

EU TAXONOMY: QUALIFYING AS GREEN

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Abstract

What is ‘sustainable’? What economic activity qualifies as green and should receive, accordingly, investments? Is nuclear energy green? Is gas green? The legal classification system defines a list of environmentally sustainable economic activities that aims at playing a significant part in facilitating sustainable investment in EU. The paper points the different views member states have on what green means, on the Hinkley Point C Case before the Court of Justice of European Union. The main purpose of this paper is to explore the legal base concerning the concept of sustainable development in EU law. In order to address this question the paper is divided into three parts. The first part is dedicated to the legal framework of EU primary and secondary law relating to the concepts of sustainable development, green and environmental law. The recent classification of sustainable activities in the Taxonomy Regulation is considered in the second part. The third part of the paper selects some interpretations of the Court of Justice of European Union case-law.

Keywords: nuclear energy, green, sustainable finance, climate law, CJEU jurisprudence, environment protection.

1. Introduction

On 8 October 2014, the Commission approved an aid scheme planned by the United Kingdom for the construction of a nuclear power station ‘Hinkley Point C’¹. The Republic of Austria (supported by numerous member states) brought an annulment action before Court of Justice of European Union (CJEU), claiming, among others, that the construction of Hinkley Point C is not intended to meet an objective of ‘common’ interest, that there is a conflict between the promotion of nuclear energy, on the one hand, and the principle of protection of the environment and the principle of sustainability, on the other. In September

2020 the Grand Chamber of the CJEU handed in a final decision.

On 2 February 2022, the Commission approved in principle a Complementary Climate Delegated Act including specific nuclear and gas energy activities in the list of economic activities covered by the EU taxonomy, a classification of green activities for investments purposes.

The question is what means ‘sustainable’? What economic activity qualify as green and should receive, accordingly, investments? Is nuclear energy green? Is gas green?

Green, protection of environment and sustainability.

What exactly is the meaning of these terms? Is there any synonymy between them? Or are they, in fact, different

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¹ Commission Decision (EU) 2015/658 of 8 October 2014 on the aid measure SA.34947 (2013/C) (ex 2013/N) which the United Kingdom is planning to implement for support to the Hinkley Point C nuclear power station (notified under document C(2014) 7142) (Text with EEA relevance), OJ L 109, 28.4.2015, pp. 44-116.

concepts? Reminiscent a mirror situation of the Sergio Leone classical movie, *The good, the bad and the ugly*, where "Leone narrates the search for a cache of gold by three grotesquely unprincipled men sardonically classified by the movie's title².

The purpose of this paper is to explore the legal base concerning the concept of sustainable development, green and environment law in European Union (EU) law.

In order to address this enquiry the paper is divided into three parts. The first part is dedicated to the legal framework of EU primary and secondary law. The recent classification of sustainable activities in the Taxonomy Regulation is considered in the second part. The third part of the paper selects some approaches of the Court of Justice of European Union (CJEU) case-law.

2. The legal sphere: a wide shot

2.1. The sustainable development

- The EU primary law

The concept of sustainable development³ appears 6 times in Treaty on European Union, and 1 time in the Treaty on the Functioning of the European Union, without any definition provided.

The Preamble of the treaty states that the Union has to take into account *the principle of sustainable development* within the context of the accomplishment of the

internal market and of reinforced cohesion and *environmental protection*.

Thus, reading it the other way, in the context of environmental protection the Union has to take into account the principle of sustainable development.

Accordingly, the principle of sustainable development is *a limit of the environmental protection*.

Art. 3 of the Treaty on European Union (TEU) laid down the objectives of the Union⁴. Although the objectives do not impose legal obligations on the member states or confer rights on individuals⁵, they are relevant for the interpretation of the Treaty provisions⁶.

Art. 3 (3) of the TEU states that:

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. It shall promote scientific and technological advance.

Consequently, the purpose of the internal market is to work for the sustainable development of Europe.

The sustainable development is based on: economic growth, price stability and competitive social market.

The aims are full employment, social progress and *a high level of protection and*

² Jameson, Richard T., *Something to do with Death: A Fistful of Sergio Leone*, Film Comment 9, no. 2 (1973): pp. 8-16, cited by https://en.wikipedia.org/wiki/The_Good,_the_Bad_and_the_Ugly.

