaboration and implementation of the different EU policies.

The term “policies” could lead to the conclusion that only strategic documents, such as Green or White Papers, programmatic decisions or Council and Parliament resolutions would have to integrate the environmental requirements. However, such an understanding would be incorrect: Article 11 explicitly joins the words “in the elaboration and implementation”. Thus, it aims to include in the term “policies” also the different individual legislative acts, executive and implementing decisions and other measures which the EU institutions, agencies, bodies and offices might take. Indeed, the EU agricultural policy cannot be reduced to the statements of Article 39 TFEU, but needs to be and is in practice elaborated, shaped, fine-tuned, reviewed, updated and made operational by numerous specific decisions and measures; competition policy is not reduced to the rules laid down in Articles 101ss. TFEU, but is made operational through individual and general decisions; and environmental policy does not exhaust itself in the provisions of Articles 191 to 193 TFEU, but needs to be put into practice by decisions which make these Articles a reality in daily life. A “policy” for a specific sector is always and necessarily composed of the specific measures and decisions which give some shape and content to the frame that was set in the Treaty provisions.

¹⁶ Charter of Fundamental Rights, OJ 2000, C 364 p1.

¹⁷ This contribution will not discuss the question, whether “sustainable development” is a *principle*, as stated in Article 37 of the Charter and in Recital 9 TEU, or rather an *objective*, as follows from Article 3(3) and (5) and Article 21(2.d) and (2.f) TEU. I am of the opinion that it is an objective.

¹⁸ See Charter (n.15, above), Articles 23 (gender equality), 31 (social issues), 38 (consumer protection) and 21 (absence of discrimination).

Therefore, the obligation to integrate environmental requirements into “policies” includes the obligation to have these requirements also included into the different decisions and measures taken under the specific policies which the EU pursues.

It is clear, though, that a high level of environmental protection and an improvement of the quality of the environment – these are the two elements the pursuance of which Article 37 of the Charter imposes on the EU administration – need not be realised by each individual measure. It is sufficient that overall the high level is aimed at and that the environment is improved¹⁹. Another question is, whether there should not be an explanation or justification on the question to what extent the high protection level and the environmental improvement is reached or promoted. I will come back to this.

Is the integration requirement an objective or a principle? Article 11 and Article 37 of the Charter are formulated in the strongest possible form (“must be integrated”). There is no discretion left for the EU institutions to apply or not to apply the integration requirement in a specific situation. In contrast to that, principles require a weighing as to their application in a specific case. They are not formulated in the form of an instruction: The subsidiarity principle of Article 5 TEU requires the weighing, whether the EU can do better than Member States (“not sufficiently achieved – better achieved”). The proportionality principle of the same Article has the weighing element already in the term “proportionality”, furthermore in the terms “necessary to achieve”. According to Article 191(2) TFEU, damage *should* be rectified at source, but it is not stated that damage “must” be rectified at source; the polluter *should* pay, not “the polluter *must* pay”. Moreover, as regards the Charter of Fundamental Rights, Article 37 is placed, together with other rights, in Chapter IV, entitled “solidarity”. It is not placed in Chapter V “General provisions” which contains a certain number of principles concerning the interpretation and understanding of the Charter. It would thus be surprising, if it were establishing legal *principles*. This would contradict its title and, more important, its very purpose which is the establishing of *rights* and *obligations* and not of principles.

Contrary to a wide-spread opinion²⁰, Article 11 TFEU therefore constitutes an objective of EU policy and not a principle.

Making the integration requirement operational

Little is gained with the result that the integration requirement is an objective and not a principle. This may be illustrated with an example: it is undisputed – at least in western societies - that there is a human right concerning gender equality. This right is laid down in the UN Declaration of Human Rights. Article 8 TFEU proclaims it, Article 6(1) TEU states that the rights of the Charter on Fundamental Rights have the same *legal* value as the EU Treaties, and Article 23 of the Charter proclaims the equality of men and women, while its Article 21 prohibits any discrimination for reasons of sex. Yet, within the European Union, women obtain, on average, 18 per cent less salary than men²¹. Any attempt to make the right of gender equality a reality, must therefore struggle to

¹⁹ Court of Justice, case C-341/95 Bettati, ECR 1998, p.I-4355.

