The uneasy relationship between EU environmental and economic policies, and the role of the CJEU

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Abstract: *This paper considers the constitutional imperative to integrate environmental protection requirements into the EU's economic policies, and examines how this has been operationalized in practice. It argues that, compared to the other EU institutions, the CJEU has continued to demonstrate leadership in giving effect to the integration imperative in the economic context. This is evidenced by a raft of recent judgments on the environment/economic interface, which in turn are coming before the Court due to the popularity, at Member State and EU levels, of market-based environmental instruments. Overall, the CJEU has shown itself to be a constitutionalist actor which is serious about the requirement to achieve real, substantive integration of environmental protection requirements into the EU's economic policies, as required by Article 11 TFEU.*

1. Introduction: What unease?

On the face of it, it might be thought that the EU is doing a fairly good job of balancing its economic and environmental objectives. In contrast to most of its Member States' national constitutions,[2] the authors of the EU Treaties have expressly enshrined this balance at the highest level of EU law: as is well-known, Article 3(3) TEU provides,

> "*The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment*…"

Also of relevance is Article 11 TFEU, which provides,

> "*Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development*."

[1] A version of this paper will appear in B. Sjåfjell and A. Wiesbrock, *Sustainable Public Procurement* (Cambridge University Press, forthcoming).

[2] A number of EU Member States' constitutions provide for some kind of constitutional environmental right: see, for instance, Article 20a of the German Grundgesetz, "*Mindful also of its responsibility toward future generations, the state shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order*." However, very few provide for an express balancing of economic and environmental rights or goals. A notable exception is the Polish Constitution, Article 5 of which provides, "*The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development*." For an empirical analysis of environmental rights present in national constitutions across the globe, including EU Member States' constitutions, see C. Jeffords, "Constitutional Environmental Human Rights: A Descriptive Analysis of 142 National Constitutions" University of Connecticut Working Paper 16/11, August 2011 .

Further, Article 37 of the EU's Charter of Fundamental Rights (EUCFR) provides,

> "*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*."

While broadly similar in its terms to Article 11 TFEU, Article 37 EUCFR is a stronger formulation of the integration obligation: a duty to integrate a "*high level of environmental protection*" clearly goes further than a duty to integrate "*environmental protection requirements*". Indeed, it is arguable that the very inclusion of the integration obligation within the EUCFR, and its consequent characterisation as a fundamental human right within the EU, denotes a recognition that environmental protection constitutes one of the core values upon which the Union is founded, within the meaning of Article 2 TEU.[3] The concept of a *value* of the Union is, it is reasonable to conclude from the post-Lisbon structure of the TEU, something distinct from (and perhaps even more fundamental than) an *aim* or *task* of the Union.

It is clear therefore that, as a matter of primary EU law, those drawing up and implementing EU economic *and* environmental policies have a legal duty to balance the EU's environmental and economic aims, with the ultimate objective of achieving a highly competitive social market economy at the same time as a high level of environmental protection.[4] Moreover, while the meaning of the concept of sustainable development is highly contested,[5] the constitutionalisation of this concept in each of Article 3(3) TEU, Article 11 TFEU and Article 37 EUCFR may reasonably be understood as demonstrating a belief, at the highest political level within the EU, that it is *actually possible* to achieve economic, social and environmental goals at the same time. This is, in itself, by no means an ideologically neutral position. One might contrast, for instance, the influential "limits to growth" movement (also variously described as a deep green or ecological position) which rejects the goal of constantly seeking economic growth as fundamentally in conflict with a high level of environmental protection.[6]

At a constitutional level, therefore, the EU not only acknowledges the important relationship between its economic and environmental policies, but proposes and indeed mandates a balance. As one would expect, this position as a matter of law can also be discerned in certain of the EU's policy

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[3] See Article 2 TEU, "*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities…*" Environmental protection is not otherwise mentioned as one of the fundamental values of the Union within this Article, but by virtue of the EUCFR the environmental integration obligation may be included within the concept of respect for human rights. On the history of the drafting of what is now the Article 11 TFEU integration obligation, see J. Nowag, "The Sky is the Limit: On the Drafting of Article 11 TFEU's Integration Obligation and its Intended Reach" in B. Sjåfjell and A. Wiesbrock, *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge, 2014).

[4] For an analysis of the legal implications of Article 11 TFEU, see S. Kingston, *Greening EU Competition Law and Policy* (Cambridge University Press, 2012), ch. 3 and B. Sjåfjell, "The legal significance of Article TFEU for EU institutions and Member States" in B. Sjåfjell and A. Wiesbrock, *The Greening of European Business under EU Law: Taking Article 11 TFEU Seriously* (Routledge, 2014).

[5] See M. Jacobs, "Sustainable Development as a Contested Concept" in A. Dobson, *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford University Press, 1999).

[6] See, notably, Meadows et al, *The Limits to Growth: 30 Years Update* (Taylor & Francis, 2005) and T. Jackson, *Prosperity without Growth: Economics for a Finite Planet* (Earthscan/Routledge, 2009).

positions. Perhaps the best recent example of this is the vision of the environment/economy interface set out by Commissioner Potočnik during his term as environmental Commissioner, which vision he termed the "new environmentalism". By this he meant that:

> "*if "old environmentalism" was about putting limits on the excesses of our old path to prosperity, the job of new environmentalists is to show that there is a possible new path to prosperity and well-being through a sustainable model of economy and society*."[7]

It is notable that the "*essence*" of Potočnik's new environmentalism was, in his words:

> "*tackling environmental problems before they happen, building it into our economic policy, our industrial policy, our energy policy, our transport policy, our agricultural and fisheries policies*."

At the very core of the environmental Commissioner's vision of EU environmental policy was, therefore, the recognition that much of that policy lay entirely outside his prerogative. The philosophy of "new" environmentalism is therefore profoundly integrationist in approach and, in this sense, not so new at all.

In terms of integrating economic concerns into EU environmental policy, a decided turn towards emphasising the "win-win" potential synergies between EU environmental and economic policies, and incorporating economic approaches into EU environmental policy, has been evident for some time, Think, for instance, of the major shift towards use of (more economically efficient) market-based instruments, whether by their creation at EU level (e.g., emissions trading) or their promotion at national level (e.g., via the environmental State aid guidelines).[8] The encouragement of eco-innovation by promoting green public procurement within Member States, most recently in the 2014 legislative package on public procurement discussed below, also fits this paradigm.[9] However perhaps the *pièce de résistance* of new environmentalism in this sense is the Commission proposal which led to EU's Seventh Environment Action Programme (EAP), on which political agreement was reached in June 2013. The Seventh EAP sets out the nine overarching priority objectives of the EU's environmental policy up to 2020.[10] The intense effort to repackage environmental aims as, at the same time, economic aims is striking throughout this document, particularly when contrasted with previous EAPs. Indeed, the very first recital of this, the EU's key environmental policy road map for seven years, leads not with the EU's environmental aims per se, but rather with the starting point that the "*Union has set itself the objective of becoming a smart, sustainable and inclusive economy by 2020*…" Even the EU's goals in biodiversity and nature conservation, a policy area which has not traditionally lent itself to an economic philosophy, has been rebranded in economic terms as the

[7] Potočnik, "New Environmentalism", SPEECH/13/554, Edinburgh, 20 June 2013.

