Conclusion. Reconciling Conflicting Values: A Call for Research on Instruments to Achieve Quasi-Sustainability

CONCLUSIONS

RECONCILING CONFLICTING VALUES: A CALL FOR RESEARCH ON INSTRUMENTS TO ACHIEVE QUASI-SUSTAINABILITY

Lorenzo Squintani and Bernard Vanheusden

Sustainable development and sustainability are also in this second EELF Conference book central terms that recur in the contributions. Unfortunately, various contributions also indicate that this goal of sustainability is often hampered by conflicting values. As already stated in the introduction to the first EELF Conference book, "Focusing on the European Union, the Union itself and each of its Member States has to balance economic welfare, social welfare and environmental welfare, *i.e.* they have to find '*sustainability*'".[1] At first glance, sustainable development ranks high in the list of objectives of the European Union. Indeed, the European Union is "determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development".[2] More explicitly, "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"[3] and "It shall contribute to peace, security, the sustainable development of the Earth".[4]

A closer reading of the Treaties, however, reveals that this policy goal is not operationalized by a specific legal framework. Its relevance in the shaping of the decision-making process at EU level is mediated by the principle of integration. First, Article 7 Treaty on the Functioning of the European Union (TFEU) states that "The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers." Second, Article 11 TFEU states 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". If we define sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs',[5] it can be doubted whether Articles 7 and 11 TFEU ensure the achievement of sustainable development under European Union law. Article 11 TFEU only focuses on one of the three 'P's of the sustainability paradigm, namely the planet,[6] and Article 7 TFEU makes the integration of all EU objectives, including the sustainable development one, conditional upon the fulfilment of the principle of conferral.

---

[1] *Hans Vedder* and *Lorenzo Squintani* with *Moritz Reese* and *Bernard Vanheusden*, Sustainable Energy United in Diversity – Challenges and Approaches in Energy Transition in the EU, European Environmental Law Forum Book Series, Volume 1 (2014), p. 1.
[2] Preamble of the Treaty on European Union (TEU).
[3] Article 3(3) TEU.
[4] Article 3(5) TEU.
[5] World Commission on Environment and Development, Our Common Future (Oxford University Press 1987).
[6] The three 'P's are: People, Planet and Profit.

Whether the principle of conferral renders sustainable development possible under the Treaties can be questioned. Under the principle of conferral, "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein." This means among others that, the Union action in the field covered by Title XX TFEU shall aim at a high level of protection of the environment while contributing to pursuit a) preserving, protecting and improving the quality of the environment, b) protecting human health, c) prudent and rational utilisation of natural resources, and d) promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. As stated under Article 191(3) TFEU, "In preparing its policy on the environment, the Union shall take account of: […] c) the potential benefits and costs of action or lack of action, and d) the economic and social development of the Union as a whole and the balanced development of its regions." The reference to economic and social development in Article 191(3) TFEU allows striking a balance between the three 'P's of the sustainability paradigm, while being in keeping with the principle of conferral, as required by Article 7 TFEU.

Yet, from the perspective of sustainable development, Article 191 TFEU seems to rank environmental protection higher than economic and social values. While environmental protection *shall be aimed at*, social and economic development *shall be taken into account*. A quick look at the case law of the Court of Justice concerning the review of the legality of acts of the European Union in light of the principle of conferral shows that the difference between these two formulas is not merely a linguistic one. In order to be based on Article 192(1) TFEU, European Union legislation must *mainly* aim at environmental protection.[7] Even if a 'high level of environmental protection' does not mean the highest possible,[8] the manner in which the Court of Justice interprets European Union measures based on Article 192(1) TFEU clearly shows a preference for environmental values. Provisions contributing to the achievement of the environmental goals of a decision, directive or regulation are interpreted extensively.[9] The principle of conferral, as applied in practice, creates a hierarchical relationship between the three 'P's of the sustainability paradigm. No such hierarchy is visible under the Brundtland Report definition.[10]

[7] For example, the seminal judgments in Case C- 300/89 Commission v Council of the European Communities, ECLI:EU:C:1991:244 and Joined Cases C-164/97 and C-165/97 European Parliament v Council of the European Communities, ECLI:EU:C:1999:99.

