LECTURE 2: PRINCIPLES OF EU ENVIRONMENTAL LAW

Content

Introduction

Environmental principles inform legal frameworks that relate to environmental protection or sustainable development. They act as guidance for national legislators, judges and decision-makers, giving the EU law specific shape and meaning. They are used in a whole host of government and public authority decisions, including planning applications, management of marine protected areas and dealing with contaminated land. Since the principles of EU environmental law are embodied in a vast array of binding legal regulation, acting against them (even incorrect interpretation) is *contra legem* and may constitute a violation of EU law.

One group of environmental principles has been used in EU policy-making since the 1970s, similar to a broader set of principles which was agreed globally at the 1992 Rio Declaration on Environment and Development.

Article 191(2) of Treaty on the Functioning of the European Union (TFEU) sets out four main environmental principles that must guide policy within the scope of EU law: *"Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."*

These principles have been influential in formulating a range of EU law. Furthermore, a 'high level of environmental protection' is outlined, which is determining for proportionality of directives and regulatory actions (see below). Since Article 191(2) TFEU is directed at action at EU level, that provision cannot be relied on as such by individuals in order to exclude the application of national legislation in an area covered by environmental policy for which there is no EU legislation adopted. Similarly, the competent environmental authorities cannot rely on Article 191(2) TFEU in the area of the environment, in the absence of any national legal basis, for the purposes of

imposing preventive and remedial measures (Case C-534/13 *Fipa Group and Others*, para. 40-41; Case C-254/08 *Futura Immobiliare and Others*, para. 48; Case C-172/08 *Pontina Ambiente*, para. 33).

A whole array of broader, general principles (including proportionality and subsidiarity) is also crucial for the effectiveness of the environmental protection and provide national judges guidelines on how to handle EU law in practice. These principles, outlined in the TFEU Articles 3, 5, 9-12, apply to the environmental policy realm but are not specifically 'environmental'.

A. General Principles

EU law primacy

EU law takes precedence over the law of the Member States and requires all Member State bodies to give full effect to the various provisions of EU law. National courts are, therefore, required **to interpret their national law, to the greatest extent possible**, in conformity with the requirements of EU law. This may even result into the change of established case-law, where necessary, if it is based on an interpretation of domestic law that is incompatible with the objectives of a directive (Case C-441/14 *DI*, para 33).

The meaning and scope of terms for which EU provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part (Case C-184/14 *A*, para. 32).

> **Example:** In Case C-585/10 *Møller*, the CJEU noticed that the term 'sow' does not have a univocal meaning in all the official languages. It decided for interpretation which equates gilts with the sows because, for industrial installations which have a significant potential for pollution, both sows and gilts have the same effect on the environment.

The CJEU generally favours giving an autonomous interpretation to concepts used in EU measures, with some exceptions when the Member States enjoy certain discretion (Case C-81/96 *Gedeputeerde Staten van Noord-Holland*, on the question of when a *development consent* is granted). Nevertheless, as regarding the purposes of the rules and the general scheme of environmental protection, any derogations must be interpreted strictly, both in national and EU law.

> **Example:** The interpretation of derogations from nature protection advocated by the CJEU is deliberately restrictive (See Case C-304/05 *Commission v. Italy*, para. 82). The CJEU even calls for 'faithful transposition', which is a term it uses exclusively in this respect and never in regards to other fields of EU law (for the Birds Directive, See Case C-38/99 *Commission v. France*, para. 53; for the Habitats Directive, Case C-6/04, *Commission v. United Kingdom*, para. 256). Similarly, in Case C-304/15 *Commission v United Kingdom*, the CJEU interpreted strictly condition for large combustion plants to qualify for derogation, because such interpretation was supported by the context of the particular footnote and by the objective of Directive.

While the principle of interpreting national law in conformity with EU law has certain limits and, in particular, cannot serve as the basis for an interpretation of national law *contra legem*, it nevertheless requires, to the greatest extent possible, that the whole body of domestic law is taken into consideration, and that the interpretative methods recognised by domestic law are applied, with a view to ensuring that EU law is fully effective, and achieving an outcome that is consistent

with the objective it pursues. In short, the interpretation also has **to ensure that EU law is fully effective** (Case C-573/17 *Popławski*, para 53-55).