[8] For an early policy document, see the Commission's Green Paper on market-based instruments for environmental and other related policy purposes, COM (2007)140. See generally, S. Kingston, *Greening EU Competition Policy*, *op. cit*., ch. 2.

[9] Namely, Directive 2014/24/EU on public procurement OJ 2014 L 94/65, Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors OJ 2014 L94/243, Directive 2014/23/EU on the award of concession contracts OJ 2014 L94/1.

[10] Decision 1386/2013/EU on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet" OJ 2013 L 354/171.

thematic priority of "protecting, conserving and enhancing the Union's natural capital",[11] emphasising the role of biodiversity and ecosystems as a necessary input into the Union's economy. In fields as diverse as habitats protection to enforcement, the need for increased EU activity is now argued for by DG environment, therefore, on the basis of the economic benefits that such activity can bring, quantified in cash terms, with the intrinsic environmental value of the action typically relegated to a secondary line of argument.

This is not to say that the Seventh EAP necessarily in itself suggests a watered-down, "paler green" environmental policy (although this may well be the result of the lack of substantive integration of environmental goals in other policy areas, as discussed below). Indeed, certain of the Seventh EAP's goals are unquestionably ambitious and, if followed through on, would revolutionise our relationship with the environment within Europe. These include the vision of a circular economy, meaning an economy where "*nothing is wasted and where natural resources are managed sustainably, and biodiversity is protected, valued and restored in ways that enhanced our society's resilience*",[12] and the goal of "*an absolute decoupling of economic growth and environmental protection*".[13] Rather, what is remarkable about the Seventh EAP in this regard is its virtually wholesale repackaging of environmental goals in economic, or partially economic terms. While this may be anathema to more traditional ecological political movements,[14] it is also couched in realism in view of the overwhelming concentration on economic goals in recent years in the EU, to which we now turn.

2. It's the economy, stupid

Despite this integration obligation at a constitutional level, picked up by the strong integration narrative within the EU's environmental policy, serious deficiencies remain in implementing the integration obligation in other EU policy areas, particularly where such integration could be viewed as compromising economic aims.[15] These tensions between the EU's economic and environmental goals have been expressed in notably limited environmental ambition in fields where achieving a high(er) level of environmental protection might risk limiting economic growth. The commitment to integration of environmental and economic goals displayed in the EU's environmental policy in recent years has, in certain economically crucial EU policy areas, not been met with any serious reciprocal commitment to integration.

Foremost amongst these areas is the EU's macroeconomic policy. While the EU for many years had its own overarching Sustainable Development Strategy (the EU SDS), this has not been renewed since 2009, and has, according to the Commission, now been subsumed into the EU's general macroeconomic strategy, known as "Europe 2020".[16] Upon closer examination, however, the only

[11] *Ibid*, p. 178.
[12] *Ibid*, p. 176.
[13] *Ibid*, recital 18.
[14] See generally, A. Dobson, *Green Political Thought* (4th edition, Routledge, 2007).
[15] See L. Krämer, "Giving a voice to the environment by challenging the practice of integrating environmental requirements into other EU policies" in S. Kingston (ed.), *European Perspectives on Environmental Law and Governance* (Routledge, 2013), and A. Jordan and A. Lenschow, "Environmental Policy Integration: A State of the Art Review" (2010) 20 *Environmental Policy and Governance* 147.
[16] "Europe 2020: A strategy for smart, sustainable and inclusive growth" COM(2010) 2020. See, stating that the Commission will implement its Rio +20 sustainable development goals through *Europe 2020*, European Commission, "A Decent Life for All: ending Poverty and Giving the World a Sustainable Future" COM(2013) 92,

elements of EU environmental policy meaningfully incorporated as part of the Europe 2020 Strategy are the EU's climate and energy goals.[17] At this, the highest policy level, therefore, the meaning of sustainable development, EU-style, does not extend to large tranches of traditional EU environmental policy.

Even more notable, from a practical perspective, is the lack of governance structures put in place to operationalise the environmental pillar of the EU's sustainability strategy, as contained in Europe 2020. As is well-known, in the wake of the financial and subsequent economic crisis within Europe and beyond, the EU engaged in a large-scale reform of its economic governance model in the form of the European Semester process, entailing, *inter alia*, close monitoring of economic performance by means of the Annual Growth Survey, detailed reviews of Member States experiencing macro-economic imbalances, reports on Member States' excessive deficits, and Country Specific Recommendations.[18] In the case of the environmental aspects of sustainable development, while Eurostat continues to produce biennial reports on the EU's achievements in relation to the (more than 130) Sustainable Development Indicators set out in the EU SDS (which are divided into economic, social and environmental indicators), there is no specific follow-up to these reports. Similarly, while the European Environment Agency monitors over 200 environmental indicators, its four-yearly State of the European Environment and Outlook Report does not lead to any specific consequences or follow-up from EU institutions. Specifically, the advanced governance framework of the European Semester process does not apply to the non-economic elements of sustainability (although the Seventh EAP tentatively raises this possibility, by setting the goal by 2020 of "*assessing the appropriateness of the inclusion of a lead indicator and target in the European Semester*", and DG Environment is currently commissioning a report on Greening the European Semester).[19] As Lee has aptly commented,

> "*Almost by accident, monitoring and review of the environmental and the economic seem to have been separated, with all of the emphasis on the economic*."

Against this, it must be recognised that, in certain policy fields, a greater effort at genuine substantive integration between the EU's environmental and economic fields is evident. The EU's trade policy, for instance, has long accommodated environmental protection concerns,[20] and indeed the EU has used its external trade policy as an instrument to achieve its environmental sustainability goals, as illustrated by the EU's published negotiated position on the EU-US Transatlantic Trade and Investment Partnership, which includes a position paper devoted to sustainable development.[21]

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at p. 6. See also, the discussion in M. Lee, *EU Environmental Law, Governance and Decision-Making* (2nd ed., Hart, 2014), ch. 3. It should be noted that this move away from considering sustainable development in its own right is not peculiar to the EU, and mirrors similar moves at national level in the wake of the economic recession: see, for instance, the abolition of the Sustainable Development Council of Ireland (Comhar) in 2012, and the abolition of the Sustainable Development Commission of the UK in 2011.

[17] Europe 2020, *op. cit*., pp. 14-16.

[18] These documents are available per Member State and per year on http://ec.europa.eu/europe2020/index_en.htm.

[19] Seventh EAP, *op. cit*., p. 186.

[20] See generally, N. de Sadeleer, *EU Environmental Law and the Internal Market* (Oxford University Press, 2014).

[21] TTIP EU Position Paper on Trade and Sustainable Development, published on 7 January 2015, available at www.trade.ec.europa.eu.

