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DIALOGUE AND DEBATE: SYMPOSIUM ON ECOSYSTEM RESTORATION AND EU LAW

Addressing the conflicts between climate-related renewable energy goals and environmental protection interests under the RED Directive

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Abstract

The aim of the contribution is to focus on the conflicts arising between climate-related renewable energy goals *vis-a-vis* environmental protection interests. To this effect, the analysis will firstly investigate the origin of such types of conflicts, which may also be named intra-environmental conflicts, and define their main characteristics; secondly, the regulatory choices made by the RED II and the RED III Directives to manage these conflicts will be presented and compared, with a particular focus on the three key features of the recently approved RED III Directive; thirdly, an alternative approach to address such types of conflicts will be proposed. This is based on the principle of integration, to be interpreted with an ecological sustainability reading of the principle of sustainable development.

Keywords: RED Directive; principle of integration; ecological sustainability; sustainable development

1. Introduction

One of the most relevant goals currently promoted by the European Union (EU) is the climate neutrality objective, as enshrined in the European Green Deal[1] and made legally binding in Regulation (UE) 2021/1119 (the so-called 'European Climate Law').[2] One of the main instruments to promote the climate neutrality objective is represented by the energy transition, which mainly consists in the gradual replacement of fossil fuel sources with alternative renewable energy sources.

One of the basic pillars upon which the energy transition is grounded is represented by the Directive on the promotion of renewable energy sources (RED Directive), which was originally adopted as Directive 2009/28[3] (so called RED I Directive), later revised as Directive 2018/2001[4] (RED II Directive) and recently further amended by Directive 2023/2413 (RED III

[1]Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'The European Green Deal', COM (2019) 640 final, 11 December 2019.

[2]Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') OJ L243/1.

[3]Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources, OJ L140/16.

[4]Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, OJ L328/1.

Directive).[5] The RED Directive (in its various versions) aims to establish an EU wide comprehensive legal framework and create the conditions to induce Member States to support the increased construction of renewable energy plants and infrastructures. This should help implementing the commitment for increasing the share of renewable energy production and consumption within the Union, in the framework of the EU climate neutrality objective.

However, the deployment of renewable energy plants and infrastructures may give rise to possible conflicts. These types of disputes between climate-related renewable energy and environmental interests may also be named intra-environmental conflicts,[6] as they are characterised by the opposition of climate-related energy goals, operating within an environmental protection framework and connected with the promotion of renewables, on the one side, and environmental interests, related to land planning and the protection of ecosystems, on the other side.

The specific aim of the present contribution is to investigate the conflicts which may arise between climate-related energy goals *vis-a-vis* environmental interests. To this effect, the analysis will firstly investigate the origin of such types of conflicts and define their main characteristics; secondly, the regulatory choices made by the RED II and the RED III Directives to manage these conflicts will be presented and compared, with a particular focus on the three key features of the recently approved RED III Directive; thirdly, an alternative approach to address such types of conflicts will be proposed. This is based on the principle of integration, to be interpreted in connection with an ecological sustainability reading of the principle of sustainable development, as it will be better clarified below.

2. The origin of climate-related renewable energy and environmental conflicts

As mentioned above, the context in which intra-environmental conflicts may arise is deeply interconnected with the promotion of renewable energy sources within the Union. The origin of such conflicts may be found in the interplay between three sets of goals: climate objectives related to the CO_2 reduction commitments adopted by the EU for the implementation of the 2015 Paris Agreement and enshrined in EU secondary legislation; energy transition goals, as mandated by the EU Green Deal, the REPowerEU Plan[7] and the relevant secondary legislation, such as the RED Directive; environmental interests, related to land planning procedures, as guaranteed by the application of the SEA and EIA Directives, as well as the protection of biodiversity and ecosystems, as promoted primarily by the EU Habitats and Wild Birds Directives.

In the framework of EU primary law, namely within the EU Treaties, the legal basis for climate and environmental policies can be found in Articles 191–92 TFEU, while energy policies are regulated under Article 194 TFEU. Therefore, it can be argued that climate and environmental policies, at least theoretically, should pursue the same objectives and follow the same criteria, as they have the same legal basis within the TFEU. However, in practice, this is not always the case. In fact, there are several situations in which these two policies may conflict with each other, particularly in connection with energy policies. A specific situation in which such a conflict may arise, whereby climate and environmental interests may not necessarily be in agreement, is represented by the case of the promotion of renewable energy plants. Within such a category one can include different types of plants, ranging from the more traditional ones, which produce

[5]Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652, OJ L2023/2413.

