EU Environmental Policy and Law: Reflections at Fifty

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The evolution of the legislative approach in EU environmental law

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1. Introduction

The launch of the European Commission Communication on the Green Deal COM(2019) 640 (European Green Deal) in December 2019 has marked the beginning of a new phase for European Union law and policy, characterised by the imperative of promoting a green (or ecological) transition of Europe, aimed at tackling the challenges posed by the interrelated climate and environmental crises within the broader objective to transform the European economy and society and put it on a more sustainable path of development.[1]

The Green Deal is shaped by the overarching objective of sustainable development and organised in several pillars which integrate, albeit not always in a coordinated and comprehensive manner, the three dimensions of sustainable development, namely the economic, social and environmental ones. This is confirmed by the wording of the European Green Deal, which promotes a complex agenda, that under the same umbrella comprises economic goals (a growth strategy), social goals (fair and prosperous society, just and inclusive transition) as well as climate and environmental goals (climate neutrality, decoupling of economic growth from resource use, promotion of circular economy, conservation and enhancement of natural capital, protection of health and well-being of citizens from environment related risks and impacts).[2]

The implementation of the green transition promoted by the European Green Deal has given rise in the last few years to a large legislative production by the European Union, which may be seen as a sort of "legislative hyperactivity". This has been promoted by the European Commission and shaped by the two co-legislators, namely the Council and the European Parliament.[3] The new wave of legislation adopted in recent years to implement the green transition has consolidated and further expanded a trend already observed before the adoption of the European Green Deal, which consists in the evolution of the legislative style and techniques of the Union in the environmental field.

Such an evolution can be described and investigated through the examination of a series of changing characteristics. This contribution will analyse the evolution of the legislative approach in EU environmental law by presenting and highlighting some of the most striking elements of change observed in the framework of the legislative implementation of the European Green Deal. The

1 COM(2019) 640, The European Green Deal, p. 2.

2 Ibid.

3 The European Union has adopted a huge quantity of legislative acts to implement the policies and actions foreseen by the European Green Deal. There is no EU official figure regarding the number of legislative acts adopted to this effect. An estimate contained in a HSBC Report calculates 74 legislative acts (Regulations and Directives) related to the implementation of the Green Deal (HSBC Report (2024), p. 1).

analysis will focus on the following five features: the marked legislative hyperactivity, the creeping extension of the EU competence, the increased use of the subsidiarity principle, the greater use of regulations instead of directives, the increasing extraterritorial application of EU law beyond the European territory.

2. The legislative hyperactivity

The legislative hyperactivity observed in the last few years in the implementation of the European Green Deal has occurred in parallel and similar terms also in other sectors, in particular those related to the intertwined green and digital transitions. This phenomenon has been highlighted *inter alia* by the 2024 Draghi Report, which observed that in the period corresponding to the mandate of the first Von der Leyen Commission (2019-2024), the European Union has adopted over 13,000 legislative acts, while in the same period in the USA, only 3,500 legislative acts were passed.[4] In the Draghi Report, the cost of this legislative hyperactivity of the European Union is mainly presented as a competitive disadvantage for the European companies which are said to face three main hindrances related to the increased quantity of regulation. These consist firstly in the accumulation of new legislation and in its frequent changes, which often give rise to overlapping and inconsistencies in the applicable legislation; secondly, in the burden related to the national transposition, which is sometimes related to the gold plating of EU legislation by Member States and to the diverging requirements from one EU country to another; thirdly, in the proportionally higher burden imposed on SMEs with respect to larger companies which is due to the fact that most of the legislation adopted by the EU despite being targeted at larger companies is also applying in the same way to SMEs. To tackle these challenges, the Draghi Report proposes to both lower the stock of European legislation and better quantify the cost of the regulatory flow in the European Union, with the aim of simplifying and streamline regulation for the benefit of the European economy.[5]

The lucid analysis contained in the Draghi Report with respect to the impact of the legislative hyperactivity of the European Union on the competitiveness of the European economy vis-à-vis its global competitors is certainly correct. However, the increased legislative production of the EU observed in the last few years also raises other questions, which do not directly relate to the business sector, or the European economy as a whole, but rather refer to the growing lack of coherence and to the insufficiently integrated approach which may be observed in the recently adopted EU legislation.

The huge quantity of legislative acts adopted to promote the green transition in the framework of the implementation of the European Green Deal has been

4 Draghi Report (2024), p. 65.

5 Ibid.

adopted in "silos", corresponding to several priorities of action, such as climate change, energy, circular economy, biodiversity protection, and so on. In practice, due to the time constraints and the overall regulatory complexity, it seems that several DGs and working groups acting within the Commission have drafted or supervised the drafting of the various pieces of legislation implementing the Green Deal, acting "in parallel", without sufficiently being aware or each other's approach. As a consequence, a certain lack of coordination among the legislative acts adopted seems to emerge, as demonstrated for instance by the scarce presence of cross references and of common implementing paths in the relevant regulations and directives. To this respect, it may be observed that the large number of legislative acts adopted in the framework of the implementation of the Green Deal tend to show a multifaceted and often inconsistent picture characterised by the promotion of several, sometimes competing, if not properly conflicting, objectives related to climate, energy, industrial, social and environmental goals. This is confirmed not only by the actual wording of the relevant legislative acts adopted by the Union, but also by the rare, if not totally missing, reference to EU law principles and objectives, which may help promote a more coherent interpretation and application of such a complex body of legislation. This is true with regard to both the general principles of integration and sustainable development, contained in Article 11 TFEU and in Article 37 of the Charter of Fundamental Rights of the Union, as well as to the environmental protection principles and objectives contained in Article 191 TFEU, which are normally not mentioned neither in the preamble nor in the text of the EU legislative acts recently adopted in the implementation of the European Green Deal.