[8] Case C-284/95 Safety Hi-Tech Srl, ECLI:EU:C:1998:352, para. 49. It should be noted, that this statement of the Court of Justice is not linked to the need of balancing environmental protection with socio-economic development. It is linked to the division of competences between Member States and the EU in the field of environmental protection.

[9] See the explicit words of the Court of Justice in C-418/97 and C-419/97 ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (C-418/97) and Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt and Vereniging Stedelijk Leefmilieu Nijmegen v Directeur van de dienst Milieu en Water van de provincie Gelderland (C-419/97), paras 39 and 40. For a recent application of this approach see, for example, C-416/13 Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland, ECLI:EU:C:2015:433, paras 34-51.

[10] Of course, it could be argued that such a hierarchy is desirable, see *Olivia Woolley*, Ecological Governance – Reappraising Law's Role in Protecting Ecosystem Functionality, Cambridge University Press 2014, at 71 and *Renske A. Giljam*, Towards a Holistic Approach in EU Biomass Regulation, in Journal of Environmental Law (2016) vol. 28(1) (in print). Yet, these readings of the sustainability paradigm are not (yet) generally accepted and cannot, therefore, be used to understand the concept of 'sustainability' under the Treaties.

The manner in which environmental concerns are taken into account while formulating and adopting actions under policy areas other than the environmental one, e.g. transport, follows a similar pattern to that indicated under Article 192 TFEU. Article 11 TFEU requires integrating environmental concerns into other policy areas. Yet, this does not mean that the environment ranks equal to economic development or social protection, as showed by the contributions *of Marcin Stoczkiewicz* in the field of State aid, of *Delphine Misonne*, as regards noise-related operating restrictions at Union airports, of *Ludwig Kramer* in the field of Trans-European Networks, and of *Yixin Xu* with regard to CDM forest projects. As stated in Marcin Stoczkiewicz's contribution in this book: "*Environmental objectives cannot change the notion of what State aid is and therefore cannot be taken into account in the assessment of whether a particular measure constitutes State aid in the meaning of Article 107(1) of the TFEU. Environmental rules must be considered in the scope of the assessment of compatibility of the State aid measure with the internal market pursuant to Article 107(3) of the TFEU, if the measure has an environmental goal.*" Once again, thus, we see an implicit hierarchy between the various 'P's of the sustainability paradigm. A hierarchy which is visible also in the case law of the Court of Justice interpreting the provisions on EU State Aid.[11] Delphine Misonne is on this point even more explicit, when she concludes that "*These elements demonstrate a narrow-minded approach to how transport policies integrate the protection of the environment and of citizen's health against noise,*[…]". Indeed, her close analysis of the Regulation shows that operating restrictions under Regulation 598/2014 are treated as 'the exception' rather than 'the rule'. As regards Trans-European Networks, the little consideration of environmental concerns is evident also in the context of public participation in environmental matters. As stated in Ludwig Kramer's contribution in this book "*If one takes this legal requirement of EU policy* [Article 11 TFEU, LS] *seriously, one will have to admit that the consultation of the citizens concerned only after the adoption of Regulation 347/2013 on energy infrastructure, Regulation 1391/2013 on energy projects of common EU interest and Regulation 1315/2013 on transport infrastructure comes too late*.". Finally, Yixin Xu indicates that the environmental sustainability of CDM forest projects can sometimes be questioned because they may cause harm to local lands and biodiversity conditions by the plantation of harmful trees or by unintentionally increasing illegal logging in unprotected forests. To promote the sustainability of CDM forest projects in terms of biodiversity conservation and poverty alleviation, Xu proposes to enhance the current CDM sustainability assessment regulation and practices from a law and economic perspective. Within the EU, the European Commission has already required that individual and public projects and programmes co-financed by the EU have to comply with the EIA and SEA Directives. However, this seems to have a limited effect. Therefore, Xu suggests that the EU Member States could extend the scope for EIA and SEA practices to CDM projects financed by their domestic investors.