²⁰ Including myself, see L.Krämer, *EC Environmental Law*, 6th ed. London 2007, p.20.

²¹ See Eurostat, sustainable development in the European Union. 2009 monitoring report of the EU sustainable development strategy. Luxembourg 2009, p.208: „In 2006 and 2007, the gross hourly earnings of employed women were on average 18 % lower than those of men. This relative difference, which represents the (unadjusted) gender pay gap, had decreased marginally from 17.7 to 17.5 %.. The gender pay gap represents one aspect of gender inequality”

get such inequalities eliminated; and there is little use in having further discussions on the theoretical concept of gender equality.

(a) The integration requirement and other policies

As a policy objective, the integration provision of Article 11 TFEU/Article 37 of the Charter imposes an obligation on the EU institutions to take the environmental objective of a high level of protection and the improvement of the quality of the environment into account. Article 7 TFEU states in this regard: *“The Union shall ensure consistency between its policies and activities, taking all its objectives into account.”* This provision could be understood as meaning that the environmental objectives mentioned shall be considered as other, additional objectives of the transport, agricultural, fisheries etc policies and be treated as such.

However, such an understanding of Article 7 TFEU does not take account of the fact that on the one hand, Article 11 TFEU/Article 37 of the Charter both refer to one of the fundamental objectives of the European Union, the achievement of sustainable development. This connection is not made in the EU Treaties with the transport, agricultural, fisheries or other policies: sustainability does not require, for example, a high quality of transport policy or a full achievement of the objectives of agricultural policy, laid down in Article 39 TFEU. For this reason, there is a particular obligation for the EU institutions in the context of Article 7 TFEU to ensure that the different policies and activities take into account and work towards the objective of a high level of protection and an improvement of the quality of the environment.

On the other hand, Article 37 is part of the Charter of Fundamental Rights. Thus, it intends to place a particular obligation on the EU institutions and administrations to see that its objectives are achieved. There is no obligation comparable to Article 37 placed on the EU institutions in the transport, agriculture, fisheries or competition area. Rather, the environmental sector stands out with regard to all other sectors of EU policy: Indeed, it is, together with the sectors of social and consumer policy, the only one which is mentioned in the Charter. And with regard to these two other sectors, it is the only one where the Charter states that its objectives shall be pursued in order to reach a sustainable development.

These considerations justify that, while according to Article 7 TFEU, all EU objectives shall be taken into account in the pursuance of EU policies, a particular attention is to be given to the pursuing of the high level of protection and to the improvement of the quality of the environment.

(b) The right of access to information

There is another string which is relevant here: EU law gives citizens and their organisations a fundamental right of access to environmental information which is held by EU institutions, agencies,

bodies and offices. This right is laid down in the Aarhus Convention²² to which the EU adhered²³. The Aarhus Convention is part of EU law²⁴. Its provisions prevail over secondary EU legislation²⁵.

The right of access to environmental information is laid down in a clear and unmistakably form: Article 1 of the Convention states: *“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with this Convention”*. The right is given to any natural or legal person (Article 4)²⁶; a refusal of granting access may be challenged in court (Article 9); exceptions to this right are specially enumerated; they shall be interpreted restrictively. Administrations have the obligation to collect and disseminate environmental information (Article 5) etc.

Article 5 of the Aarhus Convention lays down a number of obligations for public authorities to disseminate environmental information. Article 5(7) then states: *Each Party shall (a) publish the facts and analyses of facts which it considers relevant and important in framing major environmental policy proposals; (b) publish or otherwise make accessible available explanatory material on its dealings with the public”*. Here, the Convention draws the link between the right of the citizen to accede to environmental information and the obligation of the administration to make this information publicly available.

If one reads together this fundamental right of the public of access to environmental information and the obligation flowing for the EU administration of Article 37 of the Charter, the conclusion must be that citizens have a right to be informed, if and how the EU institutions ensured, in their policies and in their individual measures, that a high level of protection and an improvement of the quality of the environment is achieved.