Nevertheless, even in the case of the EU's climate and energy policies, commonly vaunted as the greatest example of substantive environment/economic policy integration, the tension between these aims has been apparent in the context of the recent economic turndown, as evidenced by the removal of binding renewable energy targets for individual Member States in favour of an EU-level target in the EU's 2030 Climate and Energy Policy Framework, on which agreement was reached in 2014.[22] It is striking that the very Council conclusions containing this Framework, which is the EU's central climate/energy strategy for the next 15 years, follows on by stating that, "*The economic and employment situation remains our highest priority*".

Perhaps the most widely contested example of the current trend to prioritise economic aims over environmental aims at the highest EU policy level, however, has come from the Commission itself. One of the first announcements of the Juncker Commission was the intention to withdraw certain important environmental proposals following review for consistency with, in particular, the EU's "*jobs and growth agenda*".[23] These included the abandonment of the Circular Economy package which had been submitted by the previous Commission, and which was aimed at increasing recycling levels, reducing landfill and tightening rules on incineration.[24] This comes in the context of the institutional re-organisation of the Commission so that the Commissioner charged with the environmental portfolio, Commissioner Vella, is now answerable to the First Vice-President of the Commission, Commissioner Timmermans, who is tasked inter alia with furthering the EU's Better Regulation agenda. This agenda is aimed *inter alia* at reducing regulatory burdens for business, and is of course not an innovation of the Juncker Commission. The Barroso Commission had already indicated that this was a priority, which requires, amongst other things, regulatory impact assessments to be carried out on all EU initiatives expected to have significant direct economic, social or environmental impacts.[25]

The EU's Better Regulation agenda has also led, through the Regulatory Fitness and Performance Programme (REFIT), the EU to map the entire EU legislative stock to identify burdens, gaps and inefficient or ineffective measures and identify possibilities for simplification or repeal. As part of this exercise, the costs of the environmental acquis were estimated at €1.18 billion per annum, or around 1% of the total for all EU legislation.[26] In response to this, in 2012, the Commission released

[22] Conclusions of the European Council of 24 October 2014, EUCO 169/14. See, e.g., the comment of the Polish Prime Minister Kopacz at the conclusion of the negotiations, "*I said that we will not return from this summit with new [financial] burdens, and indeed there are no new burdens*", Euractiv, "EU leaders adopt 'flexible' energy and climate targets for 2030', 24 October 2014.

[23] Letter from Commission President Juncker to Commissioner for Environment, Maritime Affairs and Fisheries Vella, 1 November 2014, at p. 4 (available at http://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/vella_en.pdf).

[24] See generally, Commission Communication, "Towards a circular economy: A zero waste programme for Europe" COM (2014) 398 and, for the legislative proposal, COM (2014) 397. For the announcement of withdrawal of the proposal, see Annex to the Commission Work Programme for 2015: A New Start, COM (2014) 910. Following widespread criticism of this withdrawal, the Commission has indicated that the package will be retabled in a different form.

[25] See the EU's Impact Assessment Guidelines, 15 January 2009, SEC(2009) 92, and the Seventh EAP, *op. cit*., Preamble, recital 34 and Article 2(4): "All measures, actions and targets set out in the 7th EAP shall be proposed and implemented in accordance with the principles of smart regulation and, where appropriate, subject to a comprehensive impact assessment."

[26] European Commission, Regulatory Fitness and Performance Programme (REFIT): Initial Results of the Mapping of the Acquis SWD(2013) 401, p. 59.

an action plan to reduce the costs for the seven most burdensome pieces of environmental legislation for business by around €300 million per annum.[27] From the outset, the Juncker Commission indicated its intention to continue as a priority an "*in-depth*" review of the legislative cornerstones of EU nature conservation policy, the Birds and Habitats Directives, again in the interests of the Better Regulation agenda.[28] Again, the economic lens through which any redrafting of these Directives would be done is apparent, as is clear from the narrative coming from DG Environment on this issue that "*Protecting nature and maintaining Europe's competitiveness must go hand-in-hand as nature and biodiversity policy can play a key role in creating jobs and stimulating investment*."[29]

It hardly needs to be said that this view of biodiversity as essentially an instrument of economic growth, coming from the Commissioner for the *environment*, is a highly controversial one from an environmental perspective.[30]

In the public procurement context, the 2014 public procurement legislative package certainly contains elements representing progress in integrating environmental considerations within procurement procedures. In particular, the horizontal clause of Article 18(2) now means that Member States must ensure that, in the performance of public contracts, economic operators comply with *inter alia* EU environmental law; enterprises which do not respect environmental law may be excluded from the tender procedure,[31] or not awarded the contract, or their tender rejected where it is abnormally low due to lack of compliance with these obligations. Member States have also gained clarity on the conditions in which they can legitimately require products/services to have a specific eco-label (Article 43),[32] and on the conditions in which they can legitimately set criteria relating to the production process (Article 67(3)) and use life-cycle costing (Article 68). However, the 2014 Public Procurement Directive still leaves the choice to contracting authorities whether or not they wish to include environmental considerations in their public procurement procedures (viz. recital (91) of the Directive which, citing Article 11 TFEU, notes the Directive's aim of clarifying how the contracting authorities "*can*" contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts"). The Directive expressly declines to make green public procurement (GPP) mandatory, however, on the ground that, given "*the important differences between individual*

[27] Action Programme for Reducing Administrative Burdens in the EU – Final Report, SWD(2012) 422. Specific burdens were identified in the fields of waste and chemicals, particularly REACH.

[28] Letter from Commission President Juncker to Commissioner for Environment, Maritime Affairs and Fisheries Vella, 1 November 2014, *op. cit*., at p. 4.

[29] This is the chosen topic of Commissioner Vella's speech at the EU's Green Week 2015: see http://www.greenweek2015.eu/.

[30] Whether or not the REFIT exercise will actually result in reopening the Habitats/Birds Directives is unclear, in view in particular of the express request by letter of 26 October 2015 from nine Member States, including France and Germany, to the Commission asking that the Directives be retained in their current form for legal certainty reasons, with a greater focus to be placed on implementation. See http://www.birdlife.org/sites/default/files/attachments/fitness_check-letter_nine_ministers_to_vella_26.10.2015.pdf.

[31] Note, however, that failure to comply with EU environmental law is not a mandatory ground for exclusion from the tender process (in contrast, for instance, with failure to comply with national social security law): see Article 57(1)-(2) of the 2014 Directive.

