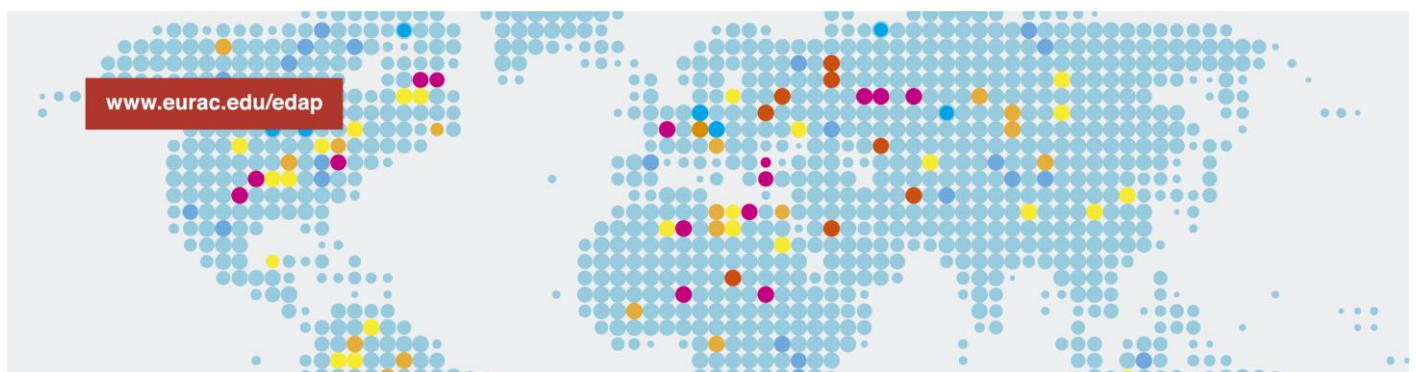


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# The Ascent of EU Environmental Policy: A Case for Unintended Consequences

Federica Cittadino



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## Abstract

This paper aims to explore the issue of unintended consequences as the key underlying theme that explains the incremental integration of policies in the EU, with a particular focus on the issue of environmental protection. The theoretical background of the present research is provided by two of the main schools of thought that, in different historical contexts, have theorized unintended consequences as a relevant interpretative/analytical tool for European integration, namely neo-functionalism and neo-institutionalism. The paper focuses on three distinctive moments of the EU environmental policy: the first steps in the 1970s, the change of regulatory paradigm during the 1990s, and the EU leadership role in global environmental policy. The main argument is that while neo-functionalism can give a convincing account of the initial phases of EU environmental policy, neo-institutionalism offers a persuasive framework to understand the consolidation phases of the policy.

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## Key words

EU environmental policy - neo-functionalism - neo-institutionalism - unintended consequences - EU environmental law - EU competences.

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# The Ascent of EU Environmental Policy: A Case for Unintended Consequences

Federica Cittadino

## 1. Introduction

The history of European integration is also the story of the expansion of the EU field of action.<sup>1</sup> From the creation of the European Coal and Steel Community (ECSC), the pooling of national sovereignty has largely exceeded a purely economic pact. Along this path, the major treaty revisions do not only represent institutional tuning operations, so as to allow the machine to operate more smoothly or to ensure new power equilibria, but they also spell out the increasing number of EU competences. The extraordinary nature of European integration thus is due both to its unprecedented start (voluntary pact to achieve peace and stability) and to the dynamics of its deepening from an economic project to a community that encompasses numerous aspects of the life of its citizens.

The incremental logic is nothing new in the project of the EU's founding fathers Jean Monnet and Robert Schuman. The former imagined integration to kick off from the institutionalized cooperation in limited technical, low-politics sectors that do not impinge directly on the sovereign powers of states but create a *de facto* solidarity.<sup>2</sup> This project had as its engine the logic of spill-over that will be illustrated in the following sections of this essay. Schuman is the author, together with Monnet himself, of the declaration that gave symbolically birth to the adventure of European integration.

In this context, this paper aims to explore the issue of unintended consequences as the key underlying theme that explains the incremental integration of policies in the EU, with a particular focus on the issue of environmental protection. The theoretical background of the present research is provided by two of the main schools of thought that, in different historical contexts, have theorized unintended consequences as a relevant interpretative/analytical tool for European integration, namely neo-

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<sup>1</sup> The term "EU" is used in this essay to indicate in a general way the institutional result of European integration. It thus encompasses not only the EU in the narrow sense (treaties of Maastricht and Lisbon), but also the ECC (Treaty of Rome) and the EC (Treaty of Maastricht).