This means that the EU institutions are obliged to inform, when they make proposals for legislations, adopt legislative or other acts, or take decisions which are capable of affecting the environment, how they complied with the obligation to ensure a high level of protection or to improve the quality of the environment. Otherwise, the rights and guarantees which flow for the citizens out of Article 37 of the Charter, run empty.

(c) Access to information and the EU’s obligation to improve environmental quality

This sounds a small step. However, the following three examples might illustrate what is meant by this.

²² Convention on access to information, public participation in decision-making and access to justice in environmental matters, of 25 June 1998 in Aarhus (Denmark).

²³ Decision 2005/370, OJ 2005, L 124 p.1.

²⁴ See Article 216(2) TFEU and Court of Justice, case C-240/09 *Lesoochránárske zoskupenie*, judgment of 13 March 2011.

²⁵ Court of Justice, case C-344/04, *IATA and ELFAA*, ECR 2006, p.I-403, with further references.

²⁶ Compare to that Article 15(3) TFEU which gives a right of access to documents to citizens of the Union and to any natural or legal person residing or having its registered office in a Member State.

(a)The Commission made, in 2008, a proposal for a review of Regulation 1049/2001 on access to documents²⁷. In its explanatory memorandum, it raised the question, whether there should be more access to documents allowed than in existing EU legislation, when commercial interests were affected. The Commission explained²⁸ : “Protection of *commercial interests*. *Public authorities and the corporate sector feel is that the current rules strike the right balance. However, journalists, NGOs and a majority of individual citizens claim that more weight should be given to the interest in disclosure. Therefore, the Commission does not propose to amend this provision*”.

Clearly greater openness and transparency on environmental matters is also in the interest of any environmental policy. Under Article 37 of the Charter and Article 11 TFEU, the Commission would have to explain, why its decision to side with public authorities – from all Member States? – and the corporate sector – why not siding with civil society?? – and its omission to improve access to documents in this specific situation ensures a high level of protection and constitutes an *improvement* of the quality of the environment.

There is no doubt that officials will be able to find arguments to explain, why a change of the legislation was not appropriate. However, then the Commission takes the responsibility (“accountability”) of declaring openly, why it does not improve access to documents and, by that, improve the possibility to protect the environment.

(b)In 2011, the Commission published a White Paper on transport²⁹. The White Paper declared quite bluntly that “*the transport system is not sustainable*”³⁰. It developed a scenario (“roadmap”) until 2050, based on a reduction of greenhouse gas emissions by 60 per cent, compared to 1990; it did not discuss the EU’s own estimation that these emissions should be reduced by 85 to 95 per cent. The White Paper was based on an impact assessment³¹ which discussed four different policy options. The impact assessment concluded that from an environmental point of view, option 2 would deliver the best results. The White Paper itself did not explicitly specify which option the Commission suggested. It proposed a number of goals and measures which were all oriented towards a more competitive and resource efficient transport system in the EU.

It is submitted that under Articles 37 of the Charter and 11 TFEU, the Commission was obliged to explain, how it envisages a high level of environmental protection and an improvement of the quality of the environment in the transport sector by 2050, and why it did or did not follow option 2 of the impact assessment which it itself qualified as the environmentally best option. In view of the Commission’s own statement that the EU transport system is not sustainable, there would also be need for an explanation, if and how this sustainability will be achieved by 2050.

Such an explicit explanation would allow a discussion in the public, the European Parliament and the Council, if and to what extent there is a consideration to integrate environmental concerns into the future EU transport policy. This is not the case with the present White Paper.

²⁷ Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001, L 145 p.43.

²⁸ Commission, COM(2008) 229, section 2.2.4 . Emphasis added.

²⁹ Commission, White Paper. Roadmap to a Single European transport area – towards a competitive and resource efficient transport system, COM(2011) 144.

³⁰ *Ibidem*, paragraph 13.

³¹ Commission, Impact assessment – accompanying document to the White Paper, SEC (2011) 358.