The lack of a fully developed legal framework to achieve sustainable development at EU level seems to be paired up with a growing wish by (at least) some Member States to reshape the balance between environmental and economic interests reached at EU level under environmental legislation. This tendency clearly emerges out of the various contributions included in this book

[11] C-487/06P British Aggregates Association v Commission of the European Communities and United Kingdom ECLI:EU:C:2008:757, paras. 81-39. In Case T-57/11 Castelnou Energía, SL v European Commission ECLI:EU:T:2014:1021, para. 189 the General Court explicitly stated that the "*protection of the environment does not constitute, per se, one of the components of that internal market*". Without arguing that this approach is right, it is explicative of the relationship between the principle of conferral and that of integration and how such a relationship shapes the legal reasoning of the Court of Justice and the General Court.

which focus on the national level. This tendency was highlighted in the field of public participation with the contributions of *Viviana Molaschi*, *Hendrik Schoukens* and *Jose Cubero Marcos* & *Unai Aberasturi Gorriño* showing that Italy, Belgium, the UK and Spain (Basque Region) see public participation rules as "*one of the main triggers of the "excessive" administrative burden and cumbersome delays large infrastructural projects are facing across Europe these days"*(Molaschi). In Belgium, the UK and Spain (Basque Region), such a perception seems at the basis of the use of legislative validation to circumvent public participation requirements. In the field of environmental impact assessment, *Glen Wright*'s contribution shows that the UK is quite 'creative' in developing instruments, such as the 'Rochdale Envelope' and the 'Deploy and Monitor' approaches, aiming at allowing economic development despite uncertainties conceding the environmental impact of projects. The tension in the relationship between environmental protection and economic development in the field covered by the EIA Directive is also highlighted in *Piri Damagh*'s contribution. His in-depth analysis of the manner in which, in particular, Germany, Denmark, Sweden and Finland, but also, Estonia, Latvia, Lithuania and Poland, cooperated in the establishing of an EIA Report for the Nord Stream Gas Pipeline shows that environmental protection was less than optimal due to the lack of willingness to go beyond the requirements of the Epsoo Convention and the EIA Directive. Rather than performing several national EIAs, a single transboundary EIA could have led to better environmental protection. This, however, would have been gold-plating, which, as known, is not a Member States' priority, to put it mildly.[12]

If we focus on the 'vertical sectors' of EU environmental law, the contributions of *Vicky Karageorgou, Lisa Löffer,* and *David Salm* highlighted shortcomings in the implementation of EU water law. The contribution of Vicky Karageorgou exposes the unwillingness of Greece to cope with the requirements stemming out from the Water Framework Directive in the context of the Interbasin Water Transfer concerning the Acheloos river. Lisa Löffler's contribution argues about a widespread tendency among the Member States not to recognize the binding force of the Water Framework Directive requirements as regards the deadline for the phasing-out of priority hazardous substances. Similar findings can be seen in the contribution of David Salm, who shows how Germany misinterpret(ed) the concept of 'no-deterioration' under the Water Framework Directive.

In the field of nature conservation, the contributions of *Nicolas de Sadeleer* and *Geert Van Hoorick* show that several Member States insufficiently implement the Habitats Directive. In particular, the Netherlands seem quite 'creative' in finding what, from the perspective of the Dutch Government, can be considered a solution to the need of lowering the regulatory burdens deriving from the Habitats Directive to speed up economic development (Van Hoorick).