> **Example:** In Case C-167/17 *Klohn*, the CJEU concluded that the Member States are required to interpret national law to the fullest extent possible, in such a way that persons should not be prevented from seeking, or pursuing a claim for, a review by the courts in environmental matters by reason of the financial burden that might arise as a result.

Where it is unable to interpret national law in compliance with the requirements of EU law, a national court may be required **to disapply case-law which represents an obstacle to the full application of EU law, and even any provision of national law which is contrary to a provision of EU law** with direct effect (Case C-573/17 *Popławski*, para 58, 61). It is not necessary for the parties to expressly plead before the national courts which individual provisions of national law those courts should disapply or interpret in accordance with EU law. Instead, the identification of those provisions and the development of the approach for eliminating any contradiction between national law and EU law is part of the obligation of national courts to achieve the result envisaged by the directive (Opinion in Case C-254/19 *Friends of the Irish Environment*, para. 67, 69). In that way, the principle of primacy of EU law has made it possible to overcome numerous procedural obstacles arising from national law, in proceedings based on EU law. In some cases, it has led to the national court applying procedural rules and adopting measures in situations not provided for by national law (Case C-415/11 *Aziz*, para. 64).

However, there are **exceptions to the obligation to disapply** the conflicting measures if there is an overriding consideration: A risk that the annulment of the measure could create a legal vacuum that is incompatible with that Member State's obligation to adopt measures to transpose another act of EU law concerning the protection of the environment (Case C-41/11 *Inter-Environnement Wallonie and Terre wallonne*) or another general interest. In any event, any possible the maintenance of the effects of those acts may last only as long as is strictly necessary to remedy the breach found (Case C-24/19 *A and Others () and à Nevele*).

> **Example:** In *Case C-411/17 Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*, the CJEU recognised that the security of electricity supply of the Member State concerned was also an overriding consideration. The Court nevertheless specified at the same time that considerations as to the security of electricity supply could justify maintaining the effects of national measures adopted in breach of the obligations under EU law only if the effects of those measures were annulled or suspended, and there was a genuine and serious threat of disruption to the electricity supply of the Member State concerned which could not be remedied by any other means or alternatives, particularly in the context of the internal market.

Effectiveness

Under the principle of cooperation in good faith laid down in Article 4(3) of the Treaty on European Union (TEU), Member States are required to give full effect to the provisions of the EU law. This means they have to interpret the national law in line with EU law, to refuse to apply any conflicting provision of national law (see above) and also **to nullify the unlawful consequences of a breach of EU law**. Such an obligation is owed, within the sphere of its competence, by **every organ of the Member State** concerned (Case C-72/95 *Kraaijeveld and Others*, para. 61; Case C-435/97 *WWF and Others*, para. 71).

Example: In Case C-201/02 *Wells*, the CJEU held it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment. Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project.

The principle of effectiveness also means that the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law must not make it in practice impossible or excessively difficult to exercise these rights (Case C-71/14 *East Sussex County Council*, para. 54-55; Case C-416/10 *Križan*, para. 106).

Example: In Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, the CJEU held that the environmental NGOs must be able to rely on the same rights as individuals and that it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organisations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest (see also Case C-570/13 *Gruber*, regarding the rights of individuals).

The Member States' obligation to achieve the result envisaged by EU law also means that they have to ensure that infringements of EU law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to violations of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive (see opinion of GA in Case C-304/02 *Commission v France*).

This general requirement is further specified in the secondary EU law, including the Environmental Crime Directive, which requires certain offences to be punishable by effective, proportionate and dissuasive criminal sanctions. The Directive does not stipulate types or levels of penalties. The Member States are provided with the degree of flexibility regarding determining the quantity and quality of sanctions. Moreover, a plethora of EU environmental directives require the Member States to establish 1) effective system of sanctions, or 2) effective system of sanctions with particular sanctions and measures such as withdrawal of permit, or actions to ensure that compliance is restored within the shortest possible time. Once again, the sanctions have to be effective, proportionate and dissuasive.