3. The creeping extension of the EU competence

Within the framework of the implementation of the European Green Deal, a tendency to expand the scope and reach of EU law related to the pursuit of environmental protection objectives may be observed. This tendency has a twofold dimension. On the one side, EU environmental legislation adopted under the legal basis of Article 192 TFEU is often pursuing multiple objectives, which are not necessarily strictly linked with the original objectives contained in such a treaty provision. This is so because the original environmental protection objectives contained in the treaty have been supplemented through the years by several further objectives and goals contained in various soft law planning documents, such as the Strategy for sustainable development, the periodical EU Action Programmes for environmental protection and more recently the European Green Deal Communication. On the other side, there are several legislative acts adopted under various (non-environmental) legal basis, such as for instance Article 114 TFEU on the functioning of the internal market or Article 194 TFEU on energy policy which, despite pursuing concurring goals, may have a sensible effect on the promotion of the environmental protection objectives of the Union. This is in line with the references contained in Article 114 TFEU to the "high level of environmental protection" as one the

concurrent goals of the legislative acts adopted under this legal basis and in Article 194 TFEU to the "need to preserve and improve the environment" as one of the objectives of the EU energy policy.

Sometimes the legislative acts adopted in the implementation of the European Green Deal have a multiple legal basis, which may comprise, alongside Article 192 TFEU, also some of the other legal bases mentioned above. This is the case for instance of the RED III directive on the promotion of renewable energy which has been adopted under a triple legal basis, namely Articles 192, 114 and 194 TFEU.[6] The presence of a multiple legal basis may help expand the scope and reach of EU environmental protection. However, at the same time it may increase the difficulty to promote a correct balancing among the various interests at stake within a single legislative act and may render more difficult to ensure the coherence of the overall policy and legislative action of the Union. For instance, in the RED III directive it seems that the promotion of renewable energy, which is meant to increase the quantity of renewable energy produced within the European territory for climate and energy purposes, may be at odds with land planning and environmental protection objectives, as will be described below in greater detail. Something similar may happen in the case of the legislative packages which encompass within a common framework a series of legislative acts relevant for a certain area, as it happens for instance in the climate policy field. The adoption of legislative packages has become a common practice in recent years and is widely used in the implementing legislation of the European Green Deal. The practice legislative packages too may help enlarging the scope and reach of EU environmental protection. However, it does not necessarily guarantee the coherence of the Union's action.

The tendency to extend the scope and reach of EU law related to the pursuit of environmental protection objectives is giving rise to a creeping extension of the EU competence. Indeed, the evolution of the EU environmental protection legislation has largely impacted the distribution of competences of the EU vis-à-vis its Member States.[7] In recent years, a growing tendency of the Union to expand its competence related to environmental protection goals and actions, at the expense of the residual competences of the Member States, has been observed. This is well exemplified in several acts of the broad and complex body of legislation adopted in the implementation of the European Green Deal. The tendency of the Union to expand its environmental protection competence can take two parallel directions. On the one side, it may consist in the addition of new topics to the scope of environmental policy and law, such as for instance with regard to nature protection, as it happened for instance with the adoption of the 2024 Nature Restoration Regulation, which aims at recovering "ecosystems" in a broader perspective than the one previously adopted for instance in the Wild Birds and Habitats directives, which simply dealt with the "conservation of

6 Directive 2023/2413/EU (RED III Directive).

7 ECJ C-176/03 (Commission/Council) para. 48.

natural habitats and of wild fauna and flora".[8] On the other side, it may consist in blurring the boundaries between the different legal bases foreseen by the treaty, for instance by promoting environmental interests within the legal acts adopted under an internal market legal basis, such as for instance in the 2024 Regulation on eco-design,[9] or by adopting measures with relevant trade effects contained within legal acts adopted under an environmental legal basis, such as for instance in Regulation (EU) 2023/1115 on the prevention of deforestation.[10]

The observed tendency to the progressive extension of the EU environmental protection competence, beyond the realm of environmental legislation *stricto sensu*, is to be read in conjunction with the increasingly broader understanding of the concept of EU environmental protection, which developed over the last decades and intensified with the European Green Deal. Currently, environmental protection interests are no longer pursued solely within the traditional realm of EU environmental legislation as such, working in isolation with respect to other areas of law, but are rather promoted in the interplay between environmental, climate, energy, industrial and internal market objectives and goals. This may be considered a successful application of the environmental integration principle, enshrined in Article 11 TFEU, which requires the EU institutions to integrate environmental protection requirements in the definition and implementation of all Union's policies and activities, with a view to promote the overarching objective of sustainable development.[11]

Within such a context, the evolutionary path from a narrow to a broader understanding of the concept of environmental protection has been marked by several phases. The early narrow understanding was focused on a limited area of action which initially almost solely included pollution control, as witnessed by the early legislative acts adopted by the EEC in the seventies and eighties of the last century for the protection of air and water, for waste management and for (a limited) protection of nature. Lately, starting from the nineties, the scope of EC environmental protection policy and law began to expand and started to include new vertical areas, such as a more comprehensive habitats protection, and some horizontal instruments, such EIA, SEA, environmental information, participation, and access to justice.