[32] Contrast the situation under the previous Directive, Directive 2004/18/EC OJ 2004 L 134/14: see Case C-368/10 *Commission v Netherlands* ECLI:EU:C:2012:284 ("Dutch Coffee").

sectors and markets, it would…not be appropriate to set general mandatory requirements for environmental, social and innovation procurement".[33] This mirrors the weak language on this issue in the Seventh EAP, which noted only that Member States "*should take further steps*" to applying GPP standards to 50% of their tenders.[34] The result is that the areas in which GPP is, as a matter of EU law, mandatory remain limited to office equipment and road transport vehicles.[35]

3. The CJEU's role in balancing economic and environmental goals

At a political level, this retreat from substantive integration of environmental protection within certain key EU economic policies is not difficult to explain. Europe has just been through, and indeed remains in, one of the most economically challenging periods in its history. Empirical evidence demonstrates that concern for environmental issues amongst voters, including EU voters, tends to drop during periods of economic difficulty and corresponding higher unemployment.[36] In this context the role of the CJEU in the economic/environment balance is thrown into sharp relief. In the absence of strong political leadership (within many Member States but also within the Commission) on the matter, the relevance of the CJEU's approach to integrating environmental protection into economic policies becomes even greater. In political science theory, this fits of course with the widely accepted analysis of the CJEU as a politically insulated, non-majoritarian institution charged with, in particular, upholding and enforcing the EU's ultimate constitutional norms. It is one of the features of the EU that elected politicians have voluntarily passed powers to unelected bodies, including the CJEU, in order to resolve collective action problems and, as Thatcher and Stone Sweet have noted, as a response to,

> "*the dilemma of political parties who agreed on the benefits of constitutional 'rules of the game', but disagreed, sometimes fundamentally, on the precise content of those rules*."[37]

Such delegation, Egan observes, is not only designed to provide greater expertise, but also to enable decisions to be taken independently of the (politicised) policy process, with all the risks of regulatory capture that entails.[38]

Yet, at the same time, it is clear that courts, including the CJEU, must not intrude into the political process, at the risk of compromising the separation of powers and with it the court's own legitimacy.[39] As Lenaerts argues, the role of the courts is rather to determine what the law is, and

[33] Directive 2014/24, recital (95).
[34] Seventh EAP, *op. cit*., p. 184.
[35] See Regulation 106/2008 on a Community energy-efficiency labelling programme for office equipment OJ 2008 L 39/1 and Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles OJ 2009 L 120/5.
[36] See, for instance, L. Scruggs and S. Benegal, "Declining public concern about climate change: Can we blame the great recession?" (2012) 22(2) Global Environmental Change 505; in the US context, M. Kahn and M. Kotchen, "Environmental Concern and the Business Cycle: The Chilling Effect of Recession" National Bureau of Economic Research Working Paper 16241, July 2010.
[37] M. Thatcher and A. Stone Sweet, "Theory and Practice of Delegation to Non-Majoritarian Institutions" (2002) 25(1) *West European Politics* 1, at p. 9.
[38] M. Egan, "Markets" in C. Rumford (ed.), *The SAGE Handbook of European Studies* (Sage, 2009) p. 135.
[39] See, in the CJEU context, K. Lenaerts, "The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice" in M. Adams, H. de Waele, J. Meeusen and G.

interpret it – indeed a "*risky venture*" as, in doing so, they are drawing the boundaries of their own legitimacy.[40]

While this debate is by no means novel, it is directly relevant to the present discussion, and to understanding the CJEU's role in balancing the EU's environmental and economic priorities. The CJEU's path-breaking role in establishing environmental protection as one of the Community's "*essential objectives*" in early judgments such as *ADBHU*, even before reference was made thereto in the founding Treaties, has been well-documented.[41] In not only upholding but also *implying* environmental constitutional objectives into the Treaties, the CJEU showed itself to be a leader in environmental governance within the EU in much the same way as its recognition of a general principle of respect for fundamental human rights within the Community.[42] As I have argued elsewhere,[43] the CJEU has by and large continued to demonstrate leadership in taking the EU's environmental objectives seriously, and in integrating them into the EU's economic policies, in a raft of case-law including *Danish Bottles*,[44] *Walloon Waste*,[45] *Dusseldorp*,[46] *PreussenElektra*,[47] and *Inn Valley*.[48]

The remainder of this paper will not discuss these earlier cases, but instead focuses on some of the large number of recent cases in which the CJEU has again been asked to consider the economic/environment interface (with more than 10 judgments handed down concerning this interface between the end of 2012 and the end of 2014). It is no accident that the CJEU is seeing increasing numbers of these cases on its docket: as the Member States and the EU have embraced market-based environmental instruments, which use economic means to achieve environmental goals, it is natural that the legislation creating such instruments finds its way before the CJEU, where it falls within the scope of EU law. Indeed, the CJEU's recent judgments cover the whole gamut of different policy options/instruments available to the EU and to its Member States, including:

- (National) laws aimed at promoting greener products/energy via green certificate schemes, where the CJEU applies Article 34 TFEU (for instance, *Vindkraft*, *Essent Belgium*, *Industrie du Bois* and *Green Network*);[49]

Straetmans, *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart, 2013).

[40] Lenaerts, *ibid*., at p. 60.

[41] Case 240/85 *ADBHU* ECLI:EU:C:1985:59. See F. Jacobs, "The Role of the European Court of Justice in the Protection of the Environment", (2006) 18(2) *Journal of Environmental Law* 185.

[42] Indeed, as former Advocate General Jacobs has noted, the CJEU gave far more support for its conclusion that respect for human rights constituted a general principle of Community law than it did for its conclusion that objective of environmental protection had constitutional status, which conclusion "*appears to have considered…that environmental protection was so fundamental to the public interest that no explicit justification was required*"; in so concluding, the CJEU was "*undoubtedly acting in accordance with the spirit of the times*" (Jacobs, *ibid*., p. 188).

[43] Kingston, *Greening EU Competition Law and Policy*, op. cit., ch. 3 and pp. 133-138.

[44] Case 302/86 *Commission v Denmark* ECLI:EU:C:1988:421.

[45] Case C-2/90 *Commission v Belgium* ECLI:EU:C:1992:310.

[46] Case C-203/96 *Dusseldorp* ECLI:EU:C:1998:316.

[47] Case C-379/98 *PreussenElektra* ECLI:EU:C:2001:160.

[48] Case C-320/03 *Commission v Austria* ECLI:EU:C:2005:684.

[49] Case C-573/12 *Vindkraft* ECLI:EU:C:2014:2037, Joined Cases C-204/12 to C-208/12 *Essent Belgium* ECLI:EU:C:2014:2192, Case C-195/12 *Industrie du Bois* ECLI:EU:C:2013:598, Case C-66/13 *Green Network* ECLI:EU:C:2014:2399.