Example: In Case C-487/14 *Total Waste Recycling*, the CJEU assessed the proportionality of the fine imposed by the Inspectorate for breach of waste shipment legislation. The fine was imposed on a transport company, which used a different border crossing point than agreed by the competent authorities. The fine was equal to a penalty imposed in the complete absence of the transportation permit. According to the CJEU, the national court should assess whether the amount of the sanction reflects, in particular, the risks of harm which may be caused by specific conduct in the field of the environment and human health. The amount of the sanction should not go beyond what is necessary in order to achieve the objectives of ensuring a high level of protection of the environment and human health, taking into account all the factual and legal circumstances of the case (see also a similar Case C-69/15 *Nutrivet*: *"the national court is required, in the context of the review of the*

proportionality of such penalty, to take particular account of the risks which may be caused by that infringement in the field of protection of the environment and human health").

In practice, there may be **limits to the full effectiveness of EU law**. First, a directive cannot of itself **impose obligations on an individual** and cannot, therefore, be relied upon as such against an individual (Case C-122/17 *Smith*, para. 42). Furthermore, the national court, which has the task of applying EU law, sometimes has to **balance a number of fundamental rights**. (Case C-73/07 *Satakunnan Markkinapörssi and Satamedia*, para. 52-53). In some cases, full application of a provision of EU law must give way to a general principle of law (Case C-234/17 *XC and Others*, para. 53) or a fundamental right (Case C-310/16 *Dzivev and Others*, para. 33, 34, 36, 39). In particular, deprivation of liberty must be a measure of last resort (Opinion in C-528/15 *Al Chodor*, para. 55).

> **Example:** In Case C-752/18 *Deutsche Umwelthilfe*, the CJEU dealt with refusal of a German regional government to comply with a court judgement ordering the Land of Bavaria to amend its air quality plan by imposing a traffic ban on diesel vehicles in the city of Munich. The Land of Bavaria refused to introduce such a ban, however, despite an order for recurring financial penalties having been made against it (the payment of financial penalties does not reduce the *Land's* resources). The national court contemplated taking the senior political representatives into coercive detention (prison) which could collide with the Constitution. The CJEU concluded that the national court could not order coercive detention solely on the basis of the principle of effectiveness and of the right to effective judicial protection. Any limitation on the right to liberty must be provided for by a law that meets the requirements of Article 52(1) of the Charter.

The full effectiveness of EU law and adequate protection of the rights which individuals derive from it may, where appropriate, be ensured by the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law for which the State can be held responsible. That principle applies to any case in which a Member State breaches EU law, whichever public authority is responsible for the breach (Case C-168/15 *Tomášová*, para. 18-19).

Direct effect

The principle of direct effect enables individuals to immediately invoke an EU law provision before the national court independent of whether national law test exists. Where the national judge is unable to interpret national law in compliance with the requirements of EU law, it has to consider whether direct applicability of EU law is possible. This way, the direct effect principle ensures the application and effectiveness of EU law in case the Member States hesitate to implement it correctly. And as a consequence, it helps to protect the rights of individuals.

The **primary EU legislation** has direct effect if the particular obligation is precise, clear and unconditional and does not call for additional measures. The **EU regulations** always have direct effect (see Art. 288 TFEU). A **directive** has direct effect when its provisions are unconditional and sufficiently clear and precise and when the Member State has not transposed the directive by the deadline. However, it can only have direct vertical effect (directives may not be cited by the Member State against an individual. **Decisions** may have direct effect when they refer to a Member State as the addressee (only a direct vertical effect).

> **Example:** With regard to Art. 47 of the Charter, the CJEU has held that in the context of a dispute relating to a situation governed by EU law, that article is sufficient in itself and does not need to be made more specific by provisions of EU or national law in order to

confer on individuals a right which they may rely on as such (Case C-414/16 *Egenberger*, para. 78).

The CJEU approaches the concept of direct effect in the field of **environmental protection** in order to ensure not only the protection of the individuals concerned but also to enable the effective enforcement of EU law. The environmental directives rarely expressly grant rights to individuals but if they fix limit values for the protection of human health, then – according to the CJEU - they also confer on the persons concerned a legally enforceable right to compliance with those limit values (Case C-59/89 *Commission v Germany*). It would be incompatible with the binding effect attributed to a directive to exclude, in principle, the possibility that the obligations which it imposes may be relied on by those concerned (Case C-243/15 *Lesoochranárske zoskupenie VLK*, para. 44).