A further increase in the EU environmental protection competence occurred in the last two decades. A key role to this effect was played by the adoption of a growing and complex body of legislation dedicated to tackle the climate change challenge, both as a means to implement the international law mitigation and adaptation requirements, as enshrined in the UNFCCC and the subsequent Kyoto Protocol and Paris Agreement, and as a way to promote an "European" original climate change legislation.[12] This trend has been well exemplified

8 Regulation (EU) 2024/1991 (Nature restoration).

9 Regulation (EU) 2024/1781 (Eco-design).

10 Regulation (EU) 2023/1115 (Deforestation prevention).

11 Montini (2018), pp. 139-149; Sjåfjell (2019), pp. 105 et seq.; V. Karageorgou (2023), pp. 159-189.

12 See further in this book: A.M. Moreno, Climate Change.

through the years by the adoption of innovative pieces of legislation, such as for instance the 2003 *Emission Trading* Directive (EU ETS),[13] the first kind of legislation introducing a cap and trade regime in the climate change field at a the global level, or more recently Regulation (EU) 2023/956 introducing a *Carbon border adjustment mechanism* (CBAM Regulation),[14] a pioneering example of legislation introducing a border charge on imported goods to achieve a level playing field between imported products and corresponding goods produced within the EU internal market.

The observed tendency towards the expansion of the EU environmental protection competence continued up to recent times with the adoption of the legislation implementing the European Green Deal and the approval of a complex variety of post-pandemic planning and legislative instruments, which marked a decisive further evolution of the very understanding of the concept of EU environmental protection within the broader framework of a complex system of legislation pursuing climate, energy, industrial, nature and biodiversity goals, in connection with the promotion of the well-functioning of the internal market. Therefore, it seems that nowadays EU environmental protection is not promoted solely through the limited scope and reach of EU environmental legislation *stricto sensu*, but rather appears to be a part of a broader regulatory framework corresponding to a vast field of action covering economic, social and environmental considerations under the overarching objective of sustainable development. In fact, it may be argued that in the last decades, the objective of sustainable development has largely shaped and has substantially changed the scope and the meaning of the concept of environmental protection, prompting a gradual transformation of the essence and content of the EU competence in this field. As a consequence, EU environmental law now seems to be a part of the vast and complex body of legislation aimed at promoting the three dimensions of sustainable development, rather than a self-standing field of EU law.[15]

4. The increased use of the subsidiarity principle

In recent years, the legislation adopted for the implementation of the European Green Deal has shown the tendency of the Union to make an increased use of the subsidiarity principle, as enshrined in Article 5 TEU, to expand the scale and scope of its action, within the area of the shared environmental protection competence. This tendency can be observed in many legislative acts related to climate and energy, nature protection, due diligence and reporting standards for the business sector, and in several other environmental related pieces of legislation with relevant trade effects.

13 Directive 2003/87/EC (Emission Trading – EU ETS).

14 Regulation (EU) 2023/956 (Carbon border adjustment mechanism – CBAM).

15 Montini (2025), pp. 47-71.

A key area where this tendency can be clearly observed is represented by the broad area related to climate change legislation, in which climate change, energy and environmental considerations are often encompassed within a single legislative act. In the last few years, the scale and scope of the action needed to effectively tackle the climate change challenge have prompted the European Union to adopt a vast array of new legislation, which aims at pursuing, not necessarily in an integrated and coordinated way, several specific interests such as those related to GHG emission mitigation, climate change adaptation, climate neutrality, promotion of renewable energy and energy efficiency. In such a context, the climate, energy and environmental requirements pursued under the umbrella of the climate change objectives are often affecting the functioning of the European internal market as well as the trade relations of the EU with its global trade partners.

A specific example of such an increased use of the subsidiarity principle which is characterising the exercise of the EU shared competence in this area, by affecting the scale and scope of the EU action at the expense of the residual Member States' discretionary powers, can be observed for instance in the RED III directive on the promotion of renewable energy.[16] In such a context, the European Union has restated and strengthened the obligation imposed upon its Member States to promote energy production from renewable energy sources within their territory, which was already contained in the previous RED I and RED II directives. This obligation aims to increase the share of renewables in energy production and consumption within the European Union territory, with the ultimate objective of decreasing GHG emissions and reducing the Union's dependence on the import of energy raw materials from other countries. With the RED III directive, however, the European Union has introduced some additional requirements which affect the discretionary power of the Member States in their land planning rules and procedures.[17] Three features of the RED III directive deserve a specific mention to this respect. The first one is the obligation imposed by the directive on the Member States to approve national plans (subject to SEA)[18] to identify in their territory a series of renewables acceleration areas.[19] In such areas the approval of renewable energy projects will be subject to a fast-track procedure, in which the application of the EIA procedure to single projects may be waived.[20] The second feature is the reduction imposed by the directive upon the Member States of the maximum duration period for the permit granting procedures for the authorisation of renewable energy projects.[21] The third feature is the determination that the planning and construction

