

The EU, the US and Global Climate Governance

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Chapter 3

The Evolution of EU Policy and Law in the Environmental Field: Achievements and Current Challenges

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1. Introduction

The steady expansion and consolidation of the European Union (EU) action in the field of environmental protection goes hand in hand with and reflects the evolution and impressive transformation of the Union over the last 60 years or so. A significant feature characterising the European integration process is the gradual extension of EU ‘material’ jurisdiction in areas, which fall outside the strict realm of the original economic mandate. With specific respect to the protection of the environment, the absence of a specific legal basis in the original Treaty establishing the European Economic Community (EEC) has not prevented EU action in this field. EU environmental law and policy has thus evolved over the years from a scattered and uncoordinated group of measures incidental to the overriding objectives of market integration to a sophisticated and detailed system of environmental regulation and multilevel governance.

Environmental protection now represents an important area of EU action both internally and on the international level. Over the last four decades, the EU has adopted more than 200 pieces of secondary legislation in this field. On the international plane, the EU is a party to more than 40 multilateral environmental agreements and it is often an active supporter of environmental standards in environmental negotiations. The Lisbon Treaty has reaffirmed the EU commitment to environmental protection and sustainable development and expressly emphasises the internal and external dimension of EU action in this field. Yet, a number of important challenges remain to be addressed if the EU is to play a meaningful role in the protection of the environment and to affirm itself as a leader in global environmental governance processes.

This chapter aims at providing an analysis of the evolution of EU policy and legislation in the environmental field. It seeks to combine an examination of the historical evolution of EU environmental policy from an institutional and constitutional perspective with the analysis of the key aspects and main trends of EU environmental governance and law-making. It also highlights the EU approach to the multilayered dimension of environmental governance, both from the internal perspective of the dynamic relationship between EU and the member states in environmental regulation and in a global context.

2. The Early Steps of the EU in the Environmental Field

One way to illustrate the evolution of EU policy in the environmental field, especially in the early phases of its development, is by looking at how the EEC/EU treaties have over time redefined the allocation of legislative powers among the various institutional actors and between the European Union and its member states. According to the principle of conferral, which governs EU action internally and on the international level, the EU may legislate only on the basis of explicit powers endowed by the treaties and within the objectives, procedures and conditions set out therein. The existence of an appropriate legal basis is therefore crucial in appraising the scope of EU powers in a given field.

With specific respect to the protection of the environment, the first measures adopted by the EU in the 1960s and early 1970s were very much influenced by the prominence of the internal market objective. In the absence of a specific legal basis and of an express EU competence on environmental policy, the first EU environmental measures were grounded principally on former Article 100 of the Treaty Establishing the European Economic Community (EEC Treaty) (1957)¹ enabling the Council to unanimously issue directives for the approximation of member state laws which directly affect the establishment or functioning of the common market. Nonetheless, the original EEC Treaty (1957) did contain some indications that the EU's competence could possibly extend far beyond the common market objective (Rehbinder and Stewart 1985). It included among the principles and objectives of the newly established Community the promotion of a 'harmonious development of economic activities', the 'raising of the standards of living' and 'the constant improving of the living and working conditions of their people'. These provisions enabled the Council, with the crucial support of the European Court of Justice (ECJ), to adopt environmental measures on former Article 235² (1957 EEC Treaty), a provision which facilitates the adoption of EU legislation, even in the absence of a specific treaty basis, provided that it is necessary to attain one of the objectives set out in the Treaty. The 'elastic' wording of this provision, which is essentially a 'codified version of the implied powers doctrine' (Weiler 1991: 2443–4), provided the Court, over the years, with a flexible legal framework in which to interpret the reach of the EU's powers in different context.

Overall, however, during the 1960s and early 1970s it is still premature to think of a coherent set of EU environmental rules. Legal scholars tend to describe the EU's attitude to environmental protection at this stage as 'incidental', 'responsive' and 'unarticulated' (Brinkhorst 1993: 9). The development of European policies in the environmental sector as well as in other social welfare areas was regarded as a necessary element in the process of economic integration itself (Scott 1998: 10) and

¹ This provision corresponds to and has been replaced by Article 115 of the Treaty on the Functioning of the European Union (2010 TFEU)

² Currently Article 352 of TFEU.

evolved primarily according to the contingent economic, political and social circumstances (Hildebrand 2002).

Nonetheless, growing public environmental concern and parallel important developments on the international level, including the 1972 Stockholm Declaration on the Human Environment, provided an important catalyst for a more explicit EU role in the environmental field. Thus, upon invitation of the heads of state and government, in 1973 an ‘Environment and Consumer Protection Service’ was set up within the European Commission and the first Environmental Action Programme (EAP) was adopted (Kramer 2012). These initiatives contributed to placing environmental concerns firmly on the EU political agenda (Jordan 2002) and are often identified as the starting point of a common EU environmental policy. Although the First EAP only provided a broad framework of principles and objectives, it inaugurated what has become an established practice of the European Commission in the environmental field. Issued periodically to cover a period ranging usually from five to ten years, the EAPs set out the European Commission’s view concerning the objectives, principles, priorities and lines of actions of the EU during the relevant time frame; therefore they provide a helpful standpoint to examine the evolution of EU environmental law and policy over the years.