The weaknesses of the *environmental* section in the Commission's impact assessment cannot be discussed here. Suffice it to say that the assessment is limited to some parameters³²; that, for example, it is just indicated that the noise levels would decrease due to a decrease in the number of cars and the increase in the number of electrical cars³³. The loss of biodiversity and land use is only dealt with by commonplaces³⁴.

(c) In 2005, the Commission set up a Scientific, Technical and Economic Committee for Fisheries (STECF)³⁵. This Committee had the task, among others, to give, on its own initiative or on request by the Commission, an opinion on the fisheries management; STECFs opinions were to be published "without delay" on the Commission's website³⁶. The Commission was obliged to take the opinions into account when presenting proposals on fisheries management³⁷. Furthermore, STECF was obliged to publish an annual report on the situation of fisheries.

The last STECF opinion published dates from 2008. No annual report has been published after the STECF report of November 2005³⁸. This omission to disseminate information on what the EU's own scientific committee stated, allowed the EU institutions to decide on fishing measures, in particular on total allowable catches, according to political but not to environmental parameters.

It is submitted that in all three cases, the Commission did not comply with its obligation under Articles 37 of the Charter and 11 TFEU, because it did not respect the fundamental right of access to information. Under these provisions, the Commission is obliged to inform the public – civil society, individuals – if and to what extent its proposal aims at a high level and improves the quality of the environment.

The general obligation to give reasons follows from Article 296(2) TFEU³⁹. This provision only refers to legal acts. However, as there is a right of information on the environment and a corresponding obligation of the EU institutions to make relevant information on policy proposals available, Article 296(2) TFEU expresses a more general obligation to lay account, to what extent the measures or proposed measures ensure a high level of environmental protection and an improvement of the quality of the environment. This corresponds to the above-mentioned principle of good EU governance that EU institutions and bodies: "*Each of the EU institutions must explain and take responsibility for what it does in Europe*"⁴⁰.

When an EU institution or body adopts or proposes a measure which is likely to affect the environment to a significant extent, it is under an obligation to explain – in the explanatory memorandum, in recitals or in another appropriate way – how this measure contributes – or omits to

³² See Impact assessment (n.31, above), section 5.4. The parameters are climate change, local air pollution, noise levels, biodiversity loss and natural resources depletion.

³³ See impact assessment (n.31, above), parameters 224ss.

³⁴ *Ibidem*, paragraph 235s.

³⁵ Commission Decision 2005/629, OJ 2005 L 225 p.18; amended by Commission Decision 2010/75, OJ 2010, L 37 p.52.

³⁶ *Ibidem*, Article 12.

³⁷ Regulation 2371(2002) on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ 2002, L 358 p.59, Article 33.

³⁸ See http://ec.europa.eu/fisheries/partners/stecf/reports/index_en.htm (visit of 28 April 2011).

³⁹ Article 296(2) TFEU: „*legal acts shall state the reasons on which they are based.*”

⁴⁰ Commission, European Governance. A White Paper, COM(2001) 428, p.10.

contribute – to a high level of environmental protection and to the improvement of the quality of the environment.

(d) Enforcing the obligation to improve environmental quality

The enforcement of environmental objectives is a specific problem, because the environment has no social pressure group behind it which would press for a full application of the principles. Article 191 TFEU contains a number of environmental objectives which read nicely on paper but which are forgotten in daily practice. A good example is the objective to aim at a high level of environmental protection. The Court of Justice declared that such a high level does not mean the highest level which is technically possible⁴¹. Furthermore, the high level need not be aimed at or achieved in all parts of the EU; it would be sufficient that the overall level of protection in the Union be increased, even if in some parts of it the EU measure would lead to a reduction of the protection level⁴². Finally, the Court declared that in complex matters such as the environment, the EU legislator has a large discretion to decide which measures should be taken and at which speed; the control by the Court would therefore have to be limited to examine, whether this large amount of discretion had been exceeded⁴³.

In practice, the EU institutions regularly take decisions in environmental matters and then declare that the adopted act constitutes a high level of environmental protection. They do not first assess what a high level is, and then measure the envisaged decision with regard to this parameter, but do it the other way round.