16 Directive 2023/2413/EU (RED III Directive).

17 Montini (2024), p. 209-219; Jendrośka and Anapyona (2023), pp. 1 et seq.

18 Directive 2023/2413/EU (RED III Directive), Art. 15c(2).

19 Ibid. Art. 15b(1).

20 Ibid. Art. 16a(3).

21 Ibid. Art. 16a(1).

phases of such projects are characterised by an overriding public interest which prevails *ex lege* over all other possibly conflicting interests.[22] These three types of requirements introduced with the RED III directive had the effect of expanding the coverage of the Union's competence at the expense of the Member States' residual discretionary powers.

In such a case, it is questionable whether the Union is acting within the legitimate limits of subsidiarity principle. In fact, the legitimacy of such an increased use of the subsidiarity principle to enlarge the scale and scope of the EU action for the implementation of the European Green Deal should be assessed on the basis of criteria foreseen by Article 5 TEU, with regard to the application of the subsidiarity principle and the related proportionality principle.[23] The criteria foreseen by Article 5 TEU for the application of the subsidiarity principle include both a negative and a positive criterion. According to the former criterion, in order to adopt legislation in areas of shared competence, the EU must prove that the objectives of the proposed action cannot be sufficiently achieved by the Member States acting unilaterally, while on the basis of the latter criterion, it must demonstrate that by reason of its scale or effects the proposed action can be better achieved at Union level. Moreover, the criterion listed by Article 5 TEU for the application of the proportionality principle foresees that in the areas of shared competence, the EU must prove that the content and form of its action shall not exceed what is necessary to achieve the objectives of the treaties. This criterion calls the Union to keep its action at a minimum to be proportionate to the proposed objective. By applying these criteria to the specific case of the RED III directive it emerges that, on the one side, the relevant provisions may be said to satisfy both the positive and the negative criterion related to the subsidiarity principle. However, on the other side, it is not quite sure that the same measures also satisfy the criterion set out in Article 5 TEU for the proportionality principle, with reference in particular to the EIA waiver, to the reduction of the maximum duration period for the permit granting procedures and to the determination (at EU level) of the overriding public interest which prevails *ex lege* over all other possibly conflicting interests. With regard to these requirements, it may be argued that the EU may have exceeded the proportionality of its action, although it may be practically difficult to challenge the legality of such measures on the basis of the "manifestly inappropriate test" developed by the CJEU jurisprudence.[24]

Similarly, other measures adopted by the Union in the implementing legislation of the Green Deal, which are not directly related to the pursuit of climate change objectives, such as for instance in the case of the nature restoration legislation or of the due diligence and reporting obligations for the business

22 Ibid. Art. 16f.

23 Jans and Vedder (2024), pp. 13-20; Krämer (2024), pp. 16-19.

24 ECJ C-331/88 (Fedesa); ECJ C-293/97 (Standley).

sector, have shown a similar tendency to point towards the enlargement of the scale and scope of the EU action at the expense of the Member States' residual discretionary powers. Therefore, the EU by means of the legislation adopted for the implementation of the European Green Deal now regulates areas and aspects previously excluded from its legislative coverage. This has given rise to a non-negligible impact on the distribution of powers between the Union and its Member States, in an area of shared competence, whose consequences for the well-functioning of the whole EU legal order would deserve further scrutiny.

5. The greater use of regulations instead of directives

Since the very beginning of the development of EU environmental policy, in the seventies and eighties of last century, the Union legislation in this field has pursued a twofold objective. On the one side, one of the two main aims has been to create a common structured response to the environmental emergencies and challenges, initially related to the prevention of air, water, waste pollution in the traditional forms of the so-called vertical legislation, and subsequently also in the form of procedural horizontal requirements, linked for instance to the common rules on the environmental impact assessment for project, the strategic impact assessment for plans and programs, or the provisions establishing access to information, public participation and access to justice. On the other side, the concurrent main aim has been to adopt common rules for environmental protection at the European level to protect the well-functioning of the European internal market, thus preventing Member States from setting different requirements for companies operating within their national territory as compared to undertakings located in other EU countries. In other terms, the concurrent main objective sought by the EU environmental legislation has always been the creation of a common level playing field for business operators located in the different Member States to prevent unfair competition based on unequal environmental requirements within the European internal market.

So far, the legislative instrument most commonly used to adopt EU environmental legislation has been traditionally the directive, which allows to pursue an EU-wide harmonisation of national environmental provisions by imposing an obligation to the Member States to achieve a specific result, while leaving them some flexibility as to the choice of the form and methods, as prescribed by Article 288 TFEU.[25] As the most commonly used instrument to achieve environmental protection objectives the directive seems to be the most suitable and reasonable choice, given the fact that the action in the environmental field is a shared competence between the Union and its Member States, pursuant to Article 4 TFEU.