[6]For an introduction to intra-environmental conflicts see M Montini, 'The Rise of "Internal Environmental Conflicts" within the Green Economy' XXIV (2015) The Italian Yearbook of International Law 95.

[7]Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'REPowerEU Plan' COM (2022) 230 final, 18 May 2022.

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energy from hydroelectric or geothermal sources, to those of more recent conception, which produce energy from photovoltaic or wind farms.

The starting point for the controversies which may arise in this context lies in the fact that the energy transition from fossil fuels to renewable energy sources is generally considered to be one of the best instruments to achieve the ambitious climate neutrality objective set by the European Green Deal. The assumption for the deployment of renewable energy sources throughout the Union is that every additional quantity of renewable energy that is produced from non-fossil sources leads to a decrease in the amount of CO_2 released into the atmosphere. This explains the fundamental interest to promote the widespread construction of renewable energy plants throughout the Union's territory. This approach is at the core of the RED Directive. The problem linked to this reasoning is that the construction of renewable energy plants is not necessarily 'clean' as it may seem at a first glance. In other words, it cannot be presumed that energy produced from renewable sources, since it is clean in the sense that it does not give rise to CO_2 emissions, is always the best choice from the broadest environmental point of view. Therefore, the localisation of renewable energy plants should be subject to a careful scrutiny, as mandated by EU law for all types of industrial or energy infrastructures, so as to minimise the possible adverse effects for the protection of nature, biodiversity and ecosystems. In general terms, in fact, only a specific and detailed analysis of the different climate, energy and environmental interests conducted on a case-by-case basis at the project level can guarantee a proper balance between climate-related energy goals on the one side and environmental interests on the other side.

The key issue is therefore the following one: how can climate-related renewable energy and environmental conflicts, arising in the interplay between climate, energy and environmental interests be addressed under EU law in order to guarantee a fair balance of all legally protected interests at stake?

3. The regulatory choices of the RED III Directive

The RED II Directive and the RED III Directive share the same overall objective, which consists in 'the promotion of renewable energy sources'. However, the specific objective and the tools provided in the texts of the two legislative acts are substantially different and acknowledge the deep transformation of the global political and economic scenario which has occurred in the last five years, from 2018 to 2023. Therefore, the regulatory choices envisaged in the RED II Directive and the RED III Directive are for many respects substantially different.

For instance, the specific objective of the RED II directive, as stated in its Recital 2, presents the goal of the promotion of renewable energy sources as an instrument to achieve greenhouse gases reduction to comply with the EU commitments under the 2015 Paris Agreement, as implemented in the EU legal order by means of the EU 2030 Climate target plan.[8] This is a clear and firm objective framed within a long-term shift from fossil fuels to renewable energy sources. However, if one compares this general objective with the more specific goal of the RED III directive, as enshrined in his Recital 1, it immediately emerges a greater sense of urgency from the reference to the combination of the ambitious long-term objective of climate neutrality in the Union by 2050 and the intermediate target of greenhouse gases reduction by 55 per cent by 2030. Moreover, the CO_2 emission reduction target is combined with the objectives to increase energy efficiency and to achieve a greater share of renewable energy sources in the integrated EU energy market. Finally, the sense of urgency is reinforced by the explicit references to the mutated global context generated by two major crises that have affected the EU in the last few years, namely 'the Russia's

[8]Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Stepping up Europe's 2030 Climate Ambition' ('EU 2030 Climate target plan') COM(2020) 562 final, 17 September 2020.

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invasion of Ukraine and the effects of the COVID-19 pandemic', as stated in Recital 4 of the RED III Directive.

If the focus shifts to the tools provided in the RED II and RED III Directives for the promotion of renewable energy sources, a different approach emerges with regard to the specific objective to help creating the conditions to reduce the lengthy administrative procedures which in many Member States slow down the construction of renewable energy plants and therefore may hamper the energy transition throughout the Union. In fact, in the RED II Directive, a first attempt to make sure that Member States revise their administrative procedures to speed up the process of authorisation of renewable energy plants is foreseen by the EU legislature. However, this is limited to the determination of maximum time limits for the approval of energy plants projects in the Member States, which are normally set at two years, with a reduction to one year for small plants, not exceeding an electrical capacity of 150kW.[9] The situation is strikingly different in the RED III Directive, where a complete set of specific objectives and instruments is defined in order to promote an increase in the share of energy produced by renewable energy sources in the Union's gross final consumption of energy up to 42.5 per cent (and possibly up to 45 per cent) by 2030.