³ For an evolutionary perspective of `sustainable development` concept in the normative field of EU law, see Nicolas de Sadeleer, *Sustainable Development in EU Law. Still a Long Way to Go*, in Jindal Global Law Review. Special Issue on Environmental Law and Governance (2015) 6(1), pp. 39-60.

⁴ Conea, Alina Mihaela, *Politicile Uniunii Europene. Curs universitar*, Universul Juridic Publishing House, Bucharest, 2019.

⁵ Klamert, Marcus, *Article 3 TEU*, In *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, 2019, p. 209.

⁶ Lenaerts, Koen, Piet Van Nuffel, Robert Bray, and Nathan Cambien. *European Union Law*, 3rd ed., London: Sweet & Maxwell, 2011, para. 7-007.

improvement of the quality of the environment.

The treaty provides for the external dimension of this objective in para. (5) of art. 3 TEU. So, the Union shall contribute to (...) the sustainable development of the Earth. In fact, the sustainable development appears widely within the general provisions on the Union's external action, in art. 21 TEU.

Remarkably, according to art. 21 (d) TEU the Union shall foster the *sustainable economic, social and environmental development*.

The Charter of Fundamental Rights also refers to sustainable development as a principle in art. 37.

The Treaty on the Functioning of the European (TFEU) Union, at art. 11 TFEU (ex art. 6 TEC) provides 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*.

Art. 11 TFEU requires environmental protection requirements to be 'integrated' into the Union's policies and activities and is therefore also referred to as 'integration clause'⁷. According to the CJEU, this provision emphasises the fundamental nature of that objective and its extension across the range of those policies and activities⁸.

- The EU secondary law and programmatic documents

The most usually mentioned definition of sustainable development is that of the United Nations Brundtland report from 1987⁹: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

The 2001 Göteborg European Council outlines the concept: sustainable development – to meet the needs of the present generation without compromising those of future generations – is a fundamental objective under the Treaties. That requires dealing with economic, social and environmental policies in a mutually reinforcing way¹⁰. As the Brundtland report express it, "economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind"¹¹.

A single exception is that if of Regulation (EC) no. 2493/2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, that is no longer in force. According with this act sustainable development relies on the integration of the environmental dimension into the development process¹². "Sustainable development" means, in the wording of this act, the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity

⁷ Klamert, Marcus, *Article 11 TFEU*, In *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, 2019, p. 564.

⁸ Judgment of the Court (Grand Chamber) of 15 November 2005, Commission of the European Communities v. Republic of Austria, Case C-320/03, ECLI:EU:C:2005:684, para. 73.

⁹ In 1983, the General Assembly of the United Nations created the World Commission on environment and Development chaired by the Prime Minister of Norway Ms. Gro Harlem Brundtland. The report (Brundtland report) entitled "Our Common Future" was presented in 1987.

¹⁰ Presidency Conclusions, Göteborg European Council, 15 and 16 June 2001.

¹¹ Brundtland report entitled "Our Common Future", presented in 1987.

¹² Regulation (EC) no. 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, OJ L 288, 15.11.2000, pp. 1-5, no longer in force.

of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations¹³.

The Commission specifies in Europe 2020. A strategy for smart, sustainable and inclusive growth, that "Sustainable growth is promoting a more resource efficient, greener and more competitive economy"¹⁴. The accent is on the development side. Further, according to the explanation of the Commission, Europe must act to have „clean and efficient energy” basically for the following: financial savings (adding an extra 0.6% to 0.8% GDP), energy security and to create more jobs¹⁵.

2.2. The green

The using of the word green is abundant, especially, in the non-binding acts of the EU institutions. For example, in different Commission's Communications (green solutions, green Infrastructure, green features such as green roofs and walls, greening our buildings)¹⁶, Reports (lack of green engineering know-how)¹⁷ or EU Parliament resolutions (green economy, green architecture)¹⁸.

Green infrastructure is defined in the *EU green infrastructure strategy*¹⁹ as 'a strategically planned network of natural and semi-natural areas with other environmental features designed and managed to deliver a wide range of ecosystem services. It incorporates green spaces (or blue if aquatic ecosystems are concerned) and other physical features in terrestrial (including coastal) and marine areas. On land, green infrastructure is present in rural and urban settings'.