- (National) measures aimed at promoting greener products/energy by granting financial support (for instance, *Vent de Colère*);[50]
- (National) laws aimed at promoting good environmental performance by granting exclusive or special rights (for instance, *Ragn Sells*)[51] or by (national or European) GPP measures (for instance, *Dutch Coffee* and *Evropaïki Dynamiki*);[52]
- (National or European) emissions trading schemes (for instance, *Commission v Estonia*, *Iberdrola*, *Billerud*, *ŠKO-ENERGO*).[53]

As, from a policy perspective, Member States and/or the EU very often have a choice between some or all of these policy instruments when deciding how best to achieve their (environmental/economic) aims,[54] it is useful to consider the CJEU's approaches to these cases together. By contrast, it is worth noting that the CJEU has not yet had the opportunity to make any significant ruling on the environmental policy instrument which leaves most to the private sector, and has the least formal role for the State, namely voluntary private environmental initiatives undertaken by corporations, such as environmental agreements or covenants.[55] Taken together, the cases to date show that, as Member States increasingly rely on various shades of environmental market-based instruments to achieve their policy aims, the CJEU is becoming a key forum in setting the legal boundaries of the environment/economic interface within the EU.

a. (National) laws aimed at promoting greener products/energy via green certificate schemes

Perhaps the most significant, and interesting, of the recent judgments is the July 2014 judgment of the Grand Chamber of the CJEU in *Vindkraft*.[56] This case concerned the compatibility with the Treaty free movement of goods provisions of the way in which Sweden chose to transpose part of the EU's 2009 renewable energy (RES) directive.[57] The RES Directive formed a key plank of the 2009 climate and energy package, setting mandatory individual national targets for Member States with the aim of reaching a 20% EU-wide share of energy from renewable sources by 2020 overall, and a mandatory 10% target for each Member State in the transport sector.[58] (As noted above, mandatory national renewables targets have, however, been removed from the EU's 2030 Climate and Energy Strategy). Under the RES Directive, this was to be done, *inter alia*, via the adoption of national

[50] Case C-262/12 *Vent de Colère* ECLI:EU:C:2013:851.
[51] Case C-292/12 *Ragn-Sells* ECLI:EU:C:2013:820.
[52] Case C-462/10 P *Evropaïki Dynamiki* ECLI:EU:C:2012:14.
[53] Case C-505/09 P *Commission v Estonia* ECLI:EU:C:2012:179, Joined Cases C-566/11 etc *Iberdrola* ECLI:EU:C:2013:660, Case C-203/12 *Billerud* ECLI:EU:C:2013:664, Case C-43/14 *ŠKO-ENERGO* ECLI:EU:C:2015:120.
[54] On the evolution of these so-called new environmental policy instruments in Europe, see R. Wurzel, A. Zito and A. Jordan, *Environmental Governance in Europe: A Comparative Analysis of New Environmental Policy Instruments* (Elgar, 2013).
[55] The few cases where potential environmental justifications have been given for prima facie anti-competitive action have not, upon examination, shown that such action was necessary or proportionate to environmental aims: see, for instance, Case C-385/07 P *DSD* ECLI:EU:C:2009:456 (Article 102 TFEU). See Kingston, op. cit.
[56] *Op. cit*.
[57] Directive 2009/28/EC on the promotion of the use of energy from renewable sources OJ 2009 L 140/16.
[58] RES directive, note 13 *supra*, Article 3. See also, Article 7d(6) of the Fuel Quality Directive, Directive 2009/30/EC OJ 2009 L 140/88, which introduced the mandatory target of achieving by 2020 a 6% reduction in the greenhouse gas intensity of fuels used in road transport and non-road mobile machinery.

renewable energy action plans to cover the period to 2020, which were to be notified to the Commission by June 2010. In contrast to the position in relation to ETS national allocation plans in Phases I/II, however, the Commission was only granted the power to issue a recommendation on foot of an evaluation of national renewable energy action plans – and not the power of approval *per se*.[59] The RES directive also contained various innovative methods of encouraging cooperation between Member States in meeting their targets, via statistical transfers of renewable energy between Member States,[60] joint projects between Member States and between Member States and third countries,[61] and joint national (financial) support schemes.[62] These methods must be viewed in the context of the broader efforts to achieve an EU internal market in electricity, in line with the EU's three successive legislative packages to achieve a single market for gas and electricity in the EU.[63] In its 2013 progress report on the RES Directive, the Commission noted that the total share of renewables in the EU was 12.5% and that, if current renewables growth rates remained in place until 2020, 11 countries would fail to meet their binding national targets.[64]

In the situation considered in *Vindkraft*, Sweden had chosen to implement the RES Directive by inter alia passing legislation on electricity certificates in 2011, by which approved producers are awarded an electricity certificate for each megawatt-hour (MWh) of green electricity produced. These certificates are tradable on an open competitive market. Electricity suppliers, and some users, are legally obliged to hold, and to surrender to the Swedish State in April each year, a certain quota of certificates corresponding to a proportion of their total quantity of electricity supplied or consumed in the previous year (failing which surrender a penalty was payable). Importantly, while the Swedish legislation did not say so expressly, the referring court stated that in fact approval for the award of green electricity certificates was reserved to green electricity production installations located in Sweden. Further, while in principle other States' green electricity certificates could be used to fulfil a producer/consumer's quota where an international agreement was in place with that State, no such agreement existed at the relevant time with Finland.

In the facts at issue in *Vindkraft*, the plaintiff (Vindkraft), a wind farm located in Finland, sought and was refused approval from the Swedish Energy Agency to be awarded green electricity certificates for the energy that it produced, and challenged this refusal in the Swedish courts on grounds inter alia of infringement of Article 34 TFEU on free movement of goods, arguing that the effect of the Swedish scheme was to reserve around 18% of the Swedish electricity market (i.e., the portion subject to the quota) to Swedish electricity producers. Understandably, the referring court was unsure how to proceed, given that, in particular, the RES Directive provides that Member States may meet their binding renewables obligations by applying "*support schemes*" (Article 3(3) RES Directive), defined to include any instrument that promotes the use of renewable energy, including green certificate schemes, and expressly provides that,

[59] RES Directive, Article 3(5).
[60] *Ibid*, Article 6.
[61] *Ibid*, Articles 7 – 10.
[62] *Ibid*, Article 11.
[63] See, in relation to electricity, the most recent Directive, Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC OJ 2009 L 211/55.
[64] COM (2013) 175.

"*Without prejudice to Articles [107 TFEU and 108 TFEU], Member States shall have the right to decide, in accordance with Articles 5 to 11 of this Directive, to which extent they support energy from renewable sources which is produced in a different Member State*."

Further, Article 15 of the RES Directive requires Member States to ensure that proof of the renewable source of energy in an energy supplier's energy mix must be proven by guarantees of origin, "in accordance with objective, transparent, and non-discriminatory criteria."

Vindkraft, therefore, raised the important question whether the CJEU's position on the role of environmental factors in EU internal market law had changed since its key 2001 judgment on national renewables support schemes, in that case the German feed-in tariff scheme, *PreussenElektra*.[65] In *PreussenElektra*, the feed-in tariff scheme obliged electricity supply undertakings to purchase electricity produced in their area of supply from renewable sources, and specified the price to be paid for this electricity. The CJEU held this to be compatible with what is now Article 34 TFEU, on the ground that the discrimination against imported renewable energy inherent in the German scheme was justified and proportionate given that, because the internal renewable energy market had not yet been fully achieved, the environmental objectives of the scheme could not be achieved in a less restrictive manner.[66] In *Vindkraft*, the CJEU was confronted with a broadly similar issue, in circumstances where the internal market had been further harmonised in the interim by, amongst other things, the RES Directive.