Therefore, the individuals concerned, including the environmental NGOs, are able to rely on the EU directives in the decision-making procedures, where the directives require, or before the national courts. They qualify as participants or plaintiffs irrespective of completely absent or overly restrictive national rules on *locus standi*.

As regards **participation in decision-making**, the CJEU confirmed direct effect of the EU directives implementing the second pillar of the Aarhus Convention: Art. 11 of the EIA Directive (Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*) and Art. 6(3) of the Habitats Directive (Case C-243/15 *Lesoochranárske zoskupenie VLK*). There is no case-law as regards direct effect of the Industrial Emissions Directive, but its provisions concerning public participation at decision-making are even more comprehensive and detailed than those of the EIA Directive (Art. 23-24).

As regards **access to justice**, the CJEU confirmed direct effect of numerous EU directives in line with Art. 9(3) of the Aarhus Convention which requires that *"members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."* As a consequence, both individuals and environmental NGOs should be able to challenge administrative acts based on EU environmental law before the national courts. Moreover, the legal form of these acts cannot, in principle, prevent the individuals from access to justice (Case C-237/07 *Janecek*).

> **Example:** In Case C-404/13 *ClientEarth*, the CJEU held that EU law (Art. 23 of Directive 2008/50) imposes a clear obligation to establish an air quality plan that complies with certain requirements; an obligation capable of being relied on by individuals as against public authorities. In Case C-529/15 *Folk*, the CJEU concluded that persons with fishing rights must have the power to initiate a review procedure in relation to environmental damage. In C-197/18 *Wasserleitungsverband Nördliches Burgenland and Others*, the CJEU held the individuals concerned including municipalities must be able to requests to have the Nitrate Action Programme Regulation amended. In Case C-664/15 *Protect Natur-, Arten- und Landschaftschutz Umweltorganisation*, the CJEU held that the environmental NGOs must be able to access the court to challenge a decision approving a project which may be in breach of an obligation laid down in the Water Framework Directive.

In particular, the last abovementioned judgment provides simple permission: If the matter is governed by EU environmental law, the Member States cannot, in principle, prevent the individuals concerned from access to the court, even if, for example, these individuals are excluded

from participation in the authorisation procedures. And if such participation is a precondition for access to justice, these individuals must be allowed to participate already at the stage of administrative proceedings.

Subsidiarity and proportionality

The principles of subsidiarity and proportionality govern the exercise of the EU's competences. Both principles are laid down in Article 5 of the TEU. The criteria for applying it are set out in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties.

In areas in which the EU does not have exclusive competence, such as the protection of the environment, the **principle of subsidiarity** defines the circumstances in which it is preferable for action to be taken by the EU, rather than the Member States. In other words, the principle of subsidiarity authorises intervention by the Union when the objectives of an action cannot be sufficiently achieved by the Member States. Subsidiarity is first and foremost a political principle, a sort of rule of reason. Its aim is to regulate the exercise of powers and to *justify their use in a particular case*.

There are three preconditions for intervention by Union institutions in accordance with the principle of subsidiarity: 1) the area concerned does not fall within the Union's exclusive competence (i.e. non-exclusive competence); 2) the objectives of the proposed action cannot be sufficiently achieved by the Member States (i.e. necessity); 3) the action can, therefore, by reason of its scale or effects, be implemented more successfully by the EU (i.e. added value).

The subsidiarity principle is not intended to limit the EU's competence on the basis of the situation of any particular Member State taken individually but requires only that the proposed action can, because of its scale or effects, be better achieved at the level of the EU, and provisions specific to various areas, including the internal market, laid down in the Treaties (Case C-508/13 Estonia v Parliament and Council, para. 53).

> **Example:** In Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco*, para. 181-183, the CJEU concluded that eliminating the differences on the manufacture, presentation and sale of tobacco products, while ensuring a high level of health protection, is in line with the principle of subsidiarity.

The reasons for concluding that a Union objective can be better achieved at Union level should be substantiated by qualitative and, wherever possible, quantitative indicators. The added value might be established by more effective protection of the environment and human health. The benefits for the environment might even come as a consequence of harmonised rules concerning placing certain products on the market (such as seal products, see *Case C-583/11 P, Inuit Tapiriit Kanatami and Others v Parliament and Council*).