<sup>2</sup> Weale, A., "European environmental policy by stealth: the dysfunctionality of functionalism?", 17 *Environment and Planning C: Government and Policy* (1999); Diez, T. & Wiener, A., Introducing the Mosaic of Integration Theory, in Diez, T. & Wiener, A. (eds.), *European Integration Theory* (Oxford University Press, Oxford, 2009).

functionalism and neo-institutionalism.<sup>3</sup> These theories are briefly reviewed in the first section of this paper, which also analyzes the rationale behind their choice. The second section illustrates the establishment and main developments of EU environmental policy, in light of the overarching theme of unintended consequences. To this end, section two is divided into three main parts covering respectively the first steps of EU environmental policy, the change of regulatory paradigm during the 1990s, and the EU leadership role in global environmental policy. In this paper, I argue that while neo-functionalism can give a convincing account of the initial phases of EU environmental policy, neo-institutionalism offers a persuasive framework to understand the consolidation phases of the policy. In the final section, I sum up the main findings and propose some concluding remarks.

## 2. The Theoretical Background: Neo-functionalism and Neo-Institutionalism

The choice to refer to neo-functionalism and neo-institutionalism in order to set the theoretical background of this paper does not intend to overlook the fundamental differences between these theories. The first is a grand theory aiming to find the causal mechanism that can explain European integration. The second is, by contrast, a descriptive theory that wants to emphasize the importance of institutions. Both, however, have a role in substantiating the argument according to which unintended consequences is the recurrent theme of European integration in the field of environmental protection. Furthermore, they have been specifically selected for their arguable complementarity. Once the logic of spill-over is accepted as a fundamental engine of EU integration, neo-institutionalism provides a solid theoretical framework to explain why spill-over can hardly be reversed. This is particularly useful both to justify the forward-looking mode of integration even in times of less EU-enthusiasm and to give a convincing account of the development of environmental policy at the EU level.

First elaborated between the end of the 1950s and the beginning of the 1960s by Ernst Haas and Leon Lindberg, neo-functionalism was specifically formulated to analyze the creation of the ECSC and its later evolution.<sup>4</sup> This theory thus sets the debate on the formation of the EU, since it is one of the first attempts to explain the new phenomenon of regional integration in Europe. Furthermore, the reasons for its original success lie in its capacity to interpret the initial phases of the European project. In this sense, the central concept of spill-over is able to give a consistent account of the accelerated pace of integration that in less than a decade had led from the creation of a European market for coal and steel to the establishment, on the one hand, of

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<sup>3</sup> Note that, in this essay, I will refer to neo-institutionalism mainly as a unitary doctrine, by emphasising the elements of the three main kinds of institutionalisms (rational choice, historical, and sociological) that are relevant to the present discussion.

<sup>4</sup> Haas, Ernst B., "The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorizing", 24 *International Organization* (1970); Diez & Wiener, *Introducing the Mosaic...*, 45.

a legal framework for a common general market in which fundamental freedoms are ensured and, on the other hand, of an institutional framework with emerging features of supra-nationalism.

The concept of spill-over lies at the heart of early formulations of the theory and refers mainly to the internal interconnectedness of the European market and its consequent capacity to incrementally absorb new fields of activity. For Haas and Lindberg integration of European states is first and foremost a process with an internal dynamic. In the words of Tranholm-Mikkelsen, who has tremendously contributed to the divulgation of the original neo-functionalism propositions, this internal dynamic consists of functional, political, and cultivated spill-over.<sup>5</sup> First, the term functional refers to the fact that, once economic policies are gradually integrated, the connections with other sectors are so strong that integration automatically extends to them. Second, political spill-over is linked to the pluralistic vision of neo-functionalism by Haas and Lindberg. Both authors make reference to the prominent role of elites who, with their transboundary interests, are the lead actors of integration. In particular, elites are subject to processes of social learning and socialization that allow them to shift their allegiance away from their national constituencies. Finally, cultivated spill-over implies that supranational institutions act to broker agreements between Member States that go beyond the threshold of the minimum common denominator, thus allowing a shift to decisions taken in view of the common interest.

While the original formulation of these three dynamics presumed the automaticity of spill-over, criticisms (and a substantial demise of the theory) following on from the failure of neo-functionalism to explain the empty-chair crisis and the stalemate of integration processes from the end of 1960s throughout the 1970s led authors like Schmitter and Rosamond to detail the conditions under which spill-over can take place, as well as to define complementary movements that are able to account for the disintegration tendencies of the European integration process.<sup>6</sup> In the eyes of Schmitter, integration is no longer a linear process, but instead can be described as a series of cycles where spill-back, namely “withdrawal from previous commitments”<sup>7</sup> and disintegration, are one of the possible outcomes. On the other hand, spill-over can be the by-product of the dissatisfaction about the status quo reached with previous integration.

Although emerging in the European debate about thirty years later than the theorising of neo-functionalism, neo-institutionalism shares with it some of its basic assumptions. First, both theories build their arguments on the presumed rationality of actors, who seek to maximise their benefits. Second,

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<sup>5</sup> Tranholm-Mikkelsen, J., “Neo-functionalism: obstinate or obsolete? A reappraisal in the light of the new dynamism of the EC”, 20 *Journal of International Studies* (1991).