There are three key features that characterise the RED III Directive which deserve our attention. These consist in the institution of renewables acceleration areas, in the further reduction of the maximum duration of permit granting procedures for the authorisation of renewable energy plants and finally in the determination that the planning and construction phases of such plants are characterised by an overriding public interest which prevails *ex lege* over all other possibly conflicting interests.

The first key feature of the RED III Directive consists in the institution of renewables acceleration areas. It derives from the general duty imposed by the Directive on Member States to proceed by 2025 to the coordinated mapping of their territory in order to identify the domestic potential for the deployment of renewable energy plants and infrastructures. This is conceived as a tool to facilitate meeting the national contributions that Member States are required to give to the overall 2030 EU target towards the increase in the share of renewable energy in the Union.[10] Within such a framework, Member States must adopt, by 2026, national plans for the designation of 'renewables acceleration areas'.[11] Such areas are intended by the Directive as 'sufficiently homogeneous land, inland water, and sea areas where the deployment of a specific type or specific types of renewable energy sources is not expected to have a significant environmental impact'.[12] The adoption of the national plans designating renewable acceleration areas[13] must be subject to a prior strategic environmental assessment (SEA), pursuant to directive Directive 2001/42,[14] and, in case they are likely to have a significant impact on Natura 2000 sites, to a Habitats assessment, pursuant to Article 6(3) of Directive 92/43/EEC.[15]

The combined effect of these provisions, however, is that within the renewables acceleration areas, which may be identified with regard to some specific types of renewable energy sources only (with the possible explicit exclusion of biomass combustion and hydropower plants), once the national plans for the designation of those areas have been adopted, the concrete localisation of renewable energy plants will be presumed not to be in contrast with other possibly conflicting interests, related to land planning, environmental and biodiversity considerations, and will not be subject to any further detailed analysis at the project level, as it will be better explained below.

[9]Art 16, RED II Directive.

[10]Art 15b, RED III Directive.

[11]Art 15c (1), RED III Directive.

[12]Ibid.

[13]Art 15c (2), RED III Directive.

[14]Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L197/30.

[15]Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ EC L206/7.

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The second key feature of the RED III Directive refers to the further reduction of the maximum duration of permit granting procedures for the authorisation of renewable energy plants, both within and outside the mentioned renewables acceleration areas. The general approach in this field is that in renewables acceleration areas the maximum time limits for concluding the permit granting procedures in the Member States, originally foreseen in the RED II directive, is halved to one year as normal time limit, which is reduced to six months for smaller plants with a maximum electric capacity not exceeding 150 kW. Longer time limits are maintained for the authorisation of plants localised outside the acceleration areas, whereas even shorter terms are foreseen for repowering of existing plants. In connection with the further reduction of the maximum duration of permit granting procedures, the RED III directive foresees that the applications for the authorisation of new renewable energy plants located in renewables acceleration areas shall be exempted from the need to conduct a prior environmental impact assessment (EIA) as well as a specific *Habitats* assessment.[16] The only condition imposed by the RED III directive for the application of this exemptions is that the proposed new renewable energy plants fall within the acceleration areas for which Member States have established appropriate rules on 'effective mitigation measures'.[17] Only in exceptional cases, when a preliminary screening conducted by the Member States authorities on proposed projects show that they are 'highly likely to give rise to significant unforeseen adverse effects in view of the environmental sensitivity of the geographical areas where they are located', a Member State may decide that such projects, even if they are located within an acceleration area, should be subject to an EIA and/or a specific *Habitats* assessment procedure. However, this possibility is severely constrained and is subject to very strict time limits.[18]

The third feature of the RED III Directive consists in the determination that the planning and construction phases of such plants are characterised by an overriding public interest which prevails *ex lege* over all other possibly conflicting interests. In more precise terms, it is foreseen that by 2024 and 'until climate neutrality is achieved',[19] Member States shall ensure that in all phases regarding the authorisation, construction and operation of renewable energy plants they are 'presumed as being in the overriding public interest and serving public health and safety' when confronted with other possibly conflicting interests.[20] These means, in other terms, that environmental interests, such as those possibly related to land planning, biodiversity and ecosystem protection considerations, are placed *ex lege* in an uneven relationship with the renewable energy goals promoted by the RED III Directive.