25 Krämer (2024), pp. 50-53; Jans and Vedder (2024), pp. 18, 100.

This traditional approach based on the directive as the reference instrument to promote environmental protection objectives has been recently replaced by a more frequent recourse to the regulation as the most common means relied upon by the European Union institutions to implement the European Green Deal. In fact, most of the legislation adopted in the last few years to fulfil the objectives and goals foreseen by the Green Deal has taken the form of regulations. This type of legislative act, as stated by Article 288 TFEU, is conceived as an instrument aimed to provide a full harmonisation of a certain matter, normally requiring no (or very limited) implementation measures to be adopted by the Member States and therefore greatly reducing their discretionary power as to the choice of the form and methods to be employed to achieve a given result. Consequently, it is questionable whether this type of instrument represents the most suitable choice as the standard type of legislative act to be relied upon for climate and environmental protection purposes, as it is the case in the broad and complex body of legislation adopted for the implementation of the European Green Deal.

This matter, however, deserves a closer scrutiny, as the choice of the correct instrument may be different on a case-to-case basis, depending on the different interests at stake and the specific objectives sought by each specific legislative act. For instance, it appears quite surprising the choice of the regulation as the type of legal instrument in the case of Regulation (EU) 2024/1991 on nature restoration[26] recently adopted by the Union which sets common objectives to be reached by the Member States through their own national policies. This legislative act takes an approach which would be probably better pursued with a directive, as previously experienced in the other EU legal instruments related to nature and habitats protection, such as the Wild Birds directive and the Habitats directive.[27] Similarly, it seems to be questionable whether the choice of the regulation was the correct one for the adoption of this so-called "European climate law" (Regulation (EU) 2021/1119), which enshrined in the European legislation "climate neutrality" as a common binding objective. This is because the legislation at stake only determines a general and abstract objective which will have to be achieved as a collective goal by 2050 through the adoption of further measures both by the EU institutions and the Member States.[28]

The use of the regulation seems to be a more reasonable choice with regard to some other legislative acts adopted for the implementation of the European Green Deal, which despite being based on Article 192 TFEU, as environmental protection measures, are largely focused on the adoption of trade measures with a transnational effect, which impose the application of European standards on the trade partners of the Union wishing to export their goods into the European

26 Regulation (EU) 2024/1991 (Nature restoration).

27 Directive 2009/147/EC (Wild Birds) and the Directive 92/43/EEC (Habitats Directive).

28 Regulation (EU) 2021/1119 (Climate Law).

internal market. This is the case for instance of the CBAM Regulation, which imposes a border charge on the import of products belonging to certain categories subject to the application of the European emission trading scheme (EU ETS) if produced within the territory of the European Union. The primary aim of such a legislation is to create a level playing field between goods produced internally within the European Union and imported products belonging to the same categories, to shield European production from unfair competition and avoid the carbon leakage phenomenon, with the ultimate objective to contribute to the achievement of more ambitious climate targets at the global level, in accordance with the Paris Agreement on climate change.

Another example which presents similar features is represented by Regulation (EU) 2023/1115 on deforestation prevention, which imposes the compliance with the European standards and criteria to traders of commodities and products belonging to certain categories imported from third countries into the European internal market, with the aim to ensure that such commodities and products originate in areas free of deforestation. In such a case, the main declared objective of the regulation consists in the environmental objective to protect global biodiversity by reducing trade in products possibly associated with deforestation practices. However, given the relevant trade impact of such a piece of legislation, it seems that it is pursuing an equally relevant objective, namely, to guarantee the well-functioning of the European internal market, which makes more understandable in this case the use of the regulation as the chosen type of legislative act.

6. The increasing extraterritorial application of EU law beyond the European territory

The implementation of the European Green Deal has been characterised by the increasing extraterritorial application of EU law beyond the European territory. This phenomenon may be considered to be a practical application of one of the objectives mentioned in the European Green Deal Communication, namely the ambition of the EU to become a (regulatory) "global leader".[29] To this effect, the EU stated that "global challenges of climate change and environmental degradation require a global response" and affirmed its willingness to "promote and implement ambitious environment, climate and energy policies across the world" by developing "a stronger 'green deal diplomacy' focused on convincing and supporting others to take on their share of promoting more sustainable development".[30] The EU green diplomacy, in the European Commission's view, should largely rely on trade policies able to support the EU's ecological transition promoted by the European Green Deal by creating a platform to connect the EU with its trade partners in the pursuit of

29 COM(2019) 640, The European Green Deal.

30 Ibid., p. 20.

common climate and environmental actions. In such a context, the EU stated that all products placed on the European internal market should fully comply with the relevant EU standards and requirements. Moreover, it affirmed that its expertise as a green regulator should be used to encourage its trade partners to adopt similarly ambitious environment protection and climate mitigation standards.[31]

The application by the European Union of its climate and environmental standards towards its trade partners should be considered a concrete application of the so-called European "strategic autonomy".[32] This concept, which has started to emerge in the last decade in the jargon of the European Union, refers to a wide variety of initiatives that the EU is promoting with the aim to increase its capacity to act autonomously in strategic areas with respect to its global partners, starting from the fields of foreign policy and defence and gradually moving into several other sectors.[33] To this respect, it may be argued that, in the pursuit of its strategic autonomy, the European Union has adopted in the last few years a whole package of legislation implementing the European Green Deal with a marked external relevance for the promotion of climate, energy and environmental goals. This perfectly fits within the phenomenon of the so-called "green strategic autonomy" of the European Union, which has emerged in more recent times as the combination within a single expression of two concepts: the strategic autonomy and the green transition.[34] In this sense, the quest for a "green strategic autonomy" may be considered as a specific dimension of the Union's more general pursuit of its strategic autonomy. Within such a context the European Union may be defined as an emerging "global green regulator" that is trying to impose an extraterritorial application of its principles, standards and rules to its trade partners, so as to promote a widespread global implementation of its climate, energy and environmental interests and goals, which are largely (albeit not totally) inspired by the relevant international obligations and objectives, such as for instance those enshrined in the Paris Agreement on climate change.