Nevertheless, one view of *Vindkraft* might be that the problem from a free movement perspective stemmed not so much from the Swedish legislation at issue, but rather from Article 3(3) of the RES Directive itself which, as stated above, expressly allowed Member States to distinguish between domestically and foreign-produced renewable energy. This indeed was Advocate General Bot's approach, who proposed that Article 3(3) be declared invalid (although this had not been raised in the referring court's Order for Reference). The CJEU, however, did not follow this approach, but instead noted first that, while the RES Directive clarified that Member States have the right to decide to what extent they support green energy produced in another Member State, it did not fully harmonise national support schemes such as to exclude the application of Article 34 TFEU.[67] Next, the CJEU held that, while the Swedish rules constituted a measure having equivalent effect to a quantitative restriction and, as such, was prima facie contrary to Article 34 TFEU, promoting the use of renewable energy sources for the production of electricity constituted a legitimate objective which was in principle capable of justifying barriers to the free movement of goods (citing *PreussenElektra*, the Kyoto Protocol and Article 194(1)(c), inserted by the Treaty of Lisbon).

The crux of the judgment, however, lies in its reasoning on proportionality, where it adopts what can be termed a "close-look" approach. Here, considering the proportionality of the territorial restriction as such, the CJEU reasoned that, while the internal market in renewable energy had moved on since *PreussenElektra*, the Swedish scheme at issue was nevertheless proportionate "*as EU law currently stands*".[68] In particular, despite the fact that the RES Directive provided for guarantees of origin of renewable energy (Article 15), the "*systematic identification*" of green

[65] Case C-379/98 *PreussenElektra* ECLI:EU:C:2001:160.
[66] *Ibid*, §§68-81.
[67] *Vindkraft*, op. cit., §§61-63.
[68] *Ibid*, §105.

electricity was still "*difficult to put into practice*" at the distribution and consumption stages,[69] and national support schemes for green electricity had not yet been fully harmonised,[70] with different Member States having different RES targets and different renewable energy potentials (and costs).

Thus far, the CJEU's reasoning was fully in line with its jurisprudence to date and, while interesting for its acknowledgement of the continued imperfections in the EU internal market for renewable energy, unremarkable from a legal perspective. Indeed, had the judgment ended there, this would hardly have been surprising. In an unusual twist, however, the CJEU went on to consider the proportionality of the Swedish legislation as a whole, and specifically of its use of a market mechanism to achieve Sweden's environmental/energy goals. Here, the CJEU noted that, in designing its national support scheme so that consumers bear the additional cost of producing renewable energy, Sweden was validly exercising its discretion in pursuit of the legitimate aim of increasing green electricity production; further, the ability of the scheme to achieve that aim was proven.[71] Nevertheless, in order to be proportionate, such a market must be proven to function effectively and fairly such that traders subject to renewables obligations can in fact "*obtain certificates effectively and under fair terms*".[72] To this end, it was,

> "*important that mechanisms be established which ensure the creation of a genuine market for certificates in which supply can match demand, reaching some kind of balance, so that it is actually possible for the relevant suppliers and users to obtain certificates under fair terms*."

Further, the CJEU added, the method for determining the penalty for non-compliance with the quota and the amount of that penalty must not go beyond what is necessary to provide an incentive to comply, and must not be "*excessive*".[73]

This aspect of the judgment is fascinating in that it shows the CJEU's willingness to embrace a Member State's effort to use a market-based approach in achieving its environmental/energy goals, but only if the Member State proves that the market is actually functioning the way that *the CJEU considers* it should. As such, it represents a curious *mélange* of economic liberalism (leave it to the market) and paternalism (as long as the market works the way we, the judges, want it to). The CJEU's acceptance of this example of market-based environmental policy instrument, therefore, is resoundingly conditional. From the economically liberal perspective, the idea that any institution, much less a court (which is not a regulator, nor equipped with particular economic expertise), would be tasked with deciding what "kind of balance" is "fair" enough to constitute a "genuine" market is rather strange. What is a "fair" balance? Who should decide, and on what (presumably value-laden) criteria? Why should the "fairness" of a market determine whether it is "genuine"? These questions certainly do not admit of easy answers, and may cause serious problems of (economic) uncertainty. In another sense, however, the (market-environmental-social) tensions in *Vindkraft* find their source in the very model of constitutionally embedded economic liberalism provided for in the EU Treaties themselves, which of course the CJEU is tasked with upholding. In this sense, the linguistic and

[69] *Ibid*, §§90, 96.
[70] *Ibid*, §94.
[71] *Ibid*, §§109-112.
[72] *Ibid*, §113.
[73] *Ibid*, §116.

conceptual tensions in *Vindkraft* can be traced to the indeterminacy of the very notion of a social market economy which lies at the foundation of the EU Treaties.

Some months later, the Fourth Chamber effectively repeated its *Vindkraft* position in *Essent Belgium*,[74] this time in the context of the previous RES Directive,[75] and concerning the Belgian scheme whereby only Belgian-produced renewable energy could be taken into account in determining whether Belgian electricity producers had satisfied their renewable obligations. Again, the CJEU declined to follow the Opinion of Advocate General Bot, [76] who had concluded that the Belgian scheme breached EU internal market law, as the EU internal electricity market had now developed far enough to make it possible to verify whether electricity produced in other Member States comes from renewable sources, and that *PreussenElektra* was no longer good law.

Aside from territoriality restrictions on the grant of green electricity certificates, the CJEU has also considered the compatibility of other limitations on the grant of such certificates by Member States. In its 2013 judgment in *Industrie du Bois*,[77] the plaintiff challenged the compatibility of the restrictions placed by the Walloon region of Belgium on the grant of green certificates to co-generation plants powered by wood (as opposed to, in particular, biomass), on the ground that these restrictions breached the principle of equal treatment and the EU Charter of Fundamental Rights. The CJEU was not convinced by this argument, holding that, in the present state of EU law, Member States were entitled, when introducing national support schemes for cogenerations and renewable energy production, to provide for enhanced support measures of particular benefit to cogeneration plants principally using biomass.

While under the RES Directive Member States now have express competence to cooperate with other Member States and with third States to achieve their national RES targets (Article 3(3)(b)), this does not mean that Member States have the competence to enter into agreements with third States recognising the renewable source of energy produced in that State. Rather, as the CJEU held in December 2014 in *Green Network*, the guarantees of origin provided for in the RES Directive apply only to EU-produced green electricity.[78] In that case, therefore, an Italian law enabling Italy to exempt from its green certificates scheme green electricity produced in a third State (in that case, Switzerland) where an agreement between Italy and Switzerland had been signed was held to be contrary to the EU Treaty. Specifically, applying Article 3(2) TFEU, the CJEU held that the EU provisions on guarantees of origin (in that case, applying the prior RES Directive, Directive 2001/77) had been harmonised such that, if Italy were to sign an agreement on the topic with Switzerland, this would be liable to "*alter the scope of common rules*" within the meaning of the CJEU's case-law on the EU's exclusive competence. *Green Network*, therefore, emphasises the important distinction between the EU rules on guarantees of origin (which, according to *Green Network*, are harmonised) and national support schemes in the form of green electricity certificates (which, according to *Vindkraft* and *Essent Belgium*, are not).