Following the presentation of the key features of the RED III directive, it is time to provide a brief critical evaluation. With regard to the institution of renewables acceleration areas, this does not seem to present specific problems with regard to intra-environmental conflicts as described above. In fact, the requirement that the approval of national plans for the designation of such areas is to be subject to a strategic environmental assessment, under the terms of directive 2001/42, should be a guarantee that in general terms there is a proper consideration of all the various interests at stake. However, the exemption from the duty to carry out a specific environmental impact assessment and a specific habitats assessment at the project level, with regard to the localisation of renewable energy plants in previously identified acceleration areas is rather problematic. In fact, under the terms of EU environmental law, the strategic environmental assessment, at the level of plans, and the environmental impact assessment, at the level of projects, serve two distinct and complementary purposes. The former assessment is meant to provide a general and broad evaluation on the suitable areas for certain types of activities, which is not able

[16]Art 16a (3), RED III Directive.
[17]Art 15c (1) (b), RED III Directive.
[18]Art 16a (4), RED III Directive.
[19]Art 16f, RED III Directive.
[20]Ibid.

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to identify and address specific issues which may emerge in the localisation of specific project in a certain place. For this reason, the environmental impact assessment is foreseen as a more suitable instrument to evaluate and prevent the specific adverse environmental effects which may derive from specific projects. Therefore, it does not seem correct to provide for an exemption from conducting an EIA for renewable energy projects located in areas previously designated as renewables acceleration areas. It is true that a preliminary screening process on the projects continues to be compulsory under the RED III Directive.[21] However, given the factual and time restraints associated to this screening it seems that such an instrument cannot prevent in an adequate way all possible adverse effect which may be caused by a given project on the environmental interests protected by the EIA directive. The same reasoning may be applied to the exemption foreseen by the RED III directive to the duty to conduct an *habitats* assessment, under the terms of directive 92/43, which is obviously serving a different purpose if conducted at the level of plans as compared to the level of specific projects.

A similar critical reading may be given to the further reduction of the maximum duration of permit granting procedures for the authorisation of renewable energy plants foreseen in the RED III directive. Whereas it is understandable the necessity to promote an increased simplification and speeding up of the authorisation procedures for the construction of renewable energy plants, such an objective should be balanced against other possibly competing interests. In fact, the excessive compression of the maximum time limits for the approval of the projects may have the non-negligible negative effect of rendering public participation almost impossible. This is because renewable energy projects are often based on huge quantity of information provided by the developer which cannot be properly assessed and possibly opposed by the general public and the affected communities in case the time limits for their participation are too short. Therefore, the further reduction of the maximum duration of permit granting procedures may create an issue of legitimacy, which goes beyond the (mis)application of the rules on public participation.

Finally, the third key feature, according to which the authorisation, construction and operation of renewable energy plants under the RED III Directive are 'presumed as being in the overriding public interest and serving public health and safety'[22] is also quite critical. In fact, it creates a legal presumption that for renewable energy plants the underpinning climate-related energy goals should always prevail *ex lege* over all other possibly conflicting interests, including all environmental interests, related for instance to land planning, biodiversity or ecosystems protection interests. Such a presumption is meant to be applied to all renewable energy plants by 2024 and 'until climate neutrality is achieved', as already mentioned above. Therefore, there is a serious risk that for a very long time the approval and operation of renewable energy plants will be subject to a special treatment, which may be not necessarily well justified, given the subordination *ex lege* that it creates for environmental interests *vis-à-vis* climate-related energy objectives. In fact, in this case it may be seriously questioned whether the goal of increasing the share of renewable energy sources in the EU internal market may justify such a compression of environmental common interests and of local communities' public interests.