<sup>6</sup> Schmitter, P. C., “Neo-Neofunctionalism”, in Diez & Wiener, *European Integration Theory* (2004); Rosamond, B., “The uniting of Europe and the foundation of EU studies”, 12 *Journal of European Public Policy* (2005).

<sup>7</sup> Niemann & Schmitter, “Neofunctionalism”, in Diez & Wiener, *European Integration Theory* (2009), 55.



neo-institutionalism arguably proposes a diluted version of the concept of spill-over by highlighting the salience of issue-linkage to understand European integration.<sup>8</sup> In the eyes of Pierson, the complexity of the European policy-making arena, which is made of a number of complex policy issues and a number of actors, generates dynamics of interaction that are hardly controllable by stakeholders. In this view, the expansion of European integration may be seen as a by-product of complex institutional mechanisms. Finally, both theories emphasize the “significance of supranational actors”,<sup>9</sup> although in this last respect neo-institutionalism does not go so far as to theorize the shift of loyalties to the supranational level.

Notwithstanding these commonalities, neo-institutionalism can be regarded, at least in the intentions of some of its most representative authors, as a theory that aims to solve the stalemate created by the dichotomy between neo-functionalism and intergovernmentalism.<sup>10</sup> Intergovernmentalism is a theory that seeks to explain European integration in overt conflict with the automatism and the supranational character emphasised by neo-functionalism. In brief, intergovernmentalism explains integration as a product of the exercise of state sovereignty and intergovernmental bargains.<sup>11</sup> In this respect, neo-institutionalism distinguishes itself from neo-functionalism for a renovated interest in State actors as opposed to non-governmental elites. Contrary to intergovernmentalism, it emphasises the role of supra-national actors in putting a brake to Member States’ predominance.

While acknowledging the role that Member States play in the process of European integration, the focus of neo-institutionalism is on the constraints imposed on national actors by supranational institutions. To this end, institutions are to be intended not only as actors, such as the Commission or the European Council, but relate also to the set of rules that regulate the interaction of those European actors with the Member States. Garrett and Weingast give an account of why institutions are created in the first place, highlighting that, while “shared beliefs” and ideas can explain the form of the chosen institutions, the need for cooperation is at first a by-product of the context of imperfect information in which national actors operate.<sup>12</sup> Institutions, therefore, compensate for the asymmetry of information by

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<sup>8</sup> Pierson, P., “The Path of European Integration. A Historical Institutional Analysis”, 29 *Comparative Political Studies* (1996), 137.

<sup>9</sup> Ibid, 147.

<sup>10</sup> Pollack, M. A., “The New Institutionalism and EU Governance: The Promise and Limits of Institutional Analysis”, 9 *Governance* (1996).

<sup>11</sup> Diez & Wiener, *Introducing the Mosaic...*, 67ff. On intergovernmentalism, see also Hoffmann, S., “Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe”, 95(3) *Daedalus*, Tradition and Change (1966), 862-915; Moravcsik, A. ‘Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach’, 31(4) *Journal of Common Market Studies*, (1993).

<sup>12</sup> Garrett, G. & Weingast, B. R., “Ideas, Interests and Institutions: Constructing the European Community Internal Market”, in Goldstein, J. & Keohane, R. (eds.) *Ideas and Foreign Policy. Beliefs, Institutions and Political Change* (Cornell University Press, New York, 1993).

acting, on the one hand, as mediators among national actors and, on the other hand, as watchdog of supranational commitments.

One of the common starting points in this strand of literature is that institutions, once created, tend to be “sticky”,<sup>13</sup> meaning that they cannot be easily reformed, thus representing a constraint for Member States’ action. This is mainly due to the fact that Member States cannot be fully in control of the functioning of institutions for a number of reasons.<sup>14</sup> First, institutions are specialized bodies created to perform selected functions that require expertise. In order for these functions to be correctly addressed, supranational bodies are endowed with sufficient powers to perform those tasks. This initial delegation of authority creates a margin of manoeuvre for the institutions, which in turn results in a certain degree of autonomy from the Member States that have originally conceived them.<sup>15</sup> This allows overtime for an extension of powers from the original set of given competences. Second, given the impossibility of regulating every aspect of the interaction between Member States (incomplete contract issue), supranational bodies receive a mandate that is broader than the tasks originally included in their portfolio. This is due to the fact that institutional action can face situations where it must fill the “unanticipated contingencies” arising during their operation.<sup>16</sup> Finally, the so-called “lock-in” effect characterises the concept of sticky institutions.<sup>17</sup> Institutional mechanisms, such as treaty revision barriers, on the one hand, and “sunk costs” for those who rely on the system of incentives created by a given institutional setting, on the other hand,<sup>18</sup> are usually described as the main determinants of path dependence.