[74] *Op. cit*.
[75] Directive 2001/77 on the promotion of electricity produced from renewable energy sources in the internal electricity market OJ 2001 L 283/33.
[76] Opinion of AG Bot, ECLI:EU:C:2013:294
[77] *Op. cit*.
[78] *Op. cit*.

b. (National) measures aimed at promoting greener products/energy by granting financial support

A further important judgment on the renewable energy/internal market interface is the Second Chamber's December 2013 judgment in *Vent de Colère*.[79] This case concerned the question whether French legislation obliging electricity distributors to purchase wind energy at a higher price than the normal market price constitutes State aid within the meaning of Article 107(1) TFEU (and therefore should have been notified to the Commission prior to grant), where the costs ensuing from this purchase obligation are compensated by a public fund to which electricity producers, suppliers and distributors contribute, and are passed on to consumers via a uniform and generally applicable charge. In finding that the French mechanism constituted an "*intervention through State resources*" (in that case, the key question in evaluating whether the law entailed State aid), the CJEU distinguished the German feed-in tariff at issue in *PreussenElektra*, which had been held not to entail State sources, on the ground that the charge intended to offset the extra costs from the French purchase obligation was collected from all final consumers of electricity in France and entrusted to the French *Caisse des dépôts et consignations*, a public body.[80] Further, the French Minister for Energy determined the amount of that charge, and French law provided for an administrative penalty for failure to pay the charge, with the French State ultimately guaranteeing that any shortfall in sums collected as compared to the additional costs of the purchase obligation for electricity undertakings would be made up by the State. As a result the CJEU's judgment, the French wind energy promotion scheme, which had been in operation since 2000, constituted illegal aid, meaning that in principle it should be repaid along with interest on the amounts due. The CJEU refused to limit the temporal effects of the judgment following argument as to its serious financial consequences for the economic actors at issue.

c. (National) laws aimed at promoting good environmental performance by granting exclusive or special rights or by (national or European) GPP measures

Outside the context of national renewable energy schemes, the CJEU has also the considered the legality of other national policy instruments aimed at promoting good environmental performance. In *Dutch Coffee*, the CJEU held that the way in which the province of North Holland had included an eco-label requirement in its technical specifications for a tender for the supply and management of automatic coffee machines breached the 2004 Public Procurement Directive.[81] Specifically, the province had referred to two particular eco-labels in the award criteria, the EKO label (an organic produce label) and the MAX HAVELAAR label (a fair trade label). Drawing on its jurisprudence in *Concordia Bus* and *Wienstrom*,[82] the CJEU recalled that the contracting authority's decision to award a contract to the tenderer who submits the most economically advantageous tender must be based on criteria which are in compliance with the requirements of the Directive, which award criteria may in principle be not only economic but also qualitative, including environmental characteristics

[79] *Op. cit*.
[80] *Ibid*, §22.
[81] OJ 2004 L 134/114.
[82] Case C-513/99 *Concordia Bus Finland* ECLI:EU:C:2002:495, Case C-448/01 *Wienstrom* ECLI:EU:C:2003:651.

(Article 53(1) of the 2004 Directive).[83] Recalling, however, that the award criteria must be linked to the subject-matter of the contract, and must be objective, with the award procedure in compliance with the principles of equality, non-discrimination and transparency. In the present case, the award criteria at issue concerned environmental and social characteristics within the meaning of the Directive, and related to products to be supplied as part of the subject-matter of the contract. Further, as regards the fair trade criterion, there is no requirement that an award criterion relates to an "*intrinsic characteristic of a product*" as opposed to the way in which the product was produced.[84] Nevertheless, the Directive did not entitle a contracting authority to make use of a specific eco-label a technical specification of the tender; rather, use of such a label was allowed only to create a presumption that the products bearing the label comply with the characteristics defined, but other appropriate means of proof must also be allowed.[85]

In *Evropaïki Dynamiki*, the General Court rejected the plaintiff's argument that the European Environment Agency (EEA) had, in the context of an award criterion referring to the "*general environmental policy of the company*", wrongly awarded a tender to the only tenderer which had submitted a certified environmental management scheme. The plaintiff argued that, rather than relying on the certificate, the EEA should have had regard to the actual environmental performance of the company. Rejecting this argument, the General Court held that the general wording of the award criterion enabled tenderers to present their environmental policy as they wish and to supply the evidence they consider to be appropriate; submission of an environmental management certificate was "*one of a number of conventional ways of providing*" such evidence.[86] Importantly, the evidence showed that, in that case, the evaluation committee had actually made a comparative assessment of the tenders and had evaluated whether the environmental policies submitted by the tenderers were "*genuine*", and had not simply accepted the environmental management certificate without more.[87]

In effect, therefore, the CJEU's reasoning in the context of public procurement mirrors, albeit applied in a partially codified legislative context, the "close-look" proportionality seen in the free movement context considered above: the means used to achieve the environmental/social goal at issue must not be more restrictive than actually necessary to achieve those goals.

d. The judicial role in the EU carbon market: the case of the ETS

While space precludes detailed discussion of the field,[88] no discussion of the CJEU's role in striking the economic/environment balance is complete without mention of the Court's growing jurisprudence of the CJEU relating to the EU's Emissions Trading Scheme (ETS). The first generation of EU ETS cases that found their way before the CJEU comprised Member State challenges to Commission decisions on their national allocation plans proposed for Phases I and II of the EU ETS.

[83] *Dutch Coffee, op. cit*., §85.
[84] *Ibid*, §91.
[85] *Ibid*, §94.
[86] *Op. cit*., §75.
[87] *Ibid*, §76.
[88] For greater discussion of the role of the CJEU in governing the EU ETS, see G. Dari-Mattiacci and J. Van Zeben, "Legal and Market Uncertainty in Market-Based Instruments: The Case of the EU ETS" (2012) 19 *NYU Environmental Law Journal* 415.

While these cases remain interesting in demonstrating how intensively the CJEU was willing to review Commission decisions of an essentially economic nature *qua* market regulator (answer: rather surprisingly intensively),[89] they are generally now of less direct significance with regard to the post-Phase II, centralised allocation, regulatory framework.[90] However, we are already now seeing judgments on the Phase III regulatory framework starting to appear. One of the first of these was the General Court's 2013 judgment in *Poland v Commission*, in which Poland sought unsuccessfully to challenge the Commission's decision as to the transitional measures for harmonised free allocation of allowances, taken pursuant to Article 10a of the ETS Directive.[91] In rejecting Poland's arguments that the Commission had not sufficiently taken into account differences between Member States and regions (in particular, Polish dependency on coal) and had gone beyond what was necessary to achieve the directive's aims, the GC distinguished its Phase I and II judgments on the basis that, in these Phases, the margin of discretion left to Member States in transposing the ETS Directive was far greater.[92]

Despite the specific legislative context of the CJEU's judgments on the ETS, a parallelism of argument is clear in the CJEU's ETS cases and many of the other cases concerning the environment/economic interface discussed above. In *Commission v Estonia*,[93] for instance, in arguing that it should have been allowed to set maximum total quantities of greenhouse gas emissions allowances, the Commission made precisely the same argument that the CJEU subsequently adopted in *Vindkraft*, i.e., that the environmental objective of the scheme could only be achieve if demand in the market outstrips supply.[94] Due to the narrow role attributed to the Commission under the 2003 ETS Directive,[95] however, the CJEU rejected that argument.