In sum, in my opinion an overall negative assessment of the key regulatory choices made by the RED III Directive to promote the simplification and speeding up of authorisation procedures for renewable energy plants should be given, despite the recognition of the legitimate purpose promoted by the Directive of increasing the share of renewable energy sources in the EU. Such a legitimate goal could in fact be promoted also through alternative requirements, which do not compromise the possibility to achieve a correct balance between climate-related objectives on the one side and environmental protection interests on the other side.[23] To this effect, in the next

[21]Art 16a, RED III Directive.

[22]Art 16f, RED III Directive.

[23]On a similar line of reasoning see J Jendrośka and A Anapyona, 'Towards a Green Energy Transition: REPowerEU Directive vs Environmental Acquis?' 23 (2023) ELNI Review 1.

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paragraph a possible alternative approach is proposed, which may help to better address climate-related renewable energy and environmental conflicts on a case-by-case basis.

4. An alternative approach based on the principle of integration

An alternative approach to address climate-related renewable energy and environmental conflicts might be based on the principle of integration,[24] as envisaged in two different norms of primary law within the EU legal order, namely Article 11 TFEU and Article 37 of the Charter of Fundamental Rights of the Union.

The principle of integration, as codified in Article 11 TFEU, calls for the integration of environmental protection requirements into the definition and implementation of all Union's policies and activities, with a particular reference to the perspective of promoting sustainable development. A different, but rather similar, version of the principle is contained in Article 37 of the Charter of Fundamental Rights of the European Union. In this context, a high level of environmental protection and the improvement of its quality must be the integrated into the policies of the Union and must be ensured in accordance with the principle of sustainable development. These two different formulations of the principle present many common features and some elements of differentiation. Before trying to determine whether the principle of integration could be appropriately used as a balancing criterion for intra-environmental conflicts, it is therefore appropriate to briefly focus on the differences between the two formulations of the principle.

There are two fundamental differences between the two versions of the principle. The first difference concerns the object of the integration activity. Whilst Article 11 TFEU establishes a duty to integrate environmental protection requirements into the definition and implementation of the Union policies and activities with a view to promoting sustainable development, according to Article 37 of the Charter the objective of a high level of protection and the improvement of the environmental quality must be integrated into the Union's policies and guaranteed in accordance with the principle of sustainable development.

The second difference concerns the different qualification of the concept of sustainable development in the two provisions. In Article 11 TFEU, sustainable development is qualified as a general objective to be pursued, while in Article 37 of the Charter it is identified as a proper principle with an arguably greater legal relevance. Generally speaking, on the issue of the legal qualification of the principle of sustainable development, there is still an on-going doctrinal discussion, according to which it can range from a mere programmatic objective that is solely meant to guide EU institutions to a proper legal principle that is capable of some relevant legal effects.[25] However, in my view,

[24]On the principle of integration see N Dhondt, *Integration of Environmental Protection into other EC Policies. Legal Theory and Practice* (Europe Law Publishing 2003); A Epiney, 'Environmental Principles' in R Macrory (ed), *Reflections of 30 Years of EU Environmental Law* (Europa Law Publishing 2006) 19; S Kingston, 'Integrating Environmental Protection and EU Competition Law: Why Competition Isn't Special' 16 (2010) European Law Journal 780; J Jans, 'Stop the Integration Principle?' 33 (5) (2011) Fordham International Law Journal 1533; L Krämer, *EU Environmental Law* (Sweet and Maxwell 2016) 21; O McIntyre, 'The Integration Challenge: Integrating Environmental Requirements into Other Policies under European Union Law' in S Kingston (ed), *European Perspectives on Environmental Law and Governance* (Routledge 2013) 126; C Voigt, 'Article 11 in Light of the Principle of Sustainable Development in International Law' in B Sjåfjell and A Wiesbrock (eds), *The Greening of European Business Under EU Law: Taking Article 11 TFEU Seriously* (Routledge 2015) 31; B Sjåfjell, 'The Legal Significance of Article 11 TFEU for EU Institutions and Member States' in B Sjåfjell and A Wiesbrock (eds), The Greening of European Business Under EU Law: Taking Article 11 TFEU Seriously (Routledge 2015) 51; M Montini, 'The Principle of Integration' in L Krämer and E Orlando (eds), *Principles of Environmental Law* (Elgar 2018) 139; N De Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, (Oxford University Press 2020) 472; V Karageorgou, 'The Environmental Integration Principle in EU Law: Normative Content and Functions also in Light of New Developments such as the European Green Deal' 8 (1) (2023) European Papers 159; J Jans and H Vedder, *European Environmental Law* (Europa Law Publishing 2024) 22.