The possibility of change, however, is not completely banned in this context. Pollack introduces the concept of “punctuated equilibrium” to explain that, although institutions are usually resistant to change, they can be transformed during critical junctures.<sup>19</sup> The possibility of sudden changes in the institutional architecture is nonetheless subject to two caveats. First, the transformation is still highly dependent on the previous institutional arrangements. Second, and as a consequence of the first point, retreating from integration is a difficult process.

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<sup>13</sup> Pierson, *The Path of...*, 127; Pollack, *Pollack, The New Institutionalism and EU Governance*, 438; Pollack, M. A., “The New Institutionalisms and European Integration”, in Diez & Wiener, *European Integration Theory*, 143.

<sup>14</sup> Pierson, *The Path of...*

<sup>15</sup> *Ibid.*

<sup>16</sup> Garrett & Weingast, *Ideas, Interests...*, 181.

<sup>17</sup> Pollack, *The New Institutionalism and EU Governance*, 432.

<sup>18</sup> Pierson, *The Path of...*, 144.

<sup>19</sup> Pollack, *The New Institutionalism and EU Governance*, 439.

## 2.1 Unintended consequences

Both neo-functionalism and neo-institutionalism include in their explanation of EU integration the paradigm of unintended consequences. This is present in the early formulations of neo-functionalism by Haas,<sup>20</sup> who refers to it with regards both to short-sighted politicians, unable to foresee the long-term consequences of their decisions, and to the creation of new institutions, whose full array of functions is often ignored by those who establish them. In a nutshell, neo-functionalism uses unintended consequences to explain some aspects of the unfolding of the mechanism of spill-over. As explained more in detail by Schmitter,<sup>21</sup> given the interconnectedness of the tasks performed at the EU level, “whatever the initial intentions, there will be a tendency to ‘spill-over’...and, hence, a...trend toward task expansion in both scope and level of authority”.

The operational mechanism underlying the concept of unintended consequences is further specified by neo-institutionalism, especially when it comes to the historical declination of this theory. Pierson, by putting the EU integration in a long-term perspective, uncovers important “gaps in member-state control”.<sup>22</sup> National negotiators rarely possess the information necessary to understand the full implications of their institutional choices. Unintended consequences, therefore, become a fundamental paradigm for neo-institutionalism. As mentioned in the previous section, the autonomy of institutions, together with the issue-linkage generated by the interaction of states and the creation of common tasks do play a prominent role in this respect. Furthermore, the main weakness in member-state control lies probably in what is defined as the “high discount rate” to the future<sup>23</sup> of national actors when negotiating supra-national arrangements. National politicians, indeed, are more concerned with the short-term electoral return than with the long-term consequences of their decisions. These elements translate into a picture of Member States that are constrained by their own creature, thus becoming subjected to the unintended consequences of their original bargains.

## 3. The Creation of the EU Environmental Policy

As of today, EU environmental policy is widely developed and covers issues ranging from air quality and water management to climate change and sustainable development. Article 4 of the Treaty on the Functioning of the European Union (TFEU) lists the environment as one of the shared competences between the Union and the Member States. Articles 191 to 193

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<sup>20</sup> Haas, *The Study of Regional...* .

<sup>21</sup> Schmitter, *Neo-neofunctionalism...*, 50.

<sup>22</sup> Pierson, *The Path of...*, 126.

<sup>23</sup> Pierson, *The Path of...*, 136; Pollack, *The New Institutionalism and EU Governance...*, 441.

set out the main elements of EU environmental policy, ranging from its objectives to the legislative procedure applicable when adopting legal acts in the field of environmental protection. In light of article 11 TFEU, the environment is a transversal policy that should be integrated in the other European policies. The improvement of the quality of the environment is also included among the Union's objectives under Article 3 of the Treaty on the European Union (TEU).

The breadth of current environmental legislation and practice is even more astounding if one thinks that the EU founding treaties did not mention environmental policy among the range of EU objectives and competences. This section, therefore, will focus on the process that led to the creation of EU environmental policy and its inclusion into the treaties, seeking neither to explore the issue of the effectiveness of the selected policy nor to uncover the difficulties of its implementation. Rather, the main aim is to show that the first steps of EU environmental policy and its subsequent consolidation can be read in terms of unintended consequences through the lenses of neo-functionalism and neo-institutionalism.

To this end, two decisive phases of the EU environmental policy have been selected as particularly telling, namely the initial legislative achievements back when the policy had no direct treaty legitimation and the transformation of the policy approach in the 1990s. Both developments anticipate patterns that are to be considered as general trends of the EU environmental policy until today. Finally, special consideration will be given in a separate sub-section to the external dimension of EU environmental policy. This will complement the analysis with important insights into one of the most supranational areas of the EU construction.