In such a context, the Union, in its implementing legislation of the European Green Deal, is characterising itself as a global "soft" green regulator, acting within the framework of the "Brussels effect" scenario. The expression "Brussels effect", coined in the legal literature by Bradford,[35] refers to the possibility that the EU standards and rules, initially conceived for the European internal market and applied therein, become reference criteria and norms in other jurisdictions as well, either directly or indirectly. In more concrete terms, it refers to the circumstance in which the EU regulatory standards and rules can be applied

31 Ibid., p. 21.

32 Damen (2022); Tocci (2021).

33 Helwig and Sinkkonen (2022), pp. 1-20; Kassoti and Wessel (2023), pp. 305-310.

34 Damen (2023).

35 Bradford (2012), pp. 1-68; Bradford (2020).

voluntarily and spontaneously by economic operators located outside the European territory. In addition, the term may also refer to the different circumstance in which, through the active contribution of relevant economic operators, the EU regulatory standards may be incorporated on a voluntary basis by third countries into their national law, by virtue of the recognition of the authority and quality of the regulation established in certain sectors by EU law. For the purposes of the present analysis, it should be highlighted that in the implementation of the European Green Deal, the Union is presenting itself as a global green regulator, which is meant to set the standards for a paradigmatic green regulation to be then voluntarily relied upon by foreign companies or incorporated in their own national legislation by other countries. In some cases, still somehow related to the "Brussels effect", the EU may gently suggest the application of its regulatory standard as a reference to its trade partners. However, the real situation emerging in the last few years in the context of the legislation implementing the European Green Deal is quite different. In fact, in such a case, the European Union has often introduced in its legislation specific measures which unilaterally and directly impose, rather than propose or suggest, the adoption of its climate and environmental standards to its trade partners.

Consequently, it should be investigated whether the EU legislation adopted for the implementation of the European Green Deal which is characterised by an extraterritorial reach should be better qualified as an expression of the so-called "territorial extension" of such a legislation. This term, which was firstly introduced in the legal literature by Scott,[36] refers to the phenomenon of the broadening of the scope of application of European legislation outside its territory which slightly differs from the more traditional case of the extra-territorial application of the legislation. In fact, unlike what occurs in the case of the extra-territorial application of the legislation *stricto sensu*, the expression territorial extension of European Union legislation refers to a situation which is always characterised by the presence of a territorial connection with the Union. This is usually linked to the effects that the conduct of a third country or an economic operator located in a third country, outside the territory of the Union, may have on the European internal market. The connection criterion to assess the legitimacy of the territorial extension of the EU legislation outside its territory is represented by the "effects criterion".[37] This criterion derives from competition law, whereby it is commonly used to shield the European market against the behaviour of economic operators who engage in anti-competitive practices that, although taking place outside the territory of the EU, may have appreciable negative effects on the functioning of the EU internal market. To this respect, it should be recalled here that the legitimacy of the territorial extension of the EU legislation to economic entities located outside its territory is widely accepted both

36 Scott (2014), pp. 87-126; Scott (2019), pp. 21-63; Scott (2024), pp. 1356-1359.

37 Scott (2024), pp. 1356-1359.

in the legal theory and in the case-law of the Court of Justice and the General Court.[38]

The presence of provisions with clear and marked extraterritorial effects aimed at pursuing climate, energy and environmental objectives is evident in many pieces of legislation adopted in the last few years by the EU in the framework of the implementation of the European Green Deal. The legitimacy of such measures has been stated by the Court of Justice, notably in the Air Transport Association of America case[39] where the Court upheld the applicability of EU ETS rules to flights originating outside the Union, on the basis of a sufficient territorial connection based on the "effects criterion". There are several examples which may be recalled here to this effect.

A first example is represented by the CBAM Regulation, which imposes the application of a border charge to the import of products belonging to certain categories which correspond to goods subject to the application of the European emission trading scheme if produced within the European territory.[40] The border charge is aimed at creating a level playing field between products produced internally within the European territory and similar imported products placed on the European internal market. With this regulation the European Union is *de facto* imposing on its trade partners its own internal standards in terms of carbon charges aimed at maximising the reduction of greenhouse gases emission at the global level in application of the objectives of the Paris Agreement on climate change. This is probably the most paradigmatic example of the European Union acting unilaterally to impose its own trade standards to goods produced in third countries to make the EU as a global green regulator, independently from its trade partners and competitors, to promote its own climate and environmental interests, in furtherance of the international obligations enshrined in the Paris Agreement on climate change. In this sense, a peculiar feature of the CBAM border charge adjustment is represented by the circumstance that it constitutes the external application of similar levy, deriving from the EU ETS legislation, which is imposed on economic operators producing similar goods within the European internal market. As already mentioned above, in this case the extension of the EU standards and rules to imported products aims to create a level playing field between internally produced goods and similar imported products, to achieve in a more meaningful way the GHG emission reduction targets set at EU level in line with the Paris Agreement objectives.