[25]E Scotford, 'Environmental Rights and Principles in the EU Context: Investigating Article 37 of the Charter of Fundamental Rights' in S Bogojevic and R Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart Publishing 2018) 4;

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considering its broad, vague and multi-faceted nature, as confirmed by the relevant CJUE case-law,[26] it has been correctly argued in the literature that 'the principle or concept of sustainable development may appear as a point of general reference and might not have a direct impact on the outcome of a case'.[27]

The legal qualification of the principle of sustainable development does not merely have a value in itself. In fact, it may determine whether or not the related principle of integration can be invoked in court, as a mere interpretative criterion or as a more relevant balancing instrument between conflicting interests.[28] In this regard, its justiciability should be determined primarily on the basis of what is exactly meant by the expression 'environmental protection requirements' in Article 11 TFEU. According to the most relevant doctrine, such expression should be intended as to cover at a minimum all the environmental policy objectives listed in Article 191(1) TFEU as well as all environmental principles listed in Article 191(2) TFEU.[29] Therefore, it may be argued that a balancing exercise based on the principle of integration should try to reconcile the environmental protection requirements on the one side and the renewable energy goals on the other side. In the context of this balancing activity, however, it is difficult to determine where to place the climate objectives related to the CO_2 control and reduction in the atmosphere. In fact, from one point of view it could be argued that they should be falling within the scope of environmental interests, insofar both types of interests find their legal basis in Article 191–2 TFEU, while from another point of view, they often tend to connect with the energy interests referred to in Article 194 TFEU.

The situation seems to be somehow more straightforward with regard to Article 37 of the Charter. In this context, two specific environmental protection interests, namely the objective of a high level of protection and the improvement of the environmental quality, are conceived as reference criteria for the development and implementation of the other Union's policies, in accordance with the principle of sustainable development. This qualification could perhaps lead to a greater consideration for the mentioned environmental interests as compared to the context of Article 11 TFEU. However, this favorable interpretation for environmental needs is neither supported by any relevant jurisprudence, nor reflected in the evolution of the Union's recent policies. The latter ones, in fact, although largely inspired by climate and environmental needs, tend to give to energy goals, particularly to those related to the production of energy from renewable sources, an overarching position with respect to other possibly conflicting interests, such the environmental ones.

Moreover, the recent practice of the Union tends not to acknowledge the possible contribution that the principle of integration may provide as a criterion for balancing the possibly conflicting interests at stake. For example, in the Commission's Communication on the European Green Deal,[30] a specific reference is made to all the environmental principles contained in Article 191 TFEU, while an explicit mention of the principle of integration, as referred to in Article 11 TFEU, is completely absent. In the light of this evidence, it can be argued that the principle of integration

G Bándi, 'Principles of EU Environmental Law Including the (Objective) of Sustainable Development' in M Peeters and M Eliantonio (eds), *Research Handbook on EU Environmental Law* (Elgar 2020) 36, at pp 38–41; V Barral, 'The Principle of Sustainable Development' in L Krämer and E Orlando (eds), *Principles of Environmental Law* (Elgar) 103; M Humphreys, *Sustainable Development in the European Union. A General Principle* (Routledge 2018); see also Opinion of Advocate General Jacobs, Case C-379/98, *Preussen Electra*, ECLI:EU:C:2000:585, para 231.

[26]See for instance the following CJUE case-law: Case C-50/09 *European Commission v Ireland* ECLI:EU:C:2011:109; Case C-406/08 *Uniplex (UK) Ltd v NHS Business Services Authority* ECLI:EU:C:2010:45; Case C-201/08 *Plantanol GmbH & Co KG v Hauptzollamt Darmstadt* ECLI:EU:C:2009:539; Case T-37/04 *Regiao autónoma dos Ácores v Council of the European Union* ECLI:EU:T:2008:236; Case C-403/05 *European Parliament v Commission of the European Communities* ECLI:EU:C:2007:624; Case C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias and others v Ipourgos Perivallontos, Khorotaxias kai Dimosion Ergon and others* ECLI:EU:C:2012:560, para 139.

[27]Bándi (n 25) 40.

[28]Bándi (n 25) 42.