### 3.1 The EU Environmental Policy from Scratch

In the creation of EU environmental policy three factors emerge as the driving forces of this transformation: the functional link between environmental protection and the market, the active role of supranational institutions, and the perceived low political salience of the policy by national actors. These elements are, furthermore, corroborated by the favourable international political climate and the responsiveness of EU citizens. The 1960s represent the cradle of environmental conscience in the global arena. The awareness of environmental problems that extend beyond issues of transboundary damage, together with the increasing demand of environmental protection from the civil society led the international community to stress new concepts, such as the prevention and the precautionary principles, as well as to elaborate new paradigms in order to reconcile opposing needs, such as the pursuit of economic development and the protection of the environment. This process resulted in 1972 in the adoption of the well-known Stockholm Declaration at the United Nation Conference on the Human Environment.

The first step of the construction of the global environmental governance did have a tremendous impact on the European project. 1973 is the year of the adoption of the first EU Environmental Action Plan. During the 1970s, in addition, an intensive legislative activity took place within the Council that, upon proposals of the Commission, adopted more than twenty directives on environmental matters.<sup>24</sup> But how was this even possible if the treaty was silent in the field of environmental protection?

Directive 70/220 is a case in point when it comes to argue for the functional spill-over from economic policy to environmental measures. This directive addresses the issue of combating air pollution from motor vehicles and was firstly elaborated to avoid that different emission standards could create indirect trade barriers to the free circulation of automotive products. To this end, directive 70/220, although having an important environmental impact, was adopted under article 100 of the ECC Treaty on the approximation of national legislations for the creation of the single market.<sup>25</sup> The first environment-related legislative measure taken at the EU level had, therefore, an economic rationale and found its legal basis on the single market provisions of the Treaty of Rome.<sup>26</sup> In this sense, the instrumental use of articles 100 and 235 (the so-called 'flexibility clause')<sup>27</sup> of the ECC Treaty allowed initially to guarantee a legal coverage to environmental measures based on the presumed linkages with a smooth functioning of the single market.<sup>28</sup> The creation of environmental legal instruments, however, goes far beyond the direct link with the market. The already cited article 235, in fact, was used as a legal basis for adopting directives that were not concerned with "the operation of the common market" as such. A prominent example of this trend is the adoption of the so-called Birds directive (79/409), which creates a regime of protection for a number of species of wild birds.

It needs to be remembered, however, that the spill-over described above did not happen automatically. Rather, it was facilitated by purposeful actions of the European Commission and of the European Court of Justice (ECJ). The

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<sup>24</sup> Lenschow, A., "Environmental Policy", in Wallace, H. et al. (eds.), *Policy-Making in the European Union* (Oxford University Press, Oxford, 2005).

<sup>25</sup> See Jordan, A., "Editorial Introduction: The Construction of a Multilevel Environmental Governance System", 17 *Environment and Planning C: Government and Policy* (1999), 7: "Strictly speaking, Article 100...was designed to 'approximate' pre-existing national provisions...But this did not prevent the ECPS [Environment and Consumer Protection Service within DG Industry] submitting proposals where no provisions existed in any of the member states."

<sup>26</sup> Lenschow, Environmental Policy....

<sup>27</sup> The original text of art. 235 of the Treaty of Rome read as follows: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures."

<sup>28</sup> Weale, European environmental policy...; Sbragia, A., "Environmental Policy", in Wallace, Policy-Making...; Lenschow, Environmental Policy...

Court confirmed later in the integration process (during the 1980s and the 1990s), in several cases, the appropriateness of article 100 as the legal basis for EU action in the field of environmental policy.<sup>29</sup> In a leading case of 1985 environmental protection is invoked as one of the “objectives of general interest pursued by the Community”.<sup>30</sup> The environment, therefore, was identified as a sector with an enormous potential in terms of its linkages with the market and its possibility to reinforce the all-encompassing attitude of supranational actors like the Commission.<sup>31</sup> In particular, the protection of the environment produced the expansion of EU competences and, thus, of the Commission’s powers. The legislative activity of the Commission was, moreover, complemented by its lobbying and brokering activity, with the aim of “coax[ing] states into accepting deeper integration than they had anticipated”.<sup>32</sup>

A further step forward was made with the adoption of the Single European Act in 1986, which introduced, under article 100A, the qualified majority voting rule for harmonization measures, in order to accelerate the realization of the Single Market. The SEA also added Title VII to the Rome Treaty, whereby a shared competence to legislate, by unanimous vote, on environmental matters was granted to the Community. The SEA, thus, created a double track whereby market-related provisions in the field of environmental protection were to be adopted under the rules of qualified majority voting of article 100A, while purely environmental measures were subject to the unanimity rule. This resulted in an intense activity of legislative initiative on the part of the Commission. The legal proposals were usually framed in such a way as to take advantage of the qualified majority voting procedure under article 100A. Qualified majority voting also substantially tamed individual Member States’ veto powers on legislation, encouraging in contrast a different bargaining game whereby so-called green states could promote their environmental agenda. As showed by Sbragia, what happened especially in the 1980s was that the green states, such as Germany and Denmark, pushed for a harmonization of environmental standards at the EU level.<sup>33</sup> In particular, the main goal was to extend strict national environmental rules to all EU Member States, thus preserving the competitiveness of national firms.