Finally, in the context of land use and planning law, the contribution of *Elizabeth Dunn* puts the UK, once again, at the table of those Member States willing to favour economic development at the cost of environmental protection. As indicated by Dunn, various amendments introduced in 2015 to the rules of procedures regulating challenges to planning decisions, arguably with the

[12] *Jan H. Jans, Lorenzo Squintani* and others, 'Gold Plating' of European Environmental Measures? (2009) 8(4) JEEPL 417, 418; *Lorenzo Squintani*, Gold-Plating of European Environmental Law, Groningen: PhD-Thesis (2013); and *Helle Anker Tegner et al.*, Coping with EU environmental legislation: transposition principles and practices, (2015) 27(1) Journal of Environmental Law, p. 17.

exception of the creation of a specialized court, aim at preventing judicial review of planning decisions in order to spur economic development. Administrative practice in Spain (Basque Region) shows a similar tendency. The contribution of *Inaki Lasagabaster* & *Maria Del Carmen Bolaño* reports several cases in which provisions aiming at environmental protection were set aside by public authorities in name of economic development.

The impressionistic appraisal performed in this book hence suggests the existence of a red line throughout the EU. Member States are not at ease with the EU environmental acquis. The Better Regulation Agenda can be seen as the EU dimension of Member States' concerns.[13]

This leads to the question on how EU environmental law can meet Member States' request for more flexibility as regards the balance between the three 'P's of the sustainability paradigm without endangering the need for a high level of environmental protection. As stated above, a full-fledged sustainability approach at EU level requires amending the Treaties. Only when the EU will abandon the principle of conferral or develop a specific policy and legal framework to achieve sustainable development, it will be able to pursuit sustainability within the meaning of the Brundtland Report. There is no sign that such intrusive changes in the EU constitutional structure will occur any soon. A quasi-sustainable approach must, consequently, be searched within the actual framework provided by Titles XX and XXI of the TFEU.

A close look at the EU environmental legislative practice over the last three decades shows a series of instruments deployed by the EU legislature to cope with this challenge. Self-regulation, especially in the form of labelling requirements, cap-and-trade instruments, especially in the form of emissions trading schemes, and the so-called programmatic approach[14] are exemplary in this context. They all aim at reducing the rigidity of EU environmental goals and requirements and enhance cost-effectiveness. Labelling requirements allow industry to compete on the level of environmental friendliness. Well informed consumers, rather than regulators, set the standard by means of their informed choice. Environmentally sensitive consumers will choose for environmentally friendly products which will then become the standard, enabling the green revolution. At least, this is the theory. Emissions trading schemes allow polluters to choose the most cost-effective route to reduce emissions. A polluter can meet environmental standards either by improving its performance or by purchasing allowances from competitors. A rational polluter will choose for the least expensive route and therefore maximise efficiency. Finally, the programmatic approach recognises 'wide leeway' in how to implement EU requirements.[15] Such flexibility can be used to foster innovative, sustainable development, foster the functioning of the preventive and polluter-pays principles and a fair allocation of the room for economic

[13] *Lorenzo Squintani*, Gold Plating of European Environmental Law (Groningen: PhD Dissertation), pp. 96 and 97.

[14] Under this approach, national public authorities adopt a plan or programme indicating how and when a certain environmental standard or goal will be achieved. On this concept see *Frank Groothuijse* and *Rosa Uylenburg*, Everything according to plan? Achieving environmental quality standards by a programmatic approach, in Marjan Peeters and Rosa Uylenburg (eds) EU Environmental Legislation, Legal Practice on Regulatory Strategies (Cheltenham, UK Edward Elgar 2014) 116-145.