[29]J Jans and H Vedder (n 24) 22; L Krämer (n 24) 21.

[30]Communication, 'The European Green Deal' (n 1).

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enshrined in Article 11 TFEU is perhaps falling into a sort of 'desuetude' in the context of European Union policies.[31] Nonetheless, a potential for a greater future role of the principle cannot be completely excluded, if, according to some relevant legal literature, this is conceived as an operational instrument which may help promoting the goal of sustainable development.[32] In this sense, with specific regard to the climate and energy transition, it has been argued that 'Article 11 TFEU may prove to be key in achieving the fundamental transformation away from a fossil fuel-based with its linear business models towards a renewables-based, circular and just economy within planetary boundaries'.[33] The same reasoning may arguably also apply to the similar version of the principle of integration contained in Article 37 of the Charter.

However, the recognition of the principle of integration as a balancing tool to address intra-environmental conflicts and as an instrument to promote sustainable development would require a change of perspective in its interpretation and application. To this effect, the complex issues raised by the climate-related energy and environmental conflicts could be addressed through an ecological sustainability-oriented reading of the principle. The relevant question to be addressed seems to be the following one: can ecological sustainability shape a different reading of the principle of integration which can enable it to operate as an instrument apt to balance the different interests at stake in the climate-related renewable energy and environmental conflicts described above? And ultimately, may it give a contribution to promote sustainable development, as foreseen in Article 11 TFEU and in Article 37 of the Charter? To try and answer such a question it is necessary firstly to define what ecological sustainability means, secondly, to determine its relationship with the principle of sustainable development, and, finally, to verify whether an ecological sustainability-oriented reading of the principle of integration might render it a suitable instrument to address intra-environmental conflicts.

Firstly, in general terms it may be said that the concept of ecological sustainability could be defined and interpreted according to either a strong or a weak meaning.[34] However, for several reasons, based on both logical[35] and historical[36] considerations, a strong meaning of the concept should be preferred.[37] To this effect, the concept of ecological sustainability may be defined as 'the duty of the human beings to protect and restore the integrity of the Earth's ecological systems'.[38] This definition shows the deep connection existing between the promotion of sustainability and the protection of the health and integrity of ecosystems. In fact, as argued elsewhere, 'the concept of "ecological sustainability" may be said to refer essentially to the need for the human civilization to live in harmony with nature and the eco-systems which enable life on the planet and support human development'.[39]

[31]M Montini, 'The European Green Deal from an Environmental Protection Perspective: The Missing Role of the Environmental Integration Principle' in K De Graaf et al (eds), *Liber amicorum Jan Jans* (Uitgeverij Paris 2021) 97.

[32]B Sjåfjell, 'The Environmental Integration Principle: A Necessary Step Towards Policy Coherence for Sustainability' in F Ippolito, ME Bartoloni and M Condinanzi (eds), *The EU and the Proliferation of Integration Principles under the Lisbon Treaty* (Routledge 2019) 105.

[33]Ibid., 21.

[34]E Chiti, 'Legal Changes: Ecosystem's Health and the Redefinition of Sustainability in the Green Deal', in this issue.

[35]K Bosselmann, *The Principle of Sustainability* (Routledge 2008).

[36]U Grober, *Sustainability: A Cultural History* (Green Books 2012).

[37]G Garver, *Ecological Law and the Planetary Crisis. A Legal Guide for Harmony on Earth* (Routledge 2021); K Anker, PD Burton, G Garver, M Maloney and C Sbert, *From Environmental Law to Ecological Law* (Routledge 2021); C Sbert, *The Lens of Ecological Law: A look at Mining* (Elgar 2020); K Bosselmann, 'The Rule of Law Grounded in the Earth: Ecological Integrity as a Grundnorm' in L Westra and M Vilela (eds), *The Earth Charter, Ecological Integrity and Social Movements* (Routledge 2014), 3; G Garver, 'The Rule of Ecological Law: The Legal Complement to Degrowth Economics' 5 (2013) Sustainability 316.

[38]Bosselmann (n 35) 53.

[39]M Montini, 'Revising International Environmental Law Through the Paradigm of Ecological Sustainability' in F Lenzerini and A Vrdoljak (eds), *International Law for Common Goods: Normative Perspectives in Human Rights, Culture and Nature* (Hart Publishing 2014) 271, at 275 (reprinted in K Bosselmann, P Taylor, *Ecological Approaches to Environmental Law* (Elgar 2017) 296.