Accordingly, the central element of the definition is biodiversity, an environment concept. Unlike *single-purpose grey infrastructure*, *biodiversity-rich green spaces* can perform a variety of extremely useful functions, often simultaneously and at very low cost, for the benefit of people, nature and the economy²⁰.

On 11 December 2019, the Commission presented the *European green deal*. This is a growth strategy aiming to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050

¹³ Art. 2 of Regulation (EC) no. 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, OJ L 288, 15.11.2000, pp. 1-5.

¹⁴ Communication from the Commission , EUROPE 2020 *A strategy for smart, sustainable and inclusive growth*, COM/2010/2020 final.

¹⁵ *Ibidem*.

¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Green Infrastructure (GI) — Enhancing Europe's Natural Capital*, * COM/2013/0249 final *, Communication from the Commission, *A Renovation Wave for Europe - greening our buildings, creating jobs, improving lives*, SWD(2020) 550 final.

¹⁷ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Review of progress on implementation of the EU green infrastructure strategy*, COM/2019/236 final.

¹⁸ European Parliament resolution of 17 September 2020 on the European Year of Greener Cities 2022 (2019/2805(RSP)), OJ C 385, 22.9.2021, pp. 167-172.

¹⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Green Infrastructure (GI) — Enhancing Europe's Natural Capital*, COM/2013/0249 final.

²⁰ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Review of progress on implementation of the EU green infrastructure strategy*, COM/2019/236 final.

and where economic growth is decoupled from resource use²¹.

In this strategy, the word green is used in the following manner, referring to: *changes of economy* (green and the digital transformation, green transition), *financial market* (the risk of green washing, 'green claims', green public purchasing, green finance, overall greening of banks activities, EU green bond standard, green assets, greening national budgets, green budgeting tools, green public investment), *the legislative framework* (a green oath to 'do no harm', "green" regulation) and *external action* ('green deal diplomacy' focused on convincing and supporting others to take on their share of promoting more sustainable development).

The concept of *green* is to be found also in the legislative acts of the Union.

For instance, *greening* (or the *green* payment) is a new type of direct payment to farmers introduced with the 2013 reform of the Common Agricultural Policy (CAP). It is the only direct payment whose main stated objective is '*green*', namely to enhance the CAP's environmental performance²². The green payment serves two distinct objectives: enhancing the CAP's environmental and climate *performance* and supporting farmers' income.

Greening is mandatory. All farmers participating in CAP direct payment schemes must also apply for the green payment. However, smaller holdings can benefit from support under greening without having to meet all, or even any, of greening

requirements. Greening requirements also do not apply to holdings considered 'green by definition': for example, organic farmers benefit from the green payment without having to demonstrate compliance with the three greening practices²³. The European Court of Auditors, in Special Report 21/2017, concludes that: Greening, as currently implemented, is unlikely to provide significant benefits for the environment and climate²⁴.

In the field of financial market, *sustainable finance* refers to the process of taking *environmental, social and governance* considerations into account when making investment decisions in the financial sector, leading to more long-term investments in sustainable economic activities and projects.

A Commission study²⁵ presents an overview and analysis of worldwide efforts on defining "green" for green bonds, lending and listed equity. The study notes that the term "green finance" is closely associated with related concepts, such as climate finance and sustainable finance and that some organisations use these terms interchangeably. The Commission study is based on the understanding that *climate, green and sustainable finance are nested concepts*.

According to the European Central Bank, the term "green bond" refers to debt securities whose proceeds are used to finance investment projects with *an environmental benefit*. There are different approaches to defining and certifying green

²¹ Communication from the Commission, European Green Deal, COM/2019/640 final.

²² Regulation (EU) no. 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) no. 637/2008 and Council Regulation (EC) no. 73/2009, OJ L 347, 20.12.2013, pp. 608-670, Recital (37).

²³ European Court of Auditors, Special Report 21/2017, Greening: a more complex income support scheme, not yet environmentally effective, (pursuant to art. 287(4), second subparagraph, TFEU).

²⁴ *Ibidem*.