The principle of subsidiarity is closely bound up with the **principle of proportionality**, which requires that any action by the EU should not go beyond what is necessary to achieve the objectives of the Treaties. The content and form of the action must be in keeping with the aim pursued: 1) The measure is suitable to achieve a legitimate aim, 2) it is necessary to achieve the aim and no less restrictive means are available, 3) the measure does not have an excessive effect on other interests. Draft legislative acts must take account of the need for any burden, whether financial or administrative, falling upon the EU, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.

> **Example:** In Case C-358/14 *Poland v Parliament and Council*, the CJEU confirmed that the EU was permitted to prohibit the sale of menthol cigarettes in the European internal market. According to the Court, the prohibition cannot be regarded as manifestly inappropriate for achieving the objective of facilitating the smooth functioning of the

internal market for tobacco and related products, taking as a base a high level of protection of human health, especially for young people. Any less restrictive measures do not appear to be equally suitable for achieving the objectives pursued.

The protection of the environment as a basis for regulation provides the Commission with a relatively wide margin of discretion, which is due to the fact that it is one of the fundamental objectives of the Union (Case C-41/11 *Inter-Environnement Wallonie and Terre wallonne*, para. 57) and the EU policy on the environment is to aim at a high level of protection.

Integration

In the **narrow sense**, the integration principle applies to considerations on environmental effects of a new project. The most notable example is the integrated pollution prevention and control regime introduced by the 1996 IPPC Directive, which was amended, codified and finally replaced by the Industrial Emissions Directive. The integrated permitting procedures for the most significant industrial installations help to introduce the best available techniques and prevent or, where that is not practicable, to reduce emissions and the impact on the environment as a whole.

In the **broad understanding** (as embodied in Art. 11 of the TFEU), the integration principle requires that 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. Environmental integration in all relevant policy areas (Agriculture, Energy, Fisheries, Transport, etc.) is essential in order to reduce pressures on the environment resulting from the policies and activities of other sectors and to meet environmental and climate-related targets.

The integration principle became part of the EU Sustainable Development Strategy, which provides a long-term vision that involves combining a dynamic economy with social cohesion and high environmental standards. It requires a new emphasis on policy coordination and integration. As part of the implementation of the EU Sustainable Development Strategy, the Commission has introduced a system of extended impact assessment for all major policy proposals. Furthermore, the integration principle became part of the Cohesion Policy which - as the EU's main investment policy - has a particular responsibility to mainstream environment into its programmes and projects.

B. Specific Principles

Prevention principle

The prevention principle aims to prevent environmental damage; such as to protected species or to natural habitats, water and soil; rather than to react to it. It requires preventive measures to be taken to anticipate and avoid environmental damage before it happens.

Unlike the precautionary principle (see below), it is applied in law and policy when the risk of harm to the environment is clear. However, the precautionary and prevention principles have been closely linked to one another; for example, in the case of ozone-depleting chemicals.

> **Example:** In the 1970s, there was the general consensus (but no proof) at the international level that chlorofluorocarbons could destroy the ozone layer. Thus, their use was cautioned (precautionary). By the late 1980s, scientific evidence emerged that depletion of the stratospheric ozone layer increased ultraviolet radiation exposure, exacerbating the risk of skin cancers and cataracts in humans and animals. This prompted a preventive approach, requiring the phase-out of chlorofluorocarbons. Until the agreement of the Montreal Protocol in 1987, there was uncertainty as to which principle

was being relied upon, but there was a scientific consensus on the risk of harm by the time the Protocol came into force in 1989.

The prevention principle was one of eleven objectives and principles listed in the First EU Environmental Action Programme in 1973. Later on, it was applied to EU waste policy (e.g. incineration, landfill and wastewater), water management requirements, protection of biodiversity, environmental impact assessment and other fields on environmental regulation. Nowadays, it is central to the planning policy and underlies lots of environmental legislation.

> **Example:** The preamble of the SEA Directive emphasises that the adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in which to operate by the inclusion of the relevant environmental information into decision making. The inclusion of a wider set of factors in decision making should contribute to more sustainable and effective solutions.