States’ perceptions of the political salience of environmental policy are central to understanding the initial momentum of environmental legislation. One part of the explanation is consistent with a view according to which,

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<sup>29</sup> Jordan, Editorial Introduction...; Sbragia, Environmental Policy...; Lenschow, Environmental Policy...

<sup>30</sup> See case C-240/83, paras. 12-13.

<sup>31</sup> Although DG ENV came into existence only in 1981, a small unity within DG Industry took the lead in preparing legislative proposals in the field of environment.

<sup>32</sup> Jordan, Editorial Introduction..., 5.

<sup>33</sup> Sbragia, Environmental Policy...

given the high technicality of environmental regulations, the new field of activity was seen more as a matter to be dealt with by bureaucrats. In this sense, environmental proposals were often underestimated by the national representatives that voted for them in the Council. In particular, it was difficult to foresee the consequences of accepting this new strand of legislation in terms of burden-sharing by the Member States. This was due to the fact that it was unclear at that time that directives, though establishing only a general framework of goals to be reached through the chosen means by Member States, can have a direct effect.<sup>34</sup>

A more sophisticated explanation, as the example of green states above shows, is that some of these legislative proposals were in line with Member States' interests.<sup>35</sup> In this respect, three elements explain why the environmentally conservative Member States were keen to accept environmental standards that would impose on them a greater economic burden. First, as contended by Jordan, "complicity between subnational and supranational actors" represents one side of the coin.<sup>36</sup> According to this explanation, the Commission managed to exclude political national actors from what it presented as technical decisions to be discussed in specialized committees. The other side of the coin, however, concerns the socialization process of national environmental ministers and their isolation from national political pressures.<sup>37</sup> The third aspect is, finally, related to the procedural mechanisms in place, including the qualified majority voting allowing for the green states to make their proposals little negotiable.

Hence, the first steps of EU environmental policy evoke neo-functionalist reasoning in many respects. The central concepts of spill-over and issue-linkage perfectly describe the rationale behind the creation of the policy stemming from the process of economic integration. It was clear from the beginning, however, that the relationship between the market and environmental protection was dual in that, while market considerations were invoked to develop the first environmental measures, "environmental policy became a central element in the evolution of the EC/EU into something 'more than a market'".<sup>38</sup> Furthermore, it is in the technical nature of environmental regulation that supranational actors such as the Commission saw the potential not only for creating a new competence field for the EU, but also for constructing a new "focal point"— a pool of shared ideas and

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<sup>34</sup> Jordan, Editorial Introduction....The direct effect doctrine was developed by the ECJ with regards to directives pretty soon during the 1970s. The liability of States for not implementing the obligations contained in the directives appeared for the first time in the 1991 with the *Francovich* judgment (joined Cases C-6/90 and C-9/90).

<sup>35</sup> Jordan, Editorial Introduction...; Sbragia, Environmental Policy....

<sup>36</sup> Jordan, Editorial Introduction..., 8.

<sup>37</sup> Sbragia, Environmental Policy...; Lenschow, Environmental Policy....

<sup>38</sup> Lenschow, A. & Sprungk, C., "The Myth of a Green Europe", 48 *Journal of Common Market Studies* (2010), 138.

objectives<sup>39</sup> - around which the allegiances of Member States can be possibly re-oriented. The environment would constitute an important ideational factor in the construction of European integration. In this respect, the active role of EU supranational institutions can be interpreted both in terms of the concept of cultivated spill-over and with reference to an attempt of the Commission to accrue its powers. This, in turn, can be seen in light of neo-institutionalism as a constraint to Member States' action that derives from the autonomy of institutions. In addition, the attitude of national actors towards the new-born policy fits particularly well with the explanation of unintended consequences as framed both by neo-functionalism and neo-institutionalism. Finally, the repeated interaction of national actors in the EU fora is in line with Checkel's argument that institutions shape the identities of the actors that operate within their settings.<sup>40</sup>

In light of the institutional interplay illustrated above, the codification of environmental policy in the Single European Act in 1986<sup>41</sup>, although representing a significant symbolic recognition of the EU's competence to act in the field, adds little to the pattern of institutional practices consolidated through the mechanism of qualified majority voting. Nor did relevant changes come from the official extension of the qualified majority voting rule to environmental legislation introduced by the Maastricht Treaty in 1992. The new change of paradigm, as it will be argued in the following sub-section, did not come from the institutional settings consolidated in the first years of the policy. Rather, it was the result of a considerable change in the regulatory approach of the EU environmental legislation.