Building upon these initial developments, the environmental policy of the EU started to become more consistent during the 1980s. The Third EAP (1982–86) contributed to shaping the direction of EU environmental legislation and policy at this stage. In particular it emphasises prevention and a rigorous approach based on emissions reduction, rather than a quality-oriented approach, which instead leaves up to the member states to determine the most cost-effective ways how to reach environmental quality objectives (Hanf 1997; Knill and Liefferink 2007). It also highlighted the importance of the Commission’s monitoring and inspections for the effectiveness of environmental legislation.

3. The Consolidation of EU Environmental Policy

A. Single European Act and the Introduction of an Explicit Legal Basis for EU Environmental Law and Policy

The Single European Act (SEA), adopted in 1986, introduced an explicit legal basis for environmental legislation at European level, thus representing a significant step forward in the process of progressive consolidation of European environmental policy. Pursuant to former Articles 130 r–t – now Article 192–3 of the Treaty on the Functioning of the European Union (TFEU) (Treaties 2010) – the Council, deciding unanimously and in consultation with the European Parliament (EP), was empowered with specific competences over environmental policy. Although, in practice, the unanimity requirement left previous practice substantially unchanged, the symbolic importance of having an explicit legal basis for environmental action was enormous. The new title contained a number of original provisions (Kramer 2001) enabling proactive EU decision-making in the environmental field (Lee 2005). It

introduced some of the key principles of EU environmental policy – such as the ‘preventive action’ principle, the idea that environmental damage should as a priority be rectified at the source, and the ‘polluter pays’ principle³ – and confirmed the existence of an EU external relations competence in the field, though shared with the member states. A few changes streamlining the decision-making process in the context of the internal market complemented and contributed to indirectly strengthening the overall institutional impact of the new environmental title.⁴

From a broader perspective, the conferral of explicit powers in the areas of environment (as well as in the fields of research and regional policy) represented a milestone in the European integration process, as it reinforced the inter-connection between the social, environmental and economic spheres in the completion of the single market project (Craig and De Burca 2011). With specific respect to the environment, the new approach, which reflected the then emerging ecological modernisation theories (Weale 1996), found official endorsement in the Fourth EAP (1987–92), which acknowledges environmental regulation as a pillar for a ‘lasting economic and social progress’ (European Commission 1987).

Overall, the 1980s turned out to be a prolific period in terms of environmental legislative output, recording a marked rise up to over 200 legislative measures by 1987 (Jordan 2002). At the same time, the growing number of infringement proceedings commenced by the Commission against member states (Collins and Earnshaw 1992) began to raise serious concerns about the real effectiveness of such legislation (Macrory 1992), and shifted the attention to the efficiency and effective implementation of environmental law. In the late 1980s, the European Commission began to

³ While the Treaty does not provide a definition of these principles, their substantive meaning can be inferred from national legislation, policy documents as well as from the legal scholars' analysis. In particular, the preventive principle is commonly understood to require that action to protect the environment and to minimise the risk of harm be undertaken even when environmental damage has not yet occurred. The preventive principle finds its complement in the principle that environmental damage should be rectified at source, which however focuses more specifically on the nature of the activity that may potentially cause damage (for example by implying a preference for the use of best available technologies). Finally, the polluter pays principle relates to the allocation of costs and responsibilities for environmental pollution, thereby implying that the polluter sustain the costs of measures to protect the environment; potentially, its interpretation can be extended to include the cost for the measures to restore or compensate environmental damage. For an analysis of these principles and their interpretation and scope of application in EU law, see De Sadeleer (2002).

⁴ Specifically, the enhancement of the European Parliament’s role in the decision-making process through the cooperation procedure and the requirement of qualified majority voting, instead of unanimity, for the adoption of measures for the approximation of national laws with a view to achieve the internal market objective (see Article 100a SEA – currently Article 114 TFEU)

explore 'new' instruments of environmental policy with a view to facilitating the involvement of private actors in the implementation of environmental norms. Thus, EU environmental law in this period features the adoption of innovative measures, including on eco-labelling, public access to environmental information, environmental impact assessment and a proposal for a directive laying down civil liability for waste (Sands 1991: 2516). From an institutional perspective, the EU was equipped with a European Environment Agency in 1990 (EU 1990), and with the European Environment Information and Observation Network (EIONET) in 1994.

B. The Role of the ECJ in the Development of EU Environmental Law

The European Court of Justice has, since the beginning, played a fundamental role in the development and consolidation of environmental policy in the EU. In the absence of an express competence in the Treaty, its case-law legitimised EU internal (ECJ 1980; ECJ 1982) and external (ECJ 1971) action in the environmental field. By interpreting the general provisions in the Treaty, the Court considered that environmental policy fell within the sphere of competence as an implied power (Koppen 2002: 106). Environmental measures could therefore be based on Article 114 TFEU (Treaty 2010) to the extent that they aimed at fulfilling the internal market objective (ECJ 1980), or on Article 352 TFEU (2010) since they may be necessary to achieve the EU objectives 'in the sphere of the protection of the environment and the improvement of the quality of life' (ECJ 1982). The Court eventually took a step further in a famous case concerning the validity of some provisions of the EC Directive on the disposal of waste oil, where it held that 'environmental protection is one of the Community's essential objectives' (ECJ 1983). In support of its reasoning, the Court held that 'the principle of freedom of trade is not to be viewed in absolute terms, but is subject to certain limits justified by the objectives of the general interest pursued by the Community' (ECJ 1983: para. 12).