With regard to the objective of integrating environmental requirements (achieving a high level of protection and the improvement of the quality of the environment), the conclusion above was that the fundamental right of information requires an explanation, how the objective of achieving a high level of protection and an improvement of the quality of the environment is to be achieved by the specific measure in question.

It is this right of information which is to be enforced. An applicant could ask the EU institution or body to disclose information in this regard. And the answer by the institution could not only be controlled by the EU courts, whether the large discretion was exceeded. As the answer constitutes an “information” and there is a fundamental right of access to information, the Courts would rather have to examine, whether the answer is sufficiently precise and complete in order to comply with the obligation to inform the applicant.

The right of information exists with regard to every institution or body, as it is a fundamental right and as all EU institutions and bodies are obliged under Articles 37 of the Charter/11 TFEU. Therefore, this right may also be advanced, when the Commission makes a proposal for a legal act.

Examples would be

- Regional funds legislation would have to explain, why the diverting of structural funds money that was ear-marked for the environment to the financing of energy and transport

⁴¹ Court of Justice, case C-233/94, *Germany v. European Parliament and Council*, ECR 1997, p.I-2405.

⁴² *Ibidem*.

⁴³ Court of Justice, case C-341/95 (n.19, above).

projects⁴⁴ which very obviously and flagrantly contradicts Article 177(2) TFEU⁴⁵, constitutes a high level and an improvement of the quality of the environment ,

- Fisheries legislation which refers to “scientific advice” in order to justify certain legislative measures, without specifying which scientific advice was used and giving the reference⁴⁶;
- A proposal for legislation on nuclear waste⁴⁷ would have to indicate, why it constitutes a high level of environmental protection that the export of *nuclear* waste to third countries is not prohibited, whereas the export of *hazardous* waste to third countries is, as a rule, prohibited.

It might well be that the EU institution in question declares that this or that measure or policy does not aim at an improvement of the protection of the quality of the environment. However, this then would at least clarify the policy of the Union or of the institution, and if there were a continuous or systematic disregard of aiming to achieve a high level of protection and an improvement of the quality of the environment, the Courts would have to examine, whether the obligations of Articles 37 of the Charter/11 TFEU have not been breached.

(e) The necessity to develop a strategy for making Article 11 operational

This approach of asking, via the right of citizens to know, the EU institutions to lay accounts why they take this or that measure, why they adopt this or that decision or spend money on this or that issue, is the attempt to reduce the gap between the high, splendid words of the Lisbon Treaties on the protection of the environment and sustainable development on the one hand, and on the other hand the daily practice by the EU institutions which is all too often not even trying to make the Treaty provisions on the environment operational.

The environment is an interest without a group: while agricultural policy (farmers), fisheries policy (fishermen), transport policy (persons who transport or are transported), competition policy (competitors) etc. all have strong, vested interest groups behind the policy, which discuss, influence, defend or attack, shape and lobby in favour of their interests, the environment as a diffuse interest has no such group behind it: one cannot consider the environmental organisations to be such a group, because they normally act in the general and not in their own interest. Overall, they are as diffuse as the interest in the environment itself.

⁴⁴ Regulation 1084/2006, establishing a Cohesion Fund, OJ 2006, L 210 p.79, Article 2(1)(b): “(The Fund shall finance) *the environment within the priorities assigned to the Community environment protection policy under the policy and action programmes on the environment. In this context, the Fund may also intervene in areas related to sustainable development which clearly present environmental benefits, namely energy efficiency and renewable energy and, in the transport sector outside the trans-European networks, rail, river and sea transport,, intermodal transport systems and their interoperability, management of road, sea and air traffic, clean urban transport and public transport*”.

⁴⁵ Article 177(2) TFEU only allows the financing of “*environment and trans-European networks in the area of transport infrastructure*”.

⁴⁶ See for example Regulation 41/2006 fixing for 2007 the fishing opportunities and associated conditions, OJ 2007, L 15 p.1. The Council was obliged to take into account the report by the EU Scientific Committee STECF (Recital 1). However, Recitals 20 and 21 only refer to “scientific advice”, Recital 23 to “scientific investigations”. No reader can follow, to what advice the Council actually referred, and why the measures that were decided, constitute a high level and an improvement of the quality of the environment.