Precautionary principle

Where there is uncertainty about the risk of environmental harm, the precautionary principle allows or requires protective measures to be taken without having to wait until the harm materialises. There is a set of factors shared in every definition of the precautionary principle - existence of danger and scientific uncertainty. As a result, the precautionary principle always deals with potential harm and serves as a tool to bridge uncertain scientific information and a political responsibility.

The principle has been applied globally to guide policy on issues such as chemicals and food safety, air quality or climate change. It is generally perceived, that the concept of precautionary principle in the EU law tends towards strict precaution and follows the "better safe than sorry" approach. For example, the EU's GMO policies are based on a strict application of the precautionary principle, which makes them the most restrictive ones in the world.

In EU legislation, the applications of the principle include, *inter alia*, the Environmental Quality Standards Directive, which sets environmental quality standards for priority substances on a precautionary basis. Similarly, the Water Framework Directive sets standards of various persistent organic pollutants, potentially toxic metals such as cadmium, and polycyclic aromatic hydrocarbons to achieve 'good' water quality. The deliberate release of Genetically Modified Organisms, including requirements for field testing in the research and development stage assessing how their use might affect ecosystems is subject to the GMO Directive.

Protection of Natura 2000 site is also based on precaution. In particular, Art. 6(3) of the Habitats Directive requires impact assessments to be carried out where a plan or project is likely to have a significant effect on the integrity of a designated habitat site.

> **Example:** In Case C-254/19 *Friends of the Irish Environment*, the CJEU held that the assessment of a project's implications must be carried out where it cannot be ruled out, having regard to the best scientific knowledge in the field, that the plan or project might affect the conservation objectives of the site. A previous assessment of that project, carried out before the original consent for the project was granted, cannot rule out that risk unless it contains full, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the works, and provided that there are no changes in the relevant environmental and scientific data, no changes to the project and no other plans or projects.

The case law of the CJEU has had a great impact on further development of the precautionary principle in the EU law, with milestone cases such as C-174/82 *Sandoz* and T-13/99 *Pfizer Animal Health v Council*. The principle was first employed by the CJEU in relation to the EU institutions in late 1990s in two judgments in the context of the BSE crisis (Case C-157/96 *National Farmers' Union and Others*; Case C-180/96 *United Kingdom v Commission*). Since then, it has been used both in relation to measures of the EU institutions or to measures of Member States, in derogation of the rules on free movement. In all cases there was indeed no scientific certainty as to the existence or extent of a risk to human health. Typically, cases arose in the area of vitamin or otherwise enriched foodstuffs (Case C-192/01 *Commission v Denmark*), novel foods (Case C-236/01 *Monsanto Agricoltura Italia and Others*), labelling requirements applicable to foods and food ingredients consisting of, or derived from, GMOs (*Case C-132/03 Codacons and Federconsumatori*) and again, the BSE (Case C-504/04 *Agrarproduktion Staebelow*).

Polluter Pays Principle

The polluter pays principle (PPP) requires polluters to bear the environmental and social cost of their actions. Prior to the recognition and application of the PPP, air and water resources were used as 'sinks' for pollution, with damage to human health and property being paid for by society rather than by the polluter. Disproportionate social and private costs of pollution were /being 'externalised' from the polluter to wider society. The PPP aims to overcome these defaults by requiring polluters to internalise the cost of potential pollution in the production process (built-in costs), rather than allowing society to incur costs in the aftermath.

> **Example:** In Case C-297/19 *Naturschutzbund Deutschland - Landesverband Schleswig-Holstein*, the CJEU was dealing with damage caused by management of the Natura 2000 sites. German language version of the Environmental Liability Directive implied that the Member States have the power to exempt operators and owners from all liability merely because damage has been caused by previous management measures. The CJEU refused such interpretation because that approach would widen excessively the scope of the exceptions and was contrary to the requirements that follow from the precautionary principle and the PPP.

The PPP has been utilised as an economic tool for managing different types of environmental pollution through embodiment in legislation including the Waste Framework Directive, the Landfill Directive and the Water Framework Directive. Article 1 of the Environmental Liability Directive is worded as follows: *'The purpose of this Directive is to establish a framework of environmental liability based on the "polluter-pays" principle, to prevent and remedy environmental damage.'*

Very often, the PPP serves as a guidance for interpretation of the abovementioned directives and considerations on their temporal scope.