Once the EU powers in the environmental sphere were firmly established with the provision of an express treaty basis in the SEA, the Court contributed to clarifying the role of environmental protection vis-à-vis other Community objectives. Its case-law had an important role in defining the balance between environmental protection and market integration, at the national and supranational level (Jacobs 2006). In the *Danish Bottle* case (ECJ 1988), the Court made one of the first applications of the environmental integration principle (Jans 2011: 1541) and held that environmental protection constituted one of the mandatory requirements which, according to the *Cassis de Dijon* case (ECJ 1979) could justify, under certain circumstances, the imposition of trade restrictions to goods from other member states.

In the years immediately following the adoption of the SEA, the conflicting relationship between the internal market and environmental protection was also at the basis of institutional controversies over the choice of the appropriate legal basis to adopt community measures aimed at addressing both objectives. The existence of different decision-making procedures, and different voting requirements, to adopt legislative measures related to the internal market and to the environment was at the basis of the *Titanium Dioxide* case (ECJ 1991). The case concerned the

annulment of Directive 89/428 on the harmonisation of national rules for the reduction of pollution caused by waste from the Titanium Dioxide industry. The Court declared that the Directive could well be based on Article 100a SEA (internal market), requiring qualified majority voting in the Council, instead of 130s (environment) requiring unanimity.

This case epitomises the institutional battle between the intergovernmental stance represented in the Council and the supra-national approach of the Commission. The Court's decision was particularly significant in shaping the evolution of the Treaty framework for environmental policy-making, and implicitly elucidating the role of the Court as an important engine behind fundamental political change. Whilst on the one hand it confirmed the vitality of the internal market justification, it also opened the way for a move towards extending qualified majority voting in the environmental field (Scott 1998: 9; Lee 2005: 17). Such a step forward was eventually made in the Maastricht Treaty.

4. From Maastricht to Amsterdam: Environmental Protection among the Union's Objectives

The Treaty of Maastricht (1993, hereafter 'Maastricht') and the Treaty of Amsterdam (1997, hereafter 'Amsterdam') did not introduce substantial changes to the environmental legislative layout set up by the Single European Act, leaving the provisions in the Environmental Title almost unvaried. Nonetheless, Maastricht did add a specific reference to the precautionary principle among the guiding principles of EU environmental policy (Wilkinson 1993) and provided a clearer formulation of the environmental integration principle.⁵ More importantly, both Treaties contributed to further enhancing the environmental foundations of EU environmental law and policy. In particular, Maastricht introduced for the first time a specific reference to environmental protection among the objectives of the European Union. Amsterdam complemented this by adding a reference to sustainable development among the Union's objectives and expressly mentioning 'the achievement of a high level of protection and improvement of the quality of the environment' among the tasks of the Community; the new formulation in the Treaty was a welcomed improvement compared to the less incisive reference to 'sustainable and non-inflationary growth respecting the environment' in the Maastricht version. The Treaty of Amsterdam also moved up the principle of environmental integration from the specific Environmental Title to Article 6 in the section outlining the general principles of EU policy.

Both Maastricht and Amsterdam were important steps from the perspective of the European integration process. Maastricht contributed important institutional and structural novelties that confirmed the spirit and ambitions of the Union to go beyond the original economic objectives (Brinkhorst 1993), with indirect positive reflections also for the environment. In the endeavour to further improving legitimacy and democracy in the EU law-making system, the Treaty of Amsterdam

⁵ Under the new formulation, 'environmental protection requirements must be integrated into the definition and implementation of other community policies', and not be simply a component of those policies.

broadened the policy areas governed by the co-decision procedure which, with some exceptions for certain politically ‘sensitive’ areas, became the standard procedure for environmental law-making (Pootschi 1998).

5. Integration, Differentiation and Flexibility in EU Environmental Policy

The progressive consolidation of the Treaty’s environmental foundations was accompanied during the 1990s by a general trend towards greater decentralisation and flexibility in the EU methods of governance. In the field of the environment, compared to the promising trend emerged during the 1980s, the beginning of the 1990s featured a significant reduction in the Commission's total legislative output, as well as the withdrawal or modification of several legislative proposals (Golub 1996: 700). This situation reflects a more general climate of political resistance by the member states towards the fast expansion of centralised supranational policies (Pollack 2000: 525), reflected among other things in the ‘generalisation’ of the subsidiarity principle in the Maastricht Treaty and the Protocol on Subsidiarity and Proportionality annexed to the Amsterdam Treaty (Chalmers, Davies and Monti 2010).

The principle of subsidiarity plays an important role in the environmental field, where the competence for policy and legislation is shared between the EU and the member states. This means that the member states have the primary responsibility for the protection of the environment, and the EU may act ‘only in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States [...] but can be better achieved at Union level’ (2010 TFEU: Article 5). In practice, this principle has often been ‘interpreted politically’ (Kramer 2012) by member states as a means to block EU regulation in certain more sensitive areas.

Furthermore, the TFEU allows for regional differentiation in the field of environmental policy. To start with, EU environmental law does not aim at complete harmonisation of domestic legislation. Rather, it normally sets common minimum environmental standards aimed at achieving convergence among national legislation and ensuring ‘the optimum environmental improvement of the different regions’ (Kramer 2001). Accordingly, Article 193 TFEU (2010) allows member states to introduce or maintain more stringent provisions in so far as they are compatible with the attainment of the objectives laid down in the Treaty,⁶ while Article 191(3) clarifies that the pursuit of the twin EU objectives of environmental protection and European integration must take into account the diversity of environmental, social and economic conditions of the various European ‘regions’.