²⁵ European Commission, Study, Defining "green" in the context of green finance, 2017.

bonds, and no global market standard has emerged so far²⁶. The definition accepted by the ECB is that of Bank for International Settlements. (Green bonds are fixed income securities which finance investments with environmental or climate-related benefits. Green bonds are an integral component of "green finance" more generally, which aims to "internalize environmental externalities and adjust risk perceptions" for the sake of increasing environmentally friendly investments)²⁷.

Disclosure frameworks and taxonomies are also developing rapidly to create an information architecture to enable banks to manage the risks and scale up green finance²⁸.

Speaking about *greenflation*, the ECB Member of the Executive Board, acknowledge that most *green* technologies require significant amounts of metals and minerals, such as copper, lithium and cobalt, especially during the transition period. Electric vehicles, for example, use over six times more minerals than their conventional counterparts.²⁹

2.3. The environment law

A definition of *environmental law* is to be found in Regulation no. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. *Environmental law* refers to the objectives of Community policy on the environment as set out in the Treaty³⁰. '*Environmental law*' means Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems³¹.

The EU objectives with respect to the environment, set out in art. 191(1) TFEU, are *preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems.*

²⁶ Roberto A. De Santis, Katja Hettler, Madelaine Roos and Fabio Tamburrini, *Purchases of green bonds under the Eurosystem's asset purchase programme*, ECB Economic Bulletin, Issue 7/2018, https://www.ecb.europa.eu/pub/economic-bulletin/focus/2018/html/ecb.ebbox201807_01.en.html.

²⁷ Ehlers, T. and Packer, F., *Green bond finance and certification*, BIS Quarterly Review, September 2017.

²⁸ Frank Elderson, Member of the Executive Board of the ECB and Vice-Chair of the Supervisory Board of the ECB, Keynote speech, Industry outreach on the thematic review on climate-related and environmental risks, *Towards an immersive supervisory approach to the management of climate-related and environmental risks in the banking sector*, Frankfurt am Main, 18 February 2022.

²⁹ Speech by Isabel Schnabel, Member of the Executive Board of the ECB, at a panel on "Monetary Policy and Climate Change" at The ECB and its Watchers XXII Conference, *A new age of energy inflation: climateflation, fossilflation and greenflation*, Frankfurt am Main, 17 March 2022.

³⁰ Recital (10), Regulation (EC) no. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, pp. 13-19.

³¹ Art. 2 (1)(f), Regulation (EC) no. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

Recital 10 of the Aarhus Regulation states that³², in view of the fact that environmental law is constantly evolving, the *definition of environmental law* should refer to the objectives of EU policy on the environment as set out in the Treaty on the functioning of EU³³.

3. The EU taxonomy regulation: a close-up

To reach the objectives of the European Green Deal, the EU is determined to conduit investments into sustainable activities. For this purpose, the EU adopted Regulation 2020/852 (Taxonomy Regulation)³⁴ that provides harmonised criteria to determine whether an economic activity qualifies as environmentally sustainable.

The Taxonomy Regulation aims to establish at Union level a classification system to clarify which activities qualify as ‘green’ or ‘sustainable’³⁵.

Consequently, in the wording of this legislative act ‘green’ or ‘sustainable’ appears to be synonymous.

The Taxonomy Regulation defines six *environmental objectives*: (1) climate change mitigation; (2) climate change adaptation; (3) the sustainable use and protection of water and marine resources; (4) the transition to a circular economy; (5) pollution prevention and control; (6) the

protection and restoration of biodiversity and ecosystem.

The Taxonomy Regulation sets out *three groups of taxonomy users*: (1) financial market participants offering financial products in the EU; (2) large companies who are already required to provide a non-financial statement under the Non-Financial Reporting Directive; and (3) the EU and Member States, when setting public measures, standards or labels for green financial products or green (corporate) bonds.

An economic activity *can only be classified as sustainable*, according to art. 3 of Taxonomy Regulation, if: (1) The economic activity contributes to one of the six environmental objectives; (2) The economic activity does ‘no significant harm’ to any of the six environmental objectives; (3) The economic activity meets ‘minimum safeguards’ such as the UN Guiding Principles on Business and Human Rights to not have a negative social impact; (4) The economic activity complies with the technical screening criteria developed by the EU Technical Expert Group.