[15] This terminology is mutated from Ingram von Homeyer, The Evolution of EU Environmental Governance, in *Joanne Scott* (ed) Environmental Protection – European Law and Governance, Oxford University Press (2009), pp. 1-26, at. 20.

development.[16] Moreover, flexibility can be used to cope with socio-economic and environmental development, on the one hand, and developments in the state of knowledge, on the other. This latter aspect is referred to as adaptability or adaptiveness.[17] More generally, the programmatic approach is consistent with the subsidiarity principle.[18]

Each of these three instruments fit well within the so-called Sustainable Development Governance Regime and, thanks to their enhanced cost-effectiveness, is potentially capable of achieving quasi-sustainability within the framework offered under Titles XX and XXI of the TFEU.[19] Yet, they all camp with severe shortcomings.

The success of labelling requirements depends upon the sensitivity of consumers and the willingness of producers to invest in environmentally friendly technologies. In certain fields, the benefits of environmentally friendly technologies will be visible only over a long period of time, such as in the fields covered by the Labelling Directive[20] and the Energy Performance of Buildings Directive.[21] Given that the high investment costs required under these two Directives will be recouped only over a long period of time, purchasing decisions do not seem to be informed by labelling.[22] Moreover, producers do not seem willing to cooperate in deploying energy saving technologies.[23] Finally, in those cases in which the producers themselves assess the energy efficiency of products, the quality of the assessment is not always impeccable, to be friendly.[24]

---

[16] As regards the two latter effects, see *Chris W. Backes* and *(Marleen) H.F.M.W.van Rijswick*, Effective environmental protection: towards a better understanding of environmental quality standards in environmental legislation, in Lena Gipperth and Charlotta Zetterberg, *Miljörättsliga perspektiv och tankevändor*, Vänbok till Jan Darpö & Gabriel Michanek (Uppsala: Iustus Förlag AB 2013) 19-50 and *Chris W. Backes, Andrea M. Keesen* and *(Marleen) H.F.M.W.van Rijswick*, Effectgerichte normen in het omgevingsrecht – De betekenis van kwaliteteitseisen, instandhoudingsdoelstellingen en emissieplafonds voor de bescherming van milieu, water en natuur (The Hague: Boom Juridische uitgevers 2012) 130.

[17] *Lorenzo Squintani* and *Marleen van Rijswick*, Improving legal certainty and adaptability in the programmatic approach, (Submitted to Journal of Environmental Law).

[18] *Frank Groothuijse* and *Rosa Uylenburg*, Everything according to plan? Achieving environmental quality standards by a programmatic approach, in Marjan Peeters and Rosa Uylenburg (eds) EU Environmental Legislation, Legal Practice on Regulatory Strategies (Cheltenham, UK Edward Elgar 2014) 116-145, 143.

[19] *Ingram von Homeyer*, The Evolution of EU Environmental governance, in Joanne Scott, Environmental Protection European Law and Governance, Oxford, 2009, pp 1-26, p. 18-24. This regime is characterized by four elements: a) concrete targets are formulated during the implementation phase (see for example Article 4 of the WFD), b) long time spam for implementation (twenty and more years), c) wide leeway in how to implement the EU requirements, and d) the possible lack of binding requirements in respect of certain important aspect.

[20] Commission Directive 2010/30/EU of the European Parliament and of the Council of 19 May 2010 on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products, OJ 2010 L 153/1.

[21] Directive 2010/31/EU of the European Parliament and of the Council of 19 May 2010 on the energy performance of buildings, OJ 2010 L153/13.

[22] For the latest publication on this issue, see *Hans Vedder*, Chapter 7 - Energy Efficiency, in Woerdman, Roggenkamp and Holwerda, Essential EU Climate Law, (Cheltenham, Edward Elgar, 2015), pp. 157-179, at 178., with further references.

[23] Idem, p. 177.

[24] E.g. *Lorenzo Squintani*, Chapter 5 - Regulation of emissions from non-ETS sectors, in Woerdman, Roggenkamp and Holwerda, Essential EU Climate Law, (Cheltenham, Edward Elgar, 2015), pp. 96-124, at 113-121, with reference to the testing requirements of vehicle emissions.