⁶ Historically, the main reason behind the adoption of this clause is to ensure that member states which had found progressive answers to environmental problems were not obliged by subsequent EU legislation to reduce the degree of environmental protection achieved at the national level.

Within this framework, differentiation and flexibility gradually became a main feature of EU environmental governance. Two factors principally triggered the increased recourse to more flexible methods and a greater decentralisation in environmental regulation. On the one hand, the progressive widening of the EU, both in terms of policy competence and geographic scope – through past and prospective enlargements – rendered it difficult to maintain the relatively centralised and homogeneous decision-making paradigm that characterised the earlier Community (De Burca and Scott 2000). It had become clear that an effective integration process in the expanding European Union should also take into account the different backgrounds and commitments of the various member states. On the other hand, the influence of the sustainable development discourse (European Commission: Fifth EAP)⁷ and the environmental integration approach demanded more inclusiveness, dynamism and flexibility (Holder and Lee 2007: 164–5). In this context, subsidiarity becomes relevant not only ‘vertically’ in the definition of the appropriate level of intervention, but also ‘horizontally’ in determining the scope of EU intervention (Philippart and Dian Ho 2000), and encouraging the participation of an increasing number of actors and stakeholders, in line with the idea of ‘shared responsibility’, a theme that the Commission advances in the Fifth EAP. According to this approach, the reconciliation of environmental protection and economic growth could best be achieved by ensuring participation and dialogue among the various actors and the different levels of governance rather than by vertical imposition of uniform standards and harmonised framework (Lenschow 2002).

The ‘new’ approach to environmental governance translated in practice in a marked ‘proceduralisation’ of the relevant environmental obligations (Von Homeyer 2009), and a greater use of framework directives and horizontal measures, that is those measures that do not focus on specific natural resources, but on cross-cutting issues such as the legislation on environmental assessment and public access to information (Kramer 2001; Lenschow 2002: 22). Relevant examples are the Integrated Pollution Prevention and Control (IPPC) Directive (EU 1996), the Air Quality Framework Directive (Ladeur 2000) and the Water Framework Directive (EU 2000). Focusing on procedural requirements – such as permitting, planning and reporting obligations – these instruments allow greater flexibility and differentiation not only at the regulatory level, but more specifically in the implementation of the environmental obligations (Scott 2000). Interestingly, differentiation takes place not only across member states or regions within a state, but often at the level of individual enterprises. This is achieved through differentiated permitting schemes, as those established under the IPPC Directive (EU 1996; Kramer 2001) or through recourse to the so-called New Environmental Policy Instruments (NEPIs) (A. Jordan et al. 2003); the latter responded to the need for more cost-

⁷ The Fifth Environmental Action Programme (1992–2002) acknowledges that while ‘in the 1980s the principal challenge faced by the European Communities was the completion of the internal market, so now in the 1990s the challenge is to graduate to a development path which will be sustainable’.

effective and efficient methods of improving the implementation of environmental law (European Commission 1995) and include market-based instruments, voluntary agreements, eco-label schemes and other self-regulatory tools, which rely on the voluntary participation of economic operators or consumers (Kramer 2001). Whilst they did not aim at replacing traditional ‘command and control’ regulatory approaches, they nevertheless facilitated a move from a ‘top-down’ regulatory model with contents mainly conceived in a technocratic way at the Commission and Council level to a ‘cooperative’ approach based on the involvement of multiple actors and the different levels of governance in a process of dialogue and ‘mutual learning’ (Ladeur 2000; Lenschow 2002).

6. From Nice to Lisbon

The Treaty of Nice, which entered into force in 2003, left almost unvaried the pre-existing legal framework for environmental protection. However, it marked the entry of a phase of EU environmental policy characterised by significant challenges and remarkable developments. To start with, it coincided with the preparation for the upcoming ‘big bang’ enlargement and the consequent increase in state actors from 15 to 27. As in other areas, the implementation of the environmental *acquis* put enormous pressure on the often limited expertise and resources of the entrant member states; the existence of major disparities in the economic performance of the old and the new member states also fed a fear for the negative impact of enlargement on the decision-making efficiency of the EU and on the level of environmental standard-setting (Bar 2001; Lee 2005: 19). More positively, the enlargement was seen as an opportunity to raise the level of environmental protection in the acceding member states, with positive implications for Europe and globally (Shreurs 2004; European Commission 2001a: 13). Finally, it was ambitiously argued that the Eastern enlargement could act as a catalyst for the EU to interact more intensively with its more immediate neighbours, and eventually to expand the boundaries of application of the environmental law beyond the borders of the EU jurisdiction (Vogler 2005).

With specific respect to EU environmental policy and legislation, there is in large part continuity with the trends and developments that emerged during the previous decade. The 1998 European Council in Cardiff and, subsequently, the Gothenburg EU Sustainable Development Strategy (European Commission 2001b) and the Sixth EAP (2002–12) (European Commission 2001c) reiterate the emphasis on sustainable development and environmental integration as the overarching conceptual paradigm of environmental policy. Yet, following the adoption of the Lisbon Strategy in 2000 (European Council 2000) it became clear that the real challenge was now to go beyond the rhetorical emphasis on those principles and find concrete ways to reconcile the Lisbon objectives of competitiveness and economic growth with the protection of the environment.