### 3.2 The 1990s: From Command-and-Control to Economic Instruments

The first wave of environmental legislation until the 1990s was characterized by a regulatory approach known as command-and-control for the stringent requirements imposed on Member States. Germany was the main initiator of this approach, backing the Commission in the elaboration of very detailed regulations that set standards to be achieved individually by Member States and imposed penalties on those States that were not able to meet the required standards.<sup>42</sup> The typical measures wished to control emission of pollutants in the air and water, in line with an approach that was centred on

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<sup>39</sup> Garrett & Weingast, *Ideas, Interests...*

<sup>40</sup> Checkel, J., "Social Construction and Integration", 6 *Journal of European Public Policy* (1999).

<sup>41</sup> The Single European Act added Articles 130r, 130s and 130t to the EEC Treaty,

<sup>42</sup> Sbragia, *Environmental Policy...*; Alberton, M. & Palermo, F., *Environmental Protection in Multi-Layered Systems: Comparative Lessons from the Water Sector* (Martinus Nijhoff, Leiden; Boston, 2012).



the natural means to be protected.<sup>43</sup> This approach implied for the Commission a duty to patrol the respect for the standards at national level. At the same time, it ensured to countries like Germany that the stringent emission limits would not represent a cost for German firms alone, but would apply equally to European firms and not distort competition.

This approach was presumably in line with the Commission's will to be fully in control of the new policy area. However, it became soon target of criticism. With the new economic crisis of the 1990s, the command-and-control approach was suddenly called into question. The main argument was that the chosen regulatory approach was too expensive and imposed on States a heavy interference on their national systems. A new call for subsidiarity and flexibility emerged at that time: national and local actors should become more prominent in the elaboration of environmental legislation, States should be given a greater margin of manoeuvre as to attain the environmental objectives agreed at EU level.<sup>44</sup> The Commission was highly responsive to the concerns expressed by Member States and sub-national actors. It reinvented the wheel with three main changes: the introduction of market-based instruments that created a system of economic incentives and disincentives to influence the actions of private actors, an extensive use of Green papers before legislation to encourage public debate and ensure more transparency, and the recourse to less harmonized standards for environmental objectives to be reached without substantive changes at national level.

To explain this change of paradigm in the regulatory approach promoted by the Commission, one needs to acknowledge the relationship of mutual influence existing between the Commission and Member States when it comes to the direction of EU environmental policy. As claimed by Weale,<sup>45</sup> the Commission fine-tunes its proposals depending on Member States' preferences and winning coalition in the Council. Lenschow shares this view when he contends that the Commission is "responsive to ... [Member States'] demands of legislation".<sup>46</sup> These arguments, far from being supportive of an intergovernmental interpretation of European integration, add up an element of *Realpolitik* to the movement of cultivated spill-over described in section 1. When pushing for integration, the Commission must shape its proposals so as to satisfy Member States' concerns. This does not equate to say that the Commission's agenda is determined by national actors. Instead, it points to the fact that the Commission must act strategically to pursue its own integration goals. To this end, it must intercept Member States' preferences and elaborate proposals that can meet the majority voting requirements in the Council.

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<sup>43</sup> Lenschow, Environmental Policy....

<sup>44</sup> Jordan, Editorial Introduction...; Sbragia, Environmental Policy....

<sup>45</sup> Weale, European environmental policy....

<sup>46</sup> Lenschow, Environmental Policy..., 309.

This argument fits particularly well with the need to explain the passage from the command-and-control approach, firmly wanted by Germany in the first place, to the promotion of market-based instruments that were more in line with the regulatory culture of the UK.<sup>47</sup> As argued by Lenschow, Member States “liked to be on the initiating side in order to keep down the costs of any subsequent adaptation”.<sup>48</sup> Therefore, the Commission took advantage both of this competition among Member States and of the changing alliances in the Council.