Similarly, in *Iberdrola*, the CJEU interpreted the 2003 ETS Directive as compatible with a Spanish law aimed at reducing the "windfall profits" earned by electricity producers due to the initial structure of the ETS whereby such producers were allocated allowances for free, and could subsequently sell them on the allowance market. In holding that the Spanish law to reduce the price that such producers received for their electricity was compatible with the ETS Directive, the CJEU emphasised that free allocation of allowances was not directly related to the ETS's environmental aims, and that the Spanish rules did not affect the functioning of the allowances market, but only the level of profit of the electricity producers, and did not compromise the environmental aims of the ETS.[96] Notably, however, the CJEU accepted the electricity producers' claim that the way that the Spanish scheme worked in fact could in some cases reduce the incentive to reduce greenhouse gas emissions, but

[89] See, e.g., Case T-183/07 *Poland v Commission* ECLI:EU:T:2009:350 (Commission reduction of industry emission caps by 26.7% annulled – appeal to CJEU dismissed March 2012 in Case C-504/09 P;) Case T-263/07 *Estonia v Commission* ECLI:EU:T:2009:351 (Commission reduction of industry emission caps by 47.8% annulled – appeal to CJEU dismissed March 2012 in Case C-505/09 P).

[90] Some earlier cases are, however, clearly still relevant: see, for instance, Case C-524/09 *Ville de Lyon* ECLI:EU:C:2010:822, where the Fourth Chamber of the CJEU rejected, on confidentiality grounds, the claim that an administrator of a national registry of ETS allowances should be obliged to give out details of ETS trading data, account holders and the like in the medium term after completion of the relevant transactions.

[91] Case T-370/11 *Poland v Commission* ECLI:EU:T:2013:113.

[92] *Ibid*, §§52 – 53.

[93] Case C-505/09 P *Commission v Estonia* ECLI:EU:C:2012:179.

[94] *Ibid*, §72.

[95] Directive 2003/83 establishing a scheme for greenhouse gas emission allowance trading within the Community OJ 2003 L 275/32.

[96] *Op. cit*., §§35-58.

held that this did not mean the scheme was contrary to the ETS Directive, as long as it did not "*remove that incentive entirely*".[97] Here, therefore, the CJEU accepts that, however well designed, markets, including those with environmental objectives, do not always work perfectly. In *ŠKO-ENERGO*, the CJEU again noted that Member States are free to adopt measures which may affect the economic implications of using ETS emissions allowances, as long as such measures do not neutralise the principle of free allocation of allowances, which was temporarily applicable in Phases I and II of the EU's ETS, or undermine the Directive's aims. In that case, a Czech law imposing a gift tax of 32% on freely allocated emission allowances, with an exemption for photovoltaic power stations, was held in principle to be contrary to the Directive (although this was ultimately for the national court to decide).

The most notable CJEU judgment on the EU ETS to date, however, is indisputably the *ATAA* judgment,[98] where a challenge by the Air Transport Association of America and a number of US airlines to the inclusion of third country airlines within the scope of the ETS failed. In a lengthy and complex judgment, the Grand Chamber of the CJEU held that the application of the EU ETS to third country airlines was compatible with international law and, in particular, with the principle of territoriality, given that the scheme only applies to commercial aircraft that arrive at or depart from a Member State airport.[99] Nor did the fact that the ETS applied to the whole of the aircraft's journey (not just that which occurred over EU territory) affect this conclusion, given the EU's objective under Article 191(2) TFEU of achieving a high level of environmental protection and its status as a party to the UNFCCC.[100] The CJEU also considered that the extension to third country operators did not infringe the more specific relevant instruments of international law, viz. the Chicago Convention (on the ground that the validity of EU law cannot be reviewed in the light of that Convention)[101] and the Open Skies Agreement between the US and EU (on the ground that the extension was compatible with the EU's obligation to exempt the fuel load from taxes, fees and charges on fuel).[102] The judgment was highly controversial, and has contributed to a major dispute with the vast majority of members of the International Civil Aviation Organization (ICAO), leading to the EU's 2013 decision to "stop the clock" on the application of the ETS to flights between EU airports and third countries, and the EU's 2014 Regulation suspending such application between 2013 and 2016, in view of the ICAO's roadmap to develop a global market-based mechanism to tackle aviation emissions by 2016, to be implemented by 2020.[103]

4. Conclusion

These are critical times for the environment/economy interface within the EU. Its commitment to sustainable development at a constitutional level cannot be doubted. Yet the meaning of sustainable development, EU-style, is still unclear, and the past years, with their economic

[97] *Ibid*, §58.
[98] Case C-366/10 *ATAA* ECLI:EU:C:2011:864.
[99] *Ibid*., §127.
[100] *Ibid*, §128.
[101] *Ibid*, §72.
[102] *Ibid*, §145.
[103] Regulation 421/2014 establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions OJ 2014 L 129/1.

difficulties, have seen a shift at political and policy levels towards prioritising development over sustainability. At the same time, the popularity, at Member State and EU levels, of environmental market-based instruments to achieve environmental goals[104] has brought a striking increase in cases coming before the CJEU in which the Court is asked to balance environmental and economic goals. In this context, the CJEU is becoming a key forum in setting the legal boundaries of the environment/economic interface within the EU, and its role as a non-majoritarian, independent and politically-insulated institution, focused on interpreting and upholding the EU Treaties, is thrown into sharp relief.

While the case-law is still rapidly developing, overall the CJEU has demonstrated itself to be a constitutionalist actor which is serious about the requirement to achieve real, substantive integration of environmental protection requirements into the EU's economic policies, as required by Article 11 TFEU. This has meant that, in important cases (*Vindkraft*, *Essent Belgium*), its acceptance of market mechanisms to achieve environmental goals has been markedly conditional. Markets are not sacred, inviolable spaces to be protected from political or policy interference; rather, they are a means to a (political/policy) end and, where that end is not in fact being achieved, the legislator or regulator must step in. Specifically, the CJEU has used what can be termed a "close look" proportionality analysis, closely examining the purported environmental aims were actually being realised, and in the least restrictive manner. Moreover, a welcome parallelism of approach can be discerned in the CJEU's jurisprudence on different types of environmental market-based instruments, from markets in renewable energy (green certificate schemes), to markets trading rights to pollute (the ETS), to financial incentives, to GPP measures. Nevertheless, of course, the CJEU's role as an actor in environmental integration is ultimately limited by legislation, where such legislation exists, and the legislative context to the cases before it. After all – in contrast to the constitutional prohibition on restrictions to trade within the internal market - there is no constitutional prohibition on environmental damage, even the most serious and flagrant environmental damage, in the EU Treaties. In this sense, the implied prioritisation of economic over environmental goals in the EU Treaties will, despite the CJEU's integrationist efforts, persist.

[104] See also, for instance, Directive 2012/27/EU on energy efficiency OJ 2012 L 315/1 , Article 7.