The inputs from the European Commission's 2001 White Paper on European Governance (European Commission 2001d) influenced legislative developments also in the environmental sphere

(Hjerp et al. 2010), fostering initiatives aimed at promoting a more effective dialogue with civil society concerning EU policy-making ('better involvement'), as well as codifying and recasting existing legislation, and streamlining administrative and regulatory burdens ('better regulation') (European Commission 2001e). Efforts in this direction were particularly apparent in the field of water quality, air quality and integrated pollution, prevention and control.

The Sixth EAP identifies the objectives and priorities of the EU over the 2002–12 decade in four thematic areas – climate change, nature and biodiversity, environment and health and natural resources and waste. Legislative measures and strategies in the field of biodiversity and nature protection features interesting developments in the field of marine protection and sustainable use of marine resources (European Commission 2007; EU 2008a, 2008b), including action promoting EU adherence to international initiatives, as well as in the controversial area of genetically modified organisms' regulation (EU 2001, 2003). Other remarkable developments are the adoption of Regulation 1907/2006 (REACH Regulation) (EU 2006) – which provides for an extensive and inclusive regime on chemical substances in Europe, and imposes specific obligations and registration, evaluation and authorisation requirements for manufactures and importers – and the original response to the problem of illegal logging. In this last respect, the Forest Law Enforcement, Governance and Trade Action Plan (FLEGT) and the relevant specific legislation implementing it (EU 2005, 2008c) set up a scheme combining voluntary and binding commitments to address the environmental, social and economic consequences of the illegal trading of timber.

The most prominent aspect of EU environmental policy in this phase remains however the actions and initiatives in response to climate change, defined in the Sixth EAP as the 'outstanding challenge of the next 10 years and beyond'. Climate change is also one of the environmental policy areas where the interaction and interplay between the EU and the international level is most evident. Emerging initially in support of developments on the international level, the EU environmental law and policy in the field of climate change has rapidly evolved into a substantial and specific body of legislative measures aimed at mainstreaming emission reduction concerns into different sectors and policy areas, including industry, transport, energy and the building sector. The adoption of the EU climate and energy package and the commitment to the 20–20–20 target (of greenhouse gas emissions reduction, energy efficiency improvement and quantity of energy originating from renewable sources) highlight the EU's ambitious stance in this context (EU Council 2008).

A related side-effect of the growing prominence and autonomy acquired by EU climate policy is its progressive detachment from the field of environmental policy, which eventually culminated in the creation of a specific Directorate-General Climate. To what extent this will have a positive effect in terms of improved environmental protection against GHGs-induced environmental harm, and the effective implementation of the environmental integration principle is still yet to be assessed.

7. The Growing Role of the External and International Dimension of EU Environmental Policy

EU environmental policy has, since its beginning, been responsive to developments at the international level, either through parallel developments on the internal plane or through the EU engagement in negotiations and adoption of major international conventions and multilateral agreements.⁸ It is only over the last two decades, however, that the international and external dimensions of environmental policy have become one of the main tenets of EU action in this area. While the EU efforts to affirm its international leadership are particularly explicit in the field of climate change, the external impact of its action is discernible in other areas and with respects of different aspects of environmental policies.

In particular, looking at concrete actions and initiatives, it is possible to identify different facets of the EU's role at the international level and its contribution to global environmental governance.⁹ The first and probably most straightforward aspect concerns the EU's participation and leading role in international environmental agreements. In this respect, the EU attitude has been traditionally oriented towards multilateralism. The EU sees its international action as crucial in promoting the 'swift ratification, effective compliance and enforcement of all international agreements relating to the environment to which the EU is a party' (EU 2002). In this perspective, it played a leading role in the adoption of many international environmental treaties, including the 1989 Basel Convention on the trans-boundary movement of hazardous waste, the 1992 Convention on Biological Diversity, the 2001 Stockholm Convention on Persistent Organic Pollutants and notably the 2000 Cartagena Protocol on Biosafety and the 1997 Kyoto protocol on Climate Change (Kelemen and Vogel 2010).

The mainstreaming and integration of environmental concerns and objectives 'into all aspects of the Community's external relations' and the development of 'a global partnership for environment and sustainable development' emerged more recently as a further dimension of EU's external relations policy (European Commission 2001c). The main vehicles for EU action in this direction are the bilateral agreements concluded in the context of the European Neighbourhood Policy (ENP), the Euro-Mediterranean partnership and the Development and Cooperation policy (Marin Duran and Morgera 2012). The ENP offers potentially a favourable context in which the EU may exercise its normative influence. In those countries, the promise of a privileged relationship with the EU and the prospect of a progressive participation in the internal market and increased cooperation in sectors of justice and home affairs can act as a soft form of conditionality facilitating the gradual convergence of those countries' domestic systems with the EU regulatory framework (Cremona 2008).

⁸ Acknowledging the growing EU international role, the Maastricht Treaty included the promotion of 'measures at international level to deal with regional or world-wide environmental problems' as one of the objectives of EU environmental policy.

⁹ See Chapter 4 by K. Kulovesi and M. Cremona in this book.