⁴⁷ Commission, Proposal for a directive on the management of spent fuel and radioactive waste, COM(2010) 618.

In order to make the above-mentioned right of information on environmental matters operational, there would therefore be a necessity of environmental groups, journalists, academics, charity and human rights organisations to pool their forces and bring the EU institutions and bodies to answer the question, via hundreds of specific, individual answers, how the environmental requirements are being integrated in daily practice into the other policy sectors. In the same way as a democracy will not function without democrats, environment protection – here: the integration of environmental requirements into other policies - will not function without persons who become active in making this integration a political, economic, social and environmental reality.

It is clear that persons, groups and organisations which are working in the environmental sector or are interested in the protection of the environment, are hardly able to develop and implement such a strategy: too diffuse are their interests, too divergent their priorities and too underdeveloped their sense of strategic cooperation. This is the other side of the statement that the environment is an interest without a group. It is highly unlikely that such a concerted action will be able to be pursued at EU level, where one of the marked features is the absence of a *European* public opinion –as opposed to an Irish, British, French or Italian public opinion.

(f) Governance and Articles 11 TFEU/37 of the Charter

All this should not make us forget that the obligation to make Articles 11 TFEU and 37 of the Charter of Fundamental Rights a reality, lies first of all with the EU institutions and bodies. The first obligation in this regard would be to set up administrative structures to deal with the integration problem. In this regard, the EU Commission had already announced, in 1993, what could and should be done to improve environmental integration⁴⁸. As mentioned above, later it had changed policy with the aborted “Cardiff Process” which went nowhere.

It may be interesting, though, to pass in review one by one the Commission’s suggestions of the past and to indicate where the EU stands today, almost twenty years later:

- (1) All Commission proposals are assessed on their environmental effects: where such effects are likely to occur, an environmental impact assessment is to be made.

This approach was abandoned. There is an impact assessment on the economic, social and environmental effects of the Commission proposals. However: (a) the EU Treaties do not contain a requirement that economic requirements must be integrated into the policies of the Union, comparable to Article 11 TFEU/37 of the Charter. Therefore, the general embedding of environmental issues into the broader issues of general policy is itself a political decision which does not do justice to Articles 11 TFEU/37 of the Charter; (b) the environmental part of the Commission impact assessment is normally very poor and insufficient (c) the impact assessment is not result-open, but oriented to justify the political decision which was taken beforehand. The instrument of a general impact assessment which is, in practical terms, handled by the President of the Commission and the Secretariat, thus allows stopping environmental initiatives at a very early stage with the argument that economically, the initiative would not be acceptable.

⁴⁸ Commission, SEC(93) 785; Press Release IP97/636 of 11 July 1997.

- (2) Proposals for new legal measures should, in the explanatory memorandum, describe and explain environmental effects and environmental costs and benefits;

This approach was abandoned. The vast majority of Commission proposals do not even touch environmental issues. The internal guidelines of the Commission for drafting an explanatory memorandum do not contain any requirement as to the description and assessment of environmental effects.

- (3) The Commission annual work programme shall identify, with a green asterisk, those proposals that will have significant environmental effects;

This approach was abandoned.

- (4) In all relevant Commission departments, contact persons for the integration of environmental requirements shall be designated;

Approach abandoned.

- (5) An inter-service group of director-generals shall be created, chaired by the director-general for the environment. This group shall have the task to discuss and coordinate environmental questions with other policy measures in order to achieve a better integration;

Approach abandoned. Such a group does not exist.

- (6) Within the Directorate-General, a specific administrative unit shall deal with the implementation of the EU environmental action programme and the integration of environmental requirements into other policies;

Directorate- General for the environment does not have such a unit.