Hence, to be classified as a sustainable economic activity according to the EU taxonomy regulation, a company must not only contribute to at least one environmental objective but also must not violate the remaining ones³⁶. The taxonomy does not ban investments in activities not labelled

³² Regulation (EC) no. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, pp. 13-19.

³³ Judgment of the General Court (Second Chamber, Extended Composition) of 27 January 2021, *ClientEarth v. European Investment Bank*, Case T-9/19, ECLI:EU:T:2021:42.

³⁴ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (Text with EEA relevance), PE/20/2020/INIT, OJ L 198, 22.6.2020, p. 13.

³⁵ Recital (5), *Ibid.*

³⁶ Gortsos, Christos, *The Taxonomy Regulation: More Important Than Just as an Element of the Capital Markets Union* (December 16, 2020). European Banking Institute Working Paper Series 2020 - no. 80, Available at SSRN: <https://ssrn.com/abstract=3750039>.

"green", but it limits which ones companies and investors can claim are climate-friendly.

The definition of 'sustainable investment' in Regulation (EU) 2019/2088 includes investments in economic activities that contribute to an environmental objective which, amongst others, should include investments into 'environmentally sustainable economic activities'.

The regulation distinguishes between economic activities that directly contribute to one of the defined objectives, activities that serve as "enabling" (Article 16) for such direct contributions, and activities that are needed as "transitional" technologies (contributing substantially to the transition-art. 10(2)).

The regulation requires the Commission to set out a list of environmentally sustainable activities by defining technical screening criteria for each environmental objective. These criteria will be established by means of delegated acts.

The first delegated act³⁷, defining green activities from sectors such as energy, chemicals, and waste was adopted in December 2021 and entered into force on 1 January 2022. On 2 February 2022, the Commission complemented the Climate Delegated Act³⁸, specifying the screening criteria for nuclear and gas activities. This act adds gas and nuclear power as

"transitional" technologies under the EU taxonomy.

Under art. 23(6) of the Taxonomy Regulation, the European Parliament and Council have four months to block the publication of this act in the EU Official Journal and thereby keep it from entering into force.

4. The CJEU jurisprudence: some duels along the way

4.1. The concept of environmental law

The CJEU, interpreted, in the case *TestBioTech*³⁹, in a broad sense the meaning of environmental law: the EU legislature intended to give to the concept of 'environmental law', covered by Regulation no. 1367/2006, a broad meaning, not limited to matters relating to the protection of the natural environment in the strict sense.

Subsequently, the Court states in *ClientEarth v European Investment Bank*⁴⁰ that the concept of a measure of individual scope⁴¹ adopted 'under environmental law' (...) must be interpreted broadly, as meaning that it is not limited (...) to solely measures of individual scope adopted on the basis of a provision of secondary legislation that contribute to the pursuit of the objectives of

³⁷ Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives (Text with EEA relevance), C/2021/2800, OJ L 442, 9.12.2021, pp. 1-349.

³⁸ Commission Delegated Regulation (EU) /... amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities, C/2022/0631 final (not published in the Official Journal).

³⁹ Judgment of the General Court (Seventh Chamber) of 14 March 2018, *TestBioTech eV v. European Commission*, Case T-33/16, ECLI:EU:T:2018:135, para. 44-46.

⁴⁰ Judgment of the General Court (Second Chamber, Extended Composition) of 27 January 2021, *ClientEarth v. European Investment Bank*, Case T-9/19, ECLI:EU:T:2021:42, para. 126.

⁴¹ For the notion of 'administrative act', see: Ștefan Elena Emilia, *Răspunderea juridică. Privire specială asupra răspunderii juridice în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013.

the European Union in the field of the environment, which are laid down in art. 191(1) TFEU, but rather covers any measure of individual scope subject to requirements under secondary EU law which, regardless of their legal basis, are directly aimed at achieving the objectives of EU policy on the environment.

4.2. The economic- environment balance

As the concepts of (*sustainable*) development and protection of environment can be antagonist, one of most problematic topic in environmental law, is the balancing of environmental with other social and economic interest⁴².