Finally, a more subtle endeavour on the part of the EU to influence regulatory reforms on the global level is represented by the direct or potential external impact of its internal action.¹⁰ The global regulatory aspirations of EU legislation in the field of chemical safety (the abovementioned REACH Regulation) has often been referred to as an example of how the EU uses the avenue of international trade – in this case of chemical substances – to push for compliance with its standards and thereby indirectly export its environmental protection model (Heyvaert 2009). A slightly different version of this regulatory technique, which relies on the dynamics of international trade to influence developments at the global level, can be found in the EU legislation on biofuels for renewable energy production and on the aforementioned initiatives against illegal logging. Here, the hurdles in the achievement of an international consensus prompted the EU to try to indirectly promote adherence to its environmental standards through the imposition of sustainability criteria or certification requirements on imported products into the EU (Kulovesi, Morgera and Munoz 2011). The extension of the Emission Trading Scheme to the aviation sector is the most recent, and more accentuated attempt to unilaterally influence policies and norms on the global level.

These measures reveal the EU's attempts to positively contribute to global environmental governance and help remedy the failures of international negotiations by enhancing the transnational reach of its environmental legislation. However, this approach also causes one to ask whether and to what extent unilateralism, as opposed to multilateral solutions, is an effective way of dealing with global problems. It further raises the question as to what extent a unilaterally driven globalisation of standards, of the type of REACH, is a desirable objective underlying genuine environmental interests; thus, some scholars situate the EU's aspirations to expand its regulatory influence within the framework of strategies for 'managing globalisation' (Jacoby and Meunier 2010), including by relying on the dynamic of regulatory competition to alleviate the pressures of a globalised economy on European firms (Kelemen and Vogel 2010).

8. Specific Developments in the Field of Environmental Liability

The above analysis has attempted to provide an overview of the evolution of EU environmental law and policy from a scattered set of rules adopted in the context of the internal market project towards the development of an innovative and dynamic body of legislation. Within this framework, it is appropriate to take a closer look at the EU developments in the field of environmental liability. The analysis of the evolution and development of EU legislation in this field provides an interesting perspective to illustrate and discuss how the evolving rationales, objectives and concerns of EU environmental law and policy over the years have been reflected in the various texts concerning a European environmental liability regime that the Commission proposed until the final adoption of the

¹⁰ See Chapter 4 by K. Kulovesi and M. Cremona in this book.

2004/35/EC Environmental Liability Directive (2004). The legislative process of the EU in the field of environmental liability shows, in fact, a progressive evolution from a major emphasis placed on completion of the internal market to more genuine environmental concerns.

The decision to intervene in this field was aimed essentially at addressing the gap left by the lack of a common legal framework addressing the question of liability, responsibility and response action in the event of significant environmental damage occurring during the operation of economic and industrial activities. The final agreement on the text of the Environmental Liability Directive (ELD) was the result of a long and complex process lasting for more than ten years. In fact, the first attempts to introduce an environmental liability regime in the Community date back to the end of the 1980s and were limited to the waste sector. The first proposal for a directive on liability for environmental damage caused by waste envisaged a strict civil liability regime and had the ambitious objective of providing compensation for the victims and ensuring the restoration of the environment. The choice to base this measure on the internal market provision, notwithstanding the existence of a specific community environmental competence in the SEA, reflects an understanding of environmental policy as a necessary instrument for market integration. Differences in the domestic environmental liability regimes were perceived as obstacles to the effective functioning of the internal market as they could offer a competitive advantage to industries located in states with more relaxed standards.

Since then, the structure, contents and underlying rationale for environmental liability in the EU has profoundly changed. The 2001 White Paper on environmental liability and the final text of the ELD signals a radical shift from a private law–civil liability approach to a public law–administrative approach for the prevention, through preventive and response action measures, and the remediation of environmental damage. The public law nature of the new liability model emerged particularly from the concept of environmental damage – which covers ecological damage and harm to natural resources and reflects the idea of the environment as a common good – a progressive set of remedial measures, including restoration for interim losses of environmental services and complementary remediation, and an administrative scheme of enforcement. Under the new model, member states are required to appoint national authorities with the exclusive competence to order the liable operator to take the appropriate preventive or remedial measures.

Adopted on the basis of Article 191 of the TFEU, the Directive signals a radical shift from a market integration rationale to more environmentally oriented concerns (Lee 2001). The Commission perceives environmental liability as an effective means to implement the ‘polluter pays’ principle and strengthen private operators’ compliance with EU environmental norms (Lee 2002). In this sense, the Directive complies with the Commission’s commitment to diversifying its regulatory approaches and complementing direct control regulation with more flexible and efficient instruments to influence actors’ behaviour (Lee 2005).

The idea of liability rules as a tool to promote the effective implementation of EU environmental legislation and address the insufficiency of the treaty-based enforcement mechanisms determined an increased interest from the Commission in the application of criminal law to environmental offences. The first initiative in this direction was undertaken in the field of marine protection with the adoption of Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements (EU 2005). Subsequently, Directive 2009/123/EC introduced important amendments which extended liability to legal persons and specified that illegal discharges of polluting substances into the sea shall be treated not only as infringements but also, in some circumstances, as criminal acts (EU 2009).

More significantly, the EU Directive 2008/99 on the protection of the environment through criminal law provides a common framework for penal and administrative sanctions against the violations of specific pieces of EU environmental legislation (EU 2008). The Directive's preamble underlines the EU understanding of the deterrent effect of criminal penalties as an important mechanism to achieve compliance with environmental legislation.

While it is still early at this stage to provide a thorough assessment of the effectiveness of common EU liability rules in promoting compliance with EU environmental legislation, the EU intervention in this field and the adoption of specific initiatives concerning criminal liability reflects the deep concern of the European Commission about the effective implementation of environmental legislation. Thus, the Environmental Crime Directive clearly commits the member states to adopting 'effective, proportionate and dissuasive' criminal sanctions for environmental offences. It is, however, ultimately left to the various national legal systems to determine the specific amount in practice.