Another example is represented by the Regulation (EU) 2023/1115 on deforestation prevention which aims to protect global biodiversity and reduce greenhouse

38 ECJGC C-413/14 P (Intel v. Commission); ECJ T-102/96 (Gencor v. Commission), para. 90.

39 ECJ C-366/10 (Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change) paras. 125, 129.

40 Regulation (EU) 2023/956 Art. 2.

gases emissions associated with deforestation by promoting the application of European standards and due diligence requirements to all economic operators that trade in goods belonging to certain categories of commodities and products which may be produced in areas subject to deforestation.[41] Commodities and products belonging to these categories, irrespective of their place of origin, to be allowed to enter the European internal market must abide by the standards and rules imposed by the European Union, which is effectively acting as a global green regulator in this field.

A further example is represented by the Regulation (EU) 2024/1781 on eco-design, which imposes on a broad series of products belonging to certain categories identified by the regulation the fulfilment of some environmental sustainability requirements, to be supplemented by the adoption by the European Commission of relevant implementing legislation specific for each product category identified.[42] The application of these requirements is aimed at increasing the environmental sustainability of such products. In practical terms, the European standards are meant to be applied to all relevant goods marketed within the European internal market, irrespective of their place of manufacture. This can be considered another example of the extraterritorial application of the European standards to economic operators located in third countries.

The analysis conducted above has presented some examples of legislative provisions adopted in the last few years by the Union for the implementation of the European Green Deal which are characterised by clear and marked extraterritorial effects. The presence of such provisions, which are applied by the Union acting unilaterally with the aim to reinforce its position as a "global green regulator", makes it possible to argue that such legislation with an extraterritorial reach should be qualified as expression of the "territorial extension" of EU law, rather than evidence of the "Brussels effect".

7. Conclusion

The present contribution has examined the evolution of the EU legislative approach in the environmental field by presenting some of the most striking elements of change observed in the legislative implementation of the European Green Deal. The analysis has focused on the following five features: the marked legislative hyperactivity, the creeping extension of the EU competence, the increased use of the subsidiarity principle, the greater use of regulations instead of directives, the increasing extraterritorial application of EU law beyond the European territory.

41 Regulation (EU) 2024/1115 (Deforestation prevention) Art. 34(5).

42 Regulation (EU) 2024/1781 (Eco-design) Arts. 4-7.

The first feature is represented by the legislative hyperactivity of the Union. To this respect, the analysis has shown that the huge quantity of legislative acts adopted to promote the green transition in the framework of the implementation of the European Green Deal has been adopted in "silos", corresponding to several priorities of action, such as climate change, energy, circular economy, biodiversity protection, and so on. Therefore, a certain lack of coordination among the legislative acts adopted seems to emerge. The large number of legislative acts adopted in the framework of the implementation of the Green Deal tend to show a multifaceted and often inconsistent picture characterised by the promotion of several, sometimes competing, if not properly conflicting, objectives related to climate, energy, industrial, social and environmental goals. This is confirmed by the missing reference to EU law principles and objectives which may help promote a more coherent interpretation and application or such a complex body of legislation.

The second feature consists in the creeping extension of the EU competence. In this sense, the analysis has shown a tendency to extend the scope and reach of EU law related to the pursuit of environmental protection objectives which emerges from the implementation of the European Green Deal. This tendency has a twofold dimension. On the one side, EU environmental legislation adopted under the legal basis of Article 192 TFEU is often pursuing multiple objectives, which are not necessarily strictly linked with the original objectives contained in such a treaty provision. On the other side, there are several legislative acts adopted under various (non-environmental) legal basis, such as for instance Article 114 TFEU on the functioning of the internal market or Article 194 TFEU on energy policy which, despite pursuing concurring goals, may have a sensible effect on the promotion of the environmental protection objectives of the Union.

The tendency to extend the scope and reach of EU law related to the pursuit of environmental protection objectives is giving rise to a creeping extension of the EU competence at the expense of the residual competences of the Member States. The tendency of the Union to expand its environmental protection competence can take two parallel directions. On the one side, it may consist in the addition of new topics to the scope of environmental protection policy and law, and on the other side, it may consist in blurring the boundaries between different legal bases foreseen by the treaty, for instance by promoting environmental interests within legal acts adopted under an internal market legal basis.

Moreover, the analysis has shown that the tendency towards the progressive expansion of the EU environmental protection competence is to be read in conjunction with the increasingly broader understanding of the concept of EU environmental protection. This trend, which had already started in the last decades, increased and intensified with the European Green Deal, whereby environmental protection interests are no longer pursued solely within the traditional realm of EU environmental legislation as such, working in isolation

with respect to other areas of law, but are rather promoted within the broader framework of a complex system of legislation pursuing climate, energy, industrial, nature and biodiversity goals, in connection with the promotion of the well-functioning of the internal market. Therefore, it seems that nowadays EU environmental protection is not promoted solely through the limited scope and reach of EU environmental legislation *stricto sensu*, but it rather appears to be a part of a broader regulatory framework corresponding to a vast field of action covering economic, social and environmental considerations under the overarching objective of sustainable development.