In fact, a general balance requirement is enshrined in art. 191 TFEU. The EU legislature has to take into account ‘the economic and social development of the Union as a whole and the balanced development of its regions’. The balancing between economic interests and environmental protection is evident in the field of internal market law⁴³.

In fact, *one restriction to trade is the protection of the environment*⁴⁴. As such, CJEU accepted different measures that can justify the restriction to trade. For example, in Judgment of 1 July 2014 *Ålands vindkraft*⁴⁵ the Court admitted that the objective of promoting the use of renewable energy sources for the production of

electricity, such as the objective pursued by the legislation at issue in the main proceedings, is in principle capable of justifying barriers to the free movement of goods. Also in Judgment of 13 March 2001, *PreussenElektra*⁴⁶ the Court held that statutory provisions of a Member State which, first, require private electricity supply undertakings to purchase electricity produced in their area of supply from renewable energy sources at minimum prices higher than the real economic value of that type of electricity are not incompatible with art. 30 TEC (now, after amendment, art. 28 EC), such provisions being useful for protecting the environment in so far as the use of renewable energy sources which they are intended to promote contributes to the reduction in emissions of greenhouse gases which are amongst the main causes of climate change which the European Community and its Member States have pledged to combat.

As to *the level of protection of the environment*, the CJEU stated in *Gianni Bettati v Safety Hi-Tech* that the level of protection aims as being high not highest. Finally, whilst it is undisputed that art. 130r(2) of the Treaty requires Community policy in environmental matters to aim for a *high level of protection*, such a level of protection, to be compatible with that provision, does not necessarily have to be *the highest* that is technically possible⁴⁷.

⁴² On judicial precedent, see: Anghel, Elena. *Judicial Precedent, a Law Source*, LESIJ- Lex ET Scientia International Journal XXIV, no. 2 (2017), pp. 68-76.

⁴³ Peeters, Marjan, and Mariolina Eliantonio, eds. *Research Handbook on EU Environmental Law*, (Cheltenham, UK: Edward Elgar Publishing, 2020), p. 495.

⁴⁴ Commission Notice Guide on Articles 34-36 of the Treaty on the Functioning of the European Union (TFEU) (Text with EEA relevance) 2021/C 100/03, C/2021/1457, OJ C 100, 23.3.2021, pp. 38-89.

⁴⁵ Judgment of the Court (Grand Chamber) of 1 July 2014, *Ålands vindkraft AB v. Energimyndigheten* Case C-573/12, ECLI:EU:C:2014:2037, para. 82.

⁴⁶ Judgment of the Court of 13 March 2001, *PreussenElektra AG v. Schlesweg AG*, Case C-379/98, ECLI:EU:C:2001:160, para. 73, 81 and operative part, pp. 1-2.

⁴⁷ Judgment of the Court of 14 July 1998, *Gianni Bettati v. Safety Hi-Tech Srl*, Case C-341/95, ECLI:EU:C:1998:353, para. 47.

The *concept of sustainable development* was considered by the Court in several cases.

In the Judgment of 20 May 2008, ECOWAS⁴⁸, the Court annuls a Council decision as it contains two components, neither of which can be considered to be incidental to the other, one falling within Community development cooperation policy and the other within the CFSP. The Court stated that certain measures aiming to prevent fragility in developing countries, including those adopted in order to combat the proliferation of small arms and light weapons, can contribute to the elimination or reduction of obstacles to the economic and social development of those countries. Hence, the sustainable development receives a board meaning.

Sitting in Full Court, at 16 May 2017, the Court stated in Opinion 2/15 (Singapore Free Trade Agreement)⁴⁹ that the objective of sustainable development henceforth forms an integral part of the common commercial policy⁵⁰. The Court considers that in the framework of sustainable development, the social protection of workers and environmental protection are mutually reinforcing components.

4.3. No exclusion needed (*Hinkley Point C*)

The final decision handed in case *Republic of Austria v. European Commission (Hinkley Point C)*⁵¹, brings in forefront a tense antagonism between the supporters and the opponents of nuclear energy.

The present decision builds on the constitutional relation between the treaties.