> **Example:** In Case C-15/19 *Azienda Municipale Ambiente*, the CJEU held that the Landfill Directive does not preclude the national law which requires that a landfill site in operation at the date of transposition of the Directive must be subject to the obligations arising under that Directive, in particular the obligation to extend the after-care period following the closure of the landfill. That requirement is an expression of the polluter pays principle, which implies that the cost of disposing of the waste must be borne by the waste holders.

The PPP is not applied as an absolute rule, more as a method to determine the effectiveness of the financial burden as a whole. It should reflect the principle of proportionality (Case C-293/97 *Standley*).

> **Example:** In Case C-534/13 *Fipa Group and Others*, the CJEU was dealing with a dispute regarding sites in Italy polluted by industrial activity. Under the national law, the authorities could not require the new landowners who have not contributed to that pollution to carry out preventive and remedial measures. The Court held that the national legislation does not violate EU law, provided it is impossible to identify the polluter of a plot of land or to have that person adopt remedial measures.

Rectification of damage at source

Working alongside the prevention principle and the PPP, the rectification at source principle ensures damage or pollution is dealt with where it occurs. In perfect scenario, its application helps to prevent pollution which is not transferred elsewhere to get *out of sight*. Therefore, it is consistent with the principles of self-sufficiency and proximity applied in the waste management policies and set at the international level for the transboundary movements of hazardous wastes and their disposal (see the 1989 Basel Convention, to which the EU is a signatory).

> **Example:** In Case C-2/90 *Commission v Belgium*, the CJEU held that the principle that environmental damage should as a matter of priority be remedied at source entails that it is for each region, municipality or other local authority to take appropriate steps to ensure that its own waste is collected, treated and disposed of; it must accordingly be disposed of as dose as possible to the place where it is produced, in order to limit as far as possible the transport of waste.

In wider sense, the principle serves as an overriding guide to policy, opposite to end-of-pipe approach. For instance, encouraging the development of environmentally friendly technologies and products to reduce pollution at the earliest stage. Instead of the general environmental situation, the principle emphasises proximity to the source, to effectively fight accumulation of the negative externalities. It is reflected *inter alia* in requirements on using the best available techniques (under the Industrial Emissions Directive).

> **Example:** in Case C-364/03 *Commission v Greece*, the CJEU held that the obligation of the Member States to adopt the measures necessary to reduce the emissions of sulphur dioxide and nitrogen is not dependent on the general environmental situation of the region in which the industrial plant in question is located inasmuch as it is undisputed that these substances have harmful effects on human health and on biological resources and ecosystems.

Sustainable Development

Sustainable development is often defined as development that aims to meet the needs of the present while not compromising the ability of future generations to meet their own needs.

The legal formalisation of the EU's commitment to sustainable development as a policy objective was completed by the Lisbon Treaty. Sustainable development is now repeatedly mentioned in the Treaties: as a basic objective of the EU in the new Article 3 TEU; in Article 21 TEU concerning the external action of the Union; and in Article 11 TFEU setting out the integration principle.

The EU is now legally committed to pursue sustainable development both internally and externally, in its relations with countries and organisations outside the EU. Furthermore, there is

a Commission-wide Impact Assessment for all future EU legislation to ensure it would conform to the principles of sustainable development as laid down in the EU Strategy for Sustainable Development. Accordingly, the requirement to preserve and improve the environment is applicable in all areas of EU law, for example in the nuclear energy sector (Case C-594/18 P *Austria v Commission*, para. 42).

In the secondary legislation, sustainable development serves as a framework principle behind the goals of environmental protection, either in specific legislation, or integrated into other policies.

> **Example:** According to recital 5 of the Birds Directive, the conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary in order to attain the European Union's objectives regarding the improvement of living conditions and sustainable development. As a consequence, inter alia, hunting of birds is restricted to certain species, must be compatible with maintenance of the population of these species at a satisfactory level, and must consider other satisfactory solutions (See Case C-161/19 *Commission v Austria*).