Similar problems affect the EU Emissions Trading Scheme (ETS). Stakeholders concerns and the lack of ambitions of the EU political class have led to a legal regime which needed, and in certain cases still needs, important reforms. Recently, Woerdman enlisted five implementation problems: a) Over-allocation, b) Windfall profits, c) New entrants and closures, d) Allowances prices and structural reforms, and e) Tax fraud and allowance theft.[25] These problems have been addressed by the EU legislature, but it can be questioned whether this has been done in a satisfactory manner. The establishment of an EU-wide cap serves to resolve the issue of over-allocation, but the emissions surplus is already so high that this reforming measure will need a long time before being effective.[26] The same can be stated for the issues of windfall profits and of new entrants and closures. The increasing percentage of emissions being auctioned, instead of being allocated for free, will eliminate the tendency of allowances owners to pass opportunity costs over to the final consumers and cure the inefficiencies associated with benchmarking.[27] Yet, the increase in the amount of allowances being auctioned occurs at a slow tempo. It will require a long time before auctioning will solve these two problems. More intrusive reforms are blocked by the lack of political will. Moreover, some problems seem to derive from an overall lack of coherence within the EU climate law policy framework, with the three pillars of the '20-20-20' target being partially incompatible.[28] As a result, the effectiveness of the structural reforms presented by the Commission has been questioned.[29]

Also as regards the programmatic approach, it is possible to highlight many shortcomings, to an extent that the effectiveness of such an instrument to achieve a high level of environmental protection is doubtful. Initial research concerning the pieces of EU environmental legislation prescribing a programmatic approach shows relevant differences among the various regimes.[30] Not all the differences can be explained at the hand of the differences between the environmental fields. For example, it is unclear why only the Water Framework Directive requires the joint establishment of a joint river basin plan, including one or more programmes of measures, in case of transboundary pollution,[31] while the Air Quality Directive just establishes an option in this regard.[32] Moreover, public participation is regulated under water management law but not under

---

[25] *Edwin Woerdman*, Chapter 3 - The EU greenhouse gas emissions trading scheme, in Woerdman, Roggenkamp and Holwerda, Essential EU Climate Law, (Cheltenham, Edward Elgar, 2015), pp.43-75, at 64-73.
[26] Idem, p. 66.
[27] Idem, pp. 66-69.
[28] *B. Görlach*, Emissions Trading in the Climate Policy Instrument Mix: Understanding and Managing Interactions with Other Policy Instruments in energy and Environment, 2014 (25), pp. 733-749.
[29] *E. Woerdman* (above), pp. 69-73. Also the measures adopted to prevent allowance theft do not seem to have weakened crime in this area, see Case T-317/12 Holcim (Romania) SA v European Commission, ECLI:EU:T:2014:782.
[30] *Frank Groothuijse* and *Rosa Uylenburg*, Everything according to plan? Achieving environmental quality standards by a programmatic approach, in Marjan Peeters and Rosa Uylenburg (eds) EU Environmental Legislation, Legal Practice on Regulatory Strategies (Cheltenham, UK Edward Elgar 2014) 116-145, focusing on the Water Framework Directive and the Air Quality Directive. *Lorenzo Squintani* and *Marleen van Rijswick*, Improving legal certainty and adaptability in the programmatic approach, (Submitted to the Journal of Environmental Law), focusing on the Water Framework Directive, the Air Quality Directive, the Nitrates Directive and the National Emission Ceilings Directive.
[31] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ 2000 L 327/1, Articles 3 and 13.
[32] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ 2008 L 152/1, Article 25.

air quality law.[33] Besides, the linkage between environmental goals and individual decisions seems to vary from one regime to another. The *RWE* case shows that the emission limit values under Article 4 of the NEC Directive can hardly be used to review the legality of specific, individual decisions.[34] They serve only to review the legality of national emissions programmes. Differently, the *Weser* case shows that the quality standards under Article 4 of the Water Framework Directive can be used to review the legality of specific, individual projects affecting water quality, regardless of the content of a programme of measures.[35] It is still unclear what the rule is under the Air Quality Directive as regards this aspect of the programmatic approach.[36] Legal certainty is not well served by such a lack of clarity.