The third feature deals with the tendency of the Union to make an increased use of the subsidiarity principle, as enshrined in Article 5 TEU, to expand the scale and scope of its action, within the area of the shared environmental protection competence. This tendency can be observed in many legislative acts, pertaining to different areas. The analysis has focused, in particular, on three types of requirements introduced by the RED III directive on the promotion of renewable energy and has assessed whether, in such a context, the Union is acting within the legitimate limits of subsidiarity principle on the basis of criteria foreseen by Article 5 TEU, with regard to the application of the subsidiarity principle and the related proportionality principle. By applying these criteria to the specific case examined it emerges that, on the one side, the relevant provisions may be said to satisfy both the positive and the negative criterion related to the subsidiarity principle. However, on the other side, it is not quite sure that the same measures also satisfy the criterion set out in Article 5 TEU for the proportionality principle, insofar in this case the content and form of the Union's action may be said to exceed what is necessary to achieve the objectives the treaties.

With regard to the fourth feature under scrutiny, represented by the greater use of regulations instead of directives, the analysis has shown that, since its very beginning, the development of EU environmental policy, has been characterised by a twofold objective: on the side to create a common structured response to the environmental emergencies and challenges and on the other side to adopt common rules for environmental protection at the European level which may protect the well-functioning of the European internal market. For these reasons, the legislative instrument most commonly used to adopt EU environmental legislation has been traditionally the directive, which allows to pursue an EU-wide harmonisation of national environmental provisions by imposing an obligation to the Member States to achieve a specific result, while leaving them some flexibility as to the choice of the form and methods, as prescribed by Article 288 TFEU.

This traditional approach has been recently replaced by a more frequent recourse to the regulation as the most common instrument relied upon by the EU institutions for the legislation implementing the European Green Deal. In fact, most of such legislation has taken the form of regulations. This type of legislative act,

as stated by Article 288 TFEU, is conceived as an instrument aimed to provide a full harmonisation of a certain matter, normally requiring no (or very limited) implementation measures to be adopted by the Member States and therefore greatly reducing their discretionary power as to the choice of the form and methods to be employed to achieve a given result. Consequently, it is questionable whether this type of instrument represents the most suitable choice as the standard type of legislative act to be relied upon for climate and environmental protection purposes, as it seems to be the case in the broad and complex body of legislation adopted for the implementation of the European Green Deal. The choice of the correct instrument, however, may be different on a case-to-case basis, depending on the different interests at stake and the specific objectives sought by each specific legal act. To this respect, the analysis has presented some cases, characterised by the adoption of trade measures, where recourse to the regulation is more justifiable, as compared to other cases, which present more traditional environmental protection features, where the directive would have probably been a more suitable legal instrument.

The fifth and final feature which characterises the implementing legislation of the European Green Deal concerns the increasing extraterritorial application of EU law beyond the European territory. This may be considered a practical application of the EU objective, explicitly stated in the European Green Deal, to become a (regulatory) "global leader" and an expression of the related "green deal diplomacy" focused on convincing and supporting EU trade partners to take on their share of promoting more sustainable development. It also fits within the phenomenon of the so-called "green strategic autonomy" of the European Union, which has emerged in more recent times as the combination within a single expression of two concepts: the strategic autonomy and the green transition.

The Union, in the implementing legislation of the European Green Deal, is characterising itself as a global "soft" green regulator, acting within the framework of a "Brussels effect" scenario. However, the real situation seems to be quite different. In fact, in the last few years, the Union has introduced in its legislation specific measures which unilaterally and directly impose, rather than propose or suggest, the adoption of its climate and environmental standards to its trade partners. The analysis conducted above presented a few legislative provisions adopted in the last few years by the Union in the framework of the implementation of the European Green Deal which are characterised by clear and marked extraterritorial effects aimed at pursuing climate, energy and environmental objectives. The presence of such provisions makes it possible to argue such legislation with an extraterritorial reach should be qualified as an expression of the so-called "territorial extension" of EU law, rather than evidence of the "Brussels effect".

In conclusion, it seems that the five features analysed above as the most striking elements of change which characterise the legislative implementation of the European Green Deal can be considered evidence of the new legislative approach of the Union for environmental protection. In such context, the latter objective is no longer pursued solely within the traditional realm of EU environmental law as such, working in isolation with respect to other areas of law, but is rather promoted in the interplay between environmental, climate, energy, industrial and internal market interests and goals. This may be considered as a successful application of the principle of environmental integration, as enshrined in Article 11 TFEU, which acts as an operational instrument for the pursuit of the overarching objective of sustainable development. However, the principle of integration, together with the general objective of sustainable development, could play an even greater role in the EU legal order if they were used more consciously as tools to promote a greater coordination of the Union's policies and measures for environmental protection, in accordance with the almost neglected principle of consistency of the Union's policies and activities stated in Article 7 TFEU.

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