Finally, the initiatives in the environmental field confirm the increasing interest of the EU in criminal law as a tool for the implementation of EU policies (European Commission 2011a). The Treaty of Lisbon on the Functioning of the European Union (EU 2010) has certainly contributed to this endeavour, providing a new legal framework for the adoption of criminal legislation at EU level. The new framework tries to facilitate EU action in this area while taking into account the specificities of each national system in such a sensitive policy field (2010 TFEU: Articles 82–5). To this end, it combines a stronger role of the European Parliament through the co-decision procedure with a wider consideration for national parliaments and the provision of a specific 'emergency brake' for the member states in case the proposed legislation touches upon fundamental aspects of their national criminal justice system. Future developments may possibly enlighten as to how far the EU will succeed in the endeavour of establishing a coherent and consistent EU criminal policy, notwithstanding the weak support provided in this respect by some of its member states.

9. Environmental Protection after Lisbon

The Treaty of Lisbon, entered into force in December 2009, maintains the structural change and most of the institutional innovations envisaged in the stillborn Constitution for Europe. It abolished the three pillars structure, clarified the division of competences, simplified and made more coherent the decision-making process and introduced a number of amendments aimed at boosting the ‘efficiency, coherence and democratic legitimacy’ of the Union. Formally, the Treaty of Lisbon has maintained the same structure of the pre-existing Treaties, with a distinction between the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) which replaces the former Treaty establishing the European Community. Article 6 TEU also includes a specific reference to the Charter of Fundamental Rights, which—although not formally incorporated into the Treaty—acquires a legally binding status and prepares the ground for the EU accession to the European Convention on Human Rights.

With specific respect to the protection of the environment, the Treaty of Lisbon reinforces the EU’s commitment in the field of environment protection and climate change, and its aspiration to gain global leadership in the field. Specifically, Article 3 of the Treaty on European Union (2010a) confers constitutional relevance to the EU intention to promote sustainability at the global level and in its relations with third countries, and reaffirm its commitment to multilateralism.¹¹ Moreover, Article 21(1) TEU stipulates that the Union ‘shall promote multilateral solutions to common problems, in particular in the framework of the United Nations’.

From a more substantive law viewpoint, changes of the TFEU are limited to an explicit reference to climate change. On the other hand, Lisbon has introduced a specific EU competence in the field of energy policy and investments, and extended the ‘ordinary’ co-decision procedure in a number of areas—namely transport, energy, fisheries, external trade, regional and agricultural policy—which more or less directly crosscut with environmental issues. In principle, such extended legislative powers and the amendment in the institutional balance in the decision-making process can lead to a future greening of the policy areas concerned (Benson and Jordan, 2010: 472). However, in practice, this will ultimately depend on the effective legal strength of the environmental integration principle and the political will to implement it and make it fully operational (see (Lee 2008: 134). More positively, the new energy title introduces explicitly an environmental dimension in the pursuit of EU

¹¹ This provision stipulates that ‘in its relations with the wider world, the Union shall uphold and promote its values and interests [...], it shall contribute to peace, security, the sustainable development of the Earth [...]’; moreover, Article 21 of Title IV TEU devoted to the Union’s external action affirms the Union’s task to define and pursue common policies and actions, and work for a high degree of cooperation in all fields of international relations in order to, *inter alia*, ‘foster the sustainable economic, social and environmental development of developing countries [...]’, and ‘help develop international measures to preserve, and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development’.

energy policies. Thus, Article 194 TFEU mentions the need to reconcile the aims of energy policy with ‘the need to preserve and improve the environment’ and includes the promotion of ‘energy efficiency and energy saving and the development of new and renewable forms of energy’ among the aims of the Union policy on energy. Given the increasing prominence of energy issues in the EU, the specific reference to environmental and climate change objectives in the Energy title is certainly a positive step towards promoting the integration of environmental concerns into other key policy areas (see further below in this chapter).

From an environmental policy point of view, the phase following the entry into force of the Lisbon Treaty features the prominence of the sustainability discourse, with efforts aimed at reconciling environment protection and economic growth. The recent economic and financial crisis which has devastated Europe's economy has contributed to shape a new approach to the relationship between environmental protection and economic growth. The Europe 2020 Strategy and its flagship initiative on ‘A Resource Efficient Europe’ (European Commission 2011b) reflects this new approach and sets the path for a transformation of European economy from resource intensive to resource efficient in line with worldwide efforts to achieve the transition towards a green economy. This translated in practice in the intensification of legislative and policy initiatives aimed at strengthening the linkages between energy and climate change objectives, within the framework of an integrated energy market. Thus, in January 2014, the European Commission has presented the new EU policy framework on climate and energy for 2030 (European Commission 2014). Building upon the implementation of the 20/20/20 target, the new framework sets an ambitious commitment to reduce greenhouse gas emissions by 40% below the 1990 level, an EU-wide binding target for renewable energy of at least 27%,¹² and a renewed emphasis on energy efficiency.