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Secondly, with regard to the relationship existing between the concept of ecological sustainability and the principle of sustainable development, the inherent ecological core on the principle should be recognised as the only possible sound foundation of sustainable development. In fact, as it has been argued in the legal literature, only patterns of human development grounded on the respect of health and integrity of ecosystems should be recognised as proper examples of sustainable development.[40] In other words, the relevance of the social and economic dimensions of sustainable development should be developed on the basis of a solid ecological foundation. In fact, as it has been correctly stated, 'development is sustainable if it tends to preserve the integrity and continued existence of ecological systems, it is unsustainable if it tends to do otherwise'.[41] Therefore, it can be argued that an ecological sustainability-oriented understanding of the principle of integration may render such a principle a suitable instrument to address intra-environmental conflicts and give full effect to the close link between the principles of integration and sustainable development envisaged in Articles 11 TFEU and in Article 37 of the Charter.

5. Conclusion

The present contribution has focused on the emerging conflicts between climate-related renewable energy goals and environmental protection interests in the framework of the energy transition, that is promoted by the European Union in connection with the climate neutrality objective, as enshrined in the European Green Deal and made legally binding in Regulation (UE) 2021/1119 (the so-called 'European Climate Law').

One of the basic pillars upon which the energy transition is grounded is represented by the Directive on the promotion of renewable energy sources (RED Directive), which was originally adopted as Directive 2009/28 (so called RED I Directive), later revised as Directive 2018/2001 (RED II Directive) and recently further amended by Directive 2023/2413 (RED III Directive). The RED Directive (in its various versions) aims to establish an EU wide comprehensive legal framework and create the conditions to induce Member States to support the construction of renewable energy plants and infrastructures to contribute to the EU energy transition.

The deployment of renewable energy plants and infrastructures, however, may give rise to conflicts between climate-related renewable energy and environmental interests (intra-environmental conflicts), which are characterised by the opposition of climate-related energy goals, operating within an environmental protection framework and connected with the promotion of renewables, on the one side, and environmental interests, related to land planning and the protection of ecosystems, on the other side.

Within such a context, the analysis conducted above has initially investigated the origin and characteristics of such types of conflicts, which can be found in the interplay between three sets of goals: climate objectives related to the CO_2 reduction commitments adopted by the EU for the implementation of the 2015 Paris Agreement and enshrined in EU secondary legislation; energy transition goals, as mandated by the EU Green Deal, the REPowerEU Plan and the relevant secondary legislation, such as the RED Directive; environmental interests, related to land planning procedures, as guaranteed by the application of the SEA and EIA Directives, as well as the protection of biodiversity and ecosystems, as promoted primarily by the EU Habitats and Wild Birds Directives.

Then, the focus has shifted to the regulatory choices made by the RED II and the RED III Directives to manage these conflicts, which have been presented and compared, with a particular focus on the three key features of the recently approved RED III Directive. These consist in the institution of renewables acceleration areas, in the further reduction of the maximum duration of permit granting procedures for the authorisation of renewable energy plants and in the

[40]Bosselmann (n 35) 53.
[41]Ibid.

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determination that the planning and construction phases of such plants are characterised by an overriding public interest which prevails *ex lege* over all other possibly conflicting interests. The critical analysis of such features has shown that, despite the legitimate purpose promoted by the Directive of increasing the share of renewable energy sources in the EU, the regulatory choices made in the RED III Directive may compromise the possibility to achieve a correct balance between climate-related objectives on the one side and environmental protection interests on the other side.

To overcome the shortcomings of the RED III Directive, an alternative approach to address such types of conflicts has been proposed. This alternative approach is grounded on the principle of integration, as envisaged in two different norms, namely Article 11 TFEU and Article 37 of the Charter of Fundamental Rights of the Union. However, it has been highlighted that the principle of integration may operate as a balancing tool to address intra-environmental conflicts and act as an instrument to promote sustainable development only if a change of perspective in its interpretation and application occurs. To this effect, it has been shown that an ecological sustainability-oriented understanding of the principle is needed, in order to promote patterns of sustainable human development grounded on the respect of health and integrity of ecosystems.

Competing interests. The author has no conflicts of interest to declare.

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