The Court states, contrary to what the General Court held, that the Euratom Treaty does not preclude the application in the nuclear sector of the rules of EU law on the environment. It follows that, since Article 107(3)(c) TFEU applies to State aid⁵² in the nuclear energy sector covered by the Euratom Treaty, State aid for an economic activity falling within that sector that is shown upon examination to contravene rules of EU law on the environment cannot be declared compatible with the internal market pursuant to that provision⁵³.

The decision was that the requirement to preserve and improve the environment, expressed in both the Charter and the TFEU, as well as the principles relied on by the Republic of Austria, which flow from it, are *applicable in the nuclear energy sector*⁵⁴.

The Hinkley Point C Decision represents a step in the gradual assimilation of the nuclear sector into the EU Treaty framework, including its environmental law

⁴⁸ Judgment of the Court (Grand Chamber) of 20 May 2008, Case C-91/05, *Commission of the European Communities v. Council of the European Union (ECOWAS)*, ECLI:EU:C:2008:288.

⁴⁹ Opinion of the Court (Full Court) of 16 May 2017, Opinion 2/15 (Singapore Free Trade Agreement), ECLI:EU:C:2017:376.

⁵⁰ For aspects related with international legal personality of EU, see: Popescu, Roxana-Mariana, *Legal Personality of International Intergovernmental Organizations*, Challenges of the Knowledge Society; Bucharest (2021), pp. 466-470.

⁵¹ Judgment of the Court (Grand Chamber) of 22 September 2020, *Republic of Austria v. European Commission (Hinkley Point C)*, Case C-594/18 P, ECLI:EU:C:2020:742.

⁵² For state aid details: Fuerea, Augustin, *Dreptul Uniunii Europene. Principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 353.

⁵³ Judgment of the Court (Grand Chamber) of 22 September 2020, *Republic of Austria v. European Commission (Hinkley Point C)*, Case C-594/18 P, ECLI:EU:C:2020:742, para. 45.

⁵⁴ *Idem*, para. 42.

requirements, save for the specific matters covered by the Euratom Treaty⁵⁵.

Thus, since the choice of nuclear energy is, under those provisions of the TFEU, a matter for the Member States, it is apparent that the objectives and principles of EU environmental law and the objectives pursued by the Euratom Treaty, do not conflict. The principle of protection of the environment and the principle of sustainability cannot be regarded as precluding, in all circumstances, the grant of State aid for the construction or operation of a nuclear power plant⁵⁶.

5. Conclusions

It seems to be a discrepancy between the green discourse of the EU, of the sustainability strategies and the decision or legislative acts adopted. We conclude that the primary law and legislative acts are using a more complex meaning of the words, which is narrower (and more *green*) in the programmatic acts of institutions.

In fact, according to the treaties, the principle of *sustainable development* is a *limit of the environmental protection*.

The using of the word green is ample, especially, in the non-binding acts of the EU institutions. In Commission strategy, European Green Deal, the word green refers to: changes of economy, financial market, the legislative framework and external action. The Taxonomy Regulation aims to establish at Union level a classification system to clarify which activities qualify as 'green' or 'sustainable'. In the wording of this legislative act 'green' or 'sustainable' appears to be synonymous.

As the concepts of (sustainable) development and protection of environment can be antagonist, one of most problematic topic in environmental law, is the balancing of environmental with other social and economic interest. The decision handed in case *Hinkley Point C*⁵⁷, that brings in forefront a tense antagonism between the supporters and the opponents of nuclear energy, states that the requirements to preserve and improve the environment are applicable in the nuclear energy sector.

The line between good or bad is not simple, life (and *green*) is more complex than that⁵⁸.

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⁵⁵ Kingston, Suzanne, *State Aid and the European Green Deal: The Implications of Case C-594/18 P Austria v Commission* (Hinkley Point C) (March 19, 2021). Forthcoming, European Law Review (2021), UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper no. 6/2021, Available at SSRN: <https://ssrn.com/abstract=3808040>, p. 12.

⁵⁶ Judgment of the Court (Grand Chamber) of 22 September 2020, Republic of Austria v European Commission (Hinkley Point C), Case C-594/18 P, ECLI:EU:C:2020:742, para. 49.

⁵⁷ *Ibidem*.

⁵⁸ <https://open.spotify.com/track/3QYMN6Q18OrIt94BCy8YLJ>.

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