- (7) The Commission's annual report shall contain, for key policy areas, an indication of which environmental considerations were taken into account;

The General Report does not contain such indications⁴⁹;

- (8) The Commission shall take a number of measures for "green accounting" (waste management, purchase policy);

In 2002, the Commission decided to adhere to the European eco-management and audit scheme⁵⁰. In 2008, it reported that 15 of its buildings in Bruxelles (30 per cent of the office space) adhered to the scheme⁵¹. The EMAS-register of 2011 indicated that 12 Commission sites come under the EMAS scheme⁵² - which means less than 25 per cent of the Commission office space.

⁴⁹ See last General Report on the activities of the European Union 2010; http://europa.eu/generalreport/pdf/rg2010_en.pdf.

⁵⁰ See Regulation 1221/2009 on the voluntary participation by organisations in a Community eco-management and audit scheme, OJ 2009, L 342 p.1; this Regulation replaced earlier Regulations.

⁵¹ Commission, Memo-08-688_EN[1].pdf – Adobe Reader (Visit of 2 May 2011).

⁵² See <http://www.emas-register.eu/search.php?base=base> (visit of 2 May 2011).

- (9) Progress in better integrating environmental requirements into other policies shall be regularly assessed;

The review of the fifth environmental action programme contained such an assessment⁵³. Since then, the approach was abandoned. In 2007, the Commission declared⁵⁴: *“progress has been mixed. In the agricultural sector there have been fundamental reforms over the last 15 years that have moved towards seeing farmers as stewards of nature. However, the integration of environmental concerns into other areas has been less successful. The Cardiff process – which was set up in 1998 in order to institutionalise this type of integration – has not lived up to expectations.*

This assessment is followed by one of the typical promises⁵⁵: *The Commission will produce a strategic framework in order to address the issue of policy integration. It will pay particular attention to the sectors where there is the greatest potential for policy synergies in order to improve the quality of the environment (agriculture, fisheries, transport, energy, regional and industrial policy and EU external relations)”.*

To date –five years later - there has been no follow-up to this announcement. And the constitutional requirement to integrate environmental concerns into other policies exists since 1987, thus for twenty-five years.

Concluding remarks

1. Article 11 TFEU and the equivalent provision of Article 37 of the Charter of Fundamental Rights contain an obligation for the EU institutions to integrate environmental requirements into the elaboration and implementation of the other EU policies and activities. These provisions do not only constitute principles.
2. It follows from Articles 11 TFEU/37 of the Charter, that sustainable development, one of the major objectives of EU policy, requires the integration of environmental concerns into other policies. This means in clear terms that sustainable development cannot be reached without such integration.
3. There is an obligation of the EU institutions and bodies to inform and explain, how their policies and individual measures taken in the context of the different policies ensure a high level of protection and an improvement of the quality of the environment.
4. To this obligation corresponds a right of the citizens to know, if and how this obligation has been complied with. This right to know flows from the fact that the integration requirement is part of the Charter of Fundamental Rights.
5. A strategic, concerted action by civil society could make this right operational, by insisting in asking for explanations and justifications, if and how the high level of protection and the improvement of quality of the environment were made operational in

⁵³ Decision 2179/98 on the review of the Fifth Environment Action Programme, OJ 1998, L 275 p.1.

⁵⁴ Commission, Mid-term review of the Sixth Environment Action Programme, COM(2007) 225, section 5.3.

⁵⁵ *Ibidem.*

the context of concrete measures. Eventually, this right to know would have to be enforced via the EU courts.

6. Such action could begin to giving a voice to the environment which is cherished in words but all too rarely by action.
7. Integrating environmental requirements into the elaboration and implementation of other EU policies remains a topic for Sunday speeches of politicians. In daily practice of the EU institution and bodies, it does not play a role.
8. The Commission which would first of all be obliged to take or propose measures to integrate environmental requirements into other policies, obviously has no political will to do so. Neither has it set up any governance mechanisms or working mechanisms to make the requirement of Article 11 TFEU and Article 37 of the Charter on Fundamental Rights operational.

The Nobel Prize winner Heinrich Böll once described a situation where the boss every morning proclaims: *"Today, something must happen"*. And the choir of his colleagues answered every day: *"Today, something will happen"*. This went on for decades, without anything happening. We are, with the integration requirement, not far away from this story: everybody agrees that there should be integration. And that's it.