Sustainable growth, low-carbon economy and resource efficiency are thus the cornerstone of the Seventh Environmental Action Programme, ‘Living well, within the limits of our planet’ (Seventh EAP) adopted in November 2013 (EU 2014). Other thematic priorities identified in the EAP include the preservation of the EU's natural capital and the strengthening of ecological resilience, and the EU citizens protection from environment-related threats to health and well-being. Besides defining the priority objectives of EU environmental policy for the period from 2013 up to 2020, the Seventh EAP identifies the main challenges hampering the effectiveness of environmental law. It includes the implementation of the EU environmental *acquis* at member states level among the key objectives to achieve by 2020 and encourages the adoption of specific actions aimed at improving member states’ and private sector’s compliance with the whole body of EU environmental law; these actions include better EU citizens’ access to information on the implementation of EU environmental law, and

¹² According to the European Commission, this would be the EU’s target for the share of renewable energy consumed in the EU as a whole; the target would therefore not bind the member states individually, although they will be required to set appropriate renewable energy targets at the national level.

improved system of access to environmental justice and a system of inspections and surveillance to the wider body of EU environmental law matters at the national and at the EU level.

From the point of view of normative production, however, the last few years have not been particularly dense for new legislation. Apart from a few exceptions, efforts appear to be mainly concentrated on improving the existing body of legislation, both formally – through specific initiatives aimed at recasting and bringing together various related pieces of legislation concerning a specific sector – and substantially, under the point of view of enhancing the effectiveness of EU environmental law. There are nonetheless certain current and emerging environmental challenges that may well form the object of more substantive EU legislative and policy initiatives in the next future. For example, current issues of major concern for the EU environmental policy makers include the dramatic increases environmental crimes across Europe, specifically in the form of wildlife trafficking; the urgency to address unsustainable patterns of consumption, especially in the food, energy and transport sector; and environmental challenges arising in relation to the growing demand of energy supply.

At the same time, the increasing intersection of the sustainability objectives with the growing focus on the economic competitiveness of European industries bears the inherent risk that environmental protection will ultimately suffer from what Jordan and Lenschow have described as the phenomenon of ‘reverse integration’, whereby EU environmental policy-makers are increasingly asked to take into account economic and social concerns into the formulation of environmental policies, thereby reducing the level of ambition of those policies (Jordan and Lenschow 2010).

10. Concluding Remarks

The evolution of EU environmental law and policy since the 1960s offers an interesting perspective from which to examine how the European project has remarkably expanded from the specific economic sphere of market integration to address new social challenges. The drivers, actors and dynamics behind this impressive journey are multiple and diverse, and not all could be fully encompassed in the present analysis. This chapter has tried to illustrate how EU environmental legislation has responded to the many regulatory challenges, often by recurring to innovative legal and policy instruments and methods of governance. It has also tried to highlight some key trends which characterise and shape the evolution of EU environmental governance: the tension between the national and supra-national level, the role of non-state actors in the policy-making process, the strive towards better implementation and increased effectiveness of environmental legislation, the influence of international developments and, more recently, the pressure to address global environmental challenges.

The implementation and effectiveness of environmental law still remains a key concern. In the 2008 Communication on Implementing Environmental Law, the European Commission identified specific strategies which tend to combine the enforcement powers of the Commission itself with an ‘*ex*

ante approach' based primarily on the prevention of breach. It focused the attention particularly on the design of legislation and involved a variety of actions and activities aimed at promoting information, public consultation and guidance to public authorities in the concrete application of EU environmental rules.

Notwithstanding the difficulties and the limits, the extensive nature of EU environmental legislation has the merit to have put in place a minimum common framework for 27 member states. When looking at current developments in the field of environmental legislation and policy at the European level, one theme that emerges strongly is the increasing interlink between the environment and other policy areas. EU initiatives in the field of climate change provide the most evident example of the increasing importance of addressing environmental problems not in isolation but by taking economic and social aspects into account. The inherent interdisciplinary and cross-cutting nature of the climate change issue has acted as the main driver in focusing the EU's attention on the environmental and climate-related aspect of energy, transport and industrial policies. In this respect, the environmental dimension of EU energy policy is one of the most remarkable developments in the past few years (Schmitt and Schulze 2011).

Yet, the often difficult relationship between climate and energy policy and other environmental concerns points to one of the most pressing challenges that the EU is facing at present: reconciling the pursuit of competitive economic growth with the objectives of sustainability and environmental protection. EU environmental policy has thus become increasingly interwoven with ongoing strategies towards a sustainable, resource-efficient and low-carbon economy, the key objectives of the European energy strategy (European Commission 2011b).

The pursuit of different, often competing, policy goals requires appropriate strategies to ensure consistency and coherence among the various sectors and the different initiatives. Consistency, policy coherence and the effective implementation of the integration principle are an important, and largely unresolved, question. The Lisbon Treaty provides, indeed, multiple references to the principle of consistency as a general principle of European policy and actions internally as well as in the field of external relations.¹³ Applied to the relationship between the environment and other policy sectors, the idea of consistency and coherence can thus be the optimal complement in support of the integration principle, mandating the inclusion and effective considerations of environmental aspects in the elaboration and implementation of other policies. Yet, despite the shortcomings in realising these ideals in practice, it is possible to share Ludwig Kramer's opinion that 'since the EU is also the only region in the world which has publicly committed itself to try to reconcile economic growth, social

¹³ Article 13 TEU: 'The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests ... and ensure the consistency, effectiveness and continuity of its policies and actions'; see also with respect to external action of the EU: Article 16 (6) and 18(4).

concerns and environmental protection', it can, in this respect, 'offer a model to other countries or regions worldwide' (Kramer 2007: 355).

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