More generally, there seem to be deficiencies affecting all regimes. Most notably, no EU environmental measure prescribing the use of a programmatic approach regulates judicial protection against plans or programmes. This is not in line with the Aarhus Convention (Articles 6 and 7 in conjunction with Article 9). Moreover, none of the EU measures prescribing a programmatic approach regulates the manner in which the effectiveness of programmes must be assessed. This renders it extremely difficult, if not impossible, to review Member States implementation of the quality standards, and related programmes.

The brief appraisal of the three exemplary instruments developed by the EU legislature to achieve quasi-sustainability shows several shortcomings. The alleged effectiveness of these instruments cannot, therefore, be taken for granted. From a legal perspective, there seem to be, at least, two recurring problems. First, there is a lack of legal certainty. Many, core aspects of the three instruments mentioned above are unclear or under regulated. The assessment methods under the labelling and programmatic approach instruments are framed in such a way that enforceability is basically impossible. Second, shortcomings in the design and implementation of these instruments require legislative reforms. Adaptability, i.e. the power to cope with new developments including those in the understanding of the functioning of these instruments, is not automatic. EU legislative reforms, however, do not seem capable of fully solving the problems that emerged during the implementation of the instruments, the reforms of the ETS Directive being exemplary on this point.

These findings justify a call for fundamental research on the shortcomings of the EU legal framework in light of the sustainability principle in general, and of the various instruments to achieve quasi-sustainability in light of the high level of environmental protection principle, in particular. Not only should the EU dimension be covered. As shown by the contributions in this book, Member States are developing 'creative' approaches to balance environmental, social and economic values. Comparative research can reveal strength and weakness of these approaches. The contributions presented at the Second EELF Conference, including those published in this book, show the urgency of such a research. The economic crisis has only intensified the wish for reshaping the EU environmental acquis. The ongoing REFIT process of EU nature conservation

[33] See Article 14 of the Water Framework Directive. The of the Air Quality Directive is completely silent on this issue.

[34] Joined cases C-165/09 to C-167/09, - Stichting Natuur en Milieu and Others v College van Gedeputeerde Staten van Groningen (C-165/09) and College van Gedeputeerde Staten van Zuid-Holland (C-166/09 and C-167/09), ECLI:EU:C:2011:348.

[35] Case C-461/13 Bund für Umwelt und Naturschutz Deutschland ECLI:EU:C:2015:433.

[36] *Chris Backes* and *Marleen van Rijswick*, Annotation to the Weser case, in JEEPL 2015 3-4, 363-377.

law could not have taken place in a worse economic climate.[37] Given the lack of clarity about the instruments mentioned above, we can only hope that the species and habitats protection will not serve a *guinea pig* for the EU legislature. We simply know too little about the effectiveness of instruments to achieve quasi-sustainability to afford ourselves the luxury of experimenting in a field of environmental law known for its fragility.

Given the extent of a research programme capable of shedding light on (quasi-)sustainability, a broad EU-steered call for research is needed. We cannot expect individual Member States to have the capacities, interest and the financial motive to finance such a research programme, let alone individual universities or research centres. It is therefore regrettable that the DG Research political agenda under the Horizon 2020 funding programme is based on market-driven innovation and does not allow room for fundamental research. If the EU and the national legislators do not want academia to continue playing the role of 'Jiminy Cricket' in the quest for (quasi-)sustainability, it is time to put fundamental research back on top of DG Research's agenda.

[37] See the proceedings on this process on http://ec.europa.eu/environment/nature/legislation/fitness_check/index_en.htm. (last accessed January 2016).