Although some authors<sup>49</sup> look at the 1990s as a substantive demise of EU environmental policy due to the changing nature of the instruments employed, my argument is instead that a retreat from environmental obligations simply did not happen. In the 1990s, on the contrary, environmental policy was “one of the fastest growing areas of the EU” and “regulation show[ed] no sign of being totally eclipsed by alternative tools”.<sup>50</sup> In the words of Lenschow, it was precisely in those years that “processes of gradual institutionalization moved environmental policy principles from the status of programmatic statements into a formal *acquis* and finally into prominent treaty provisions. This prevent[ed] a *rolling back even at times of little political enthusiasm*.”<sup>51</sup> Suffices to think of the conspicuous case law of the ECJ in the 1990s.<sup>52</sup> A topical example of the “comunitarisation” of environmental law is the decision in *France v. Commission* (C-41/93), where the Court clarifies that deviations from the harmonised rules should be notified to the Commission that must give its reasoned approval to the exceptions applied at the Member State level. This decision is relevant since it regarded a more restrictive - more environmental friendly - regime on the use of pentachlorophenol (PCP) applied by Germany in contradiction with the European directive Directive 91/173. Another important case that confirms the thesis of an environmental *acquis* is the decision in the case C-435/97 regarding the use of the Bolzano airport for commercial purposes<sup>53</sup>. The project of renovation had not been accompanied by a full environmental impact assessment as required by directive 85/377. Italian authorities, on the contrary, planned to apply an ad hoc assessment procedure. The Court clarified that a Member State cannot undermine the attainment of a

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<sup>47</sup> Sbragia, *Environmental Policy*....

<sup>48</sup> Lenschow, *Environmental Policy*..., 309.

<sup>49</sup> Pallemarts, M., “The decline of law as instrument of Community environmental policy”, 3 *Revue des Affaires Européennes* (1999); Hey, C., “EU Environmental Policies: A short history of the policy strategies”, in Scheuer, S. (ed.), *EU Environmental Policy Handbook: A Critical Analysis of EU Environmental Legislation* (European Environmental Bureau, Brussels, 2005).

<sup>50</sup> Jordan, *Editorial Introduction*..., 12, 15.

<sup>51</sup> Lenschow, *Environmental Policy*..., 324 (emphasis added).

<sup>52</sup> On this, see Krämer L., *Casebook on EU Environmental Law* (Hart Publishing, 2002).

<sup>53</sup> *World Wildlife Fund (WWF) and Others v. Autonome Provinz Bozen and Others*, Judgment of 16 September 1999, C-435/97.

directive's objective by applying an alternative regime when the case at hand would instead require the application of European rules. Further, when a Member State's authorities exceed their discretion by the misapplication of a directive, individuals can invoke the directive's rules before a national tribunal (direct effect of environmental directives).

As a consequence of this line of reasoning, and given the unwillingness of numerous Member States to accept new environmental obligations, the surge of environmental policy in the 1990s can be interpreted as the unintended result of previous integration. Member States were locked-in by the consolidation of the former *acquis*, in the form of the competence of the EU enshrined in the Treaties. By the same token, the strategy of the Commission of giving a voice to Member States' preferences can be seen as a way to counter the mounting dissent among national actors wishing to retreat from environmental commitments, thus leaving the importance of environmental policy unharmed.<sup>54</sup>

### 3.3 EU Leadership in Global Environmental Governance

A substantial part of EU environmental legislation is derived from the transposition of international multilateral agreements.<sup>55</sup> While the influence of international law could alone justify the need to give account of this aspect of EU environmental policy, what is even more interesting is the reverse side of the coin. The EU has influenced global environmental governance, imposing itself as a global environmental leader.<sup>56</sup> This section, therefore, seeks to explore to what extent EU international leadership in environmental matters has had an impact both on the institutional settings of EU environmental policy at home and, in a broader perspective, on international environmental governance. What will emerge is that internal and external dimensions are mutually intertwined when it comes to EU environmental governance. In other words, international developments are both the engine of transformations in the EU environmental policy and the result of the exercise of EU policy leadership. This interpretation, in turn, is in line with the unintended consequences paradigm in that decisions and procedures that were conceived to be applied in the exercise of EU external action in environmental matters have produced effects on environmental policy at the EU level. Plus, commitments at the international level have constrained EU environmental policy at home.

Before discussing specific empirical evidence, it is worth clarifying how the EU justified its external competence in environmental matters. This can be

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<sup>54</sup> Jordan, Editorial Introduction...

<sup>55</sup> Lenschow, Environmental Policy...

<sup>56</sup> Sbragia, A. & Damro, C., "The changing role of the European Union in international environmental politics", 17 *Environment and Planning C: Government and Policy* (1999).

traced back to the ECJ ERTA case (C-22/70 of 1971), where the Court first developed its implied power doctrine related to external competences of the EU.<sup>57</sup> According to this doctrine, “each time the Community, with a view to implementing a common policy envisaged by the treaty, adopts provisions laying down common rules...the member states no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope”. Therefore, each time the EU acts internally in one of its fields of competence, it pre-empts the right of its Member States of exercising those competences at international level. This amounted to an extension of the functions attributed to the EU, whose field of action included the external dimension of internal competences. This doctrine has been further extended (ECJ Opinion 1/76 of 1977) to imply that if there exists a competence in the Treaties to act internally to achieve certain objectives and if these objectives cannot sufficiently be achieved by internal action, the EU can enter into international agreements in order to ensure the attainment of these goals.<sup>58</sup>

The case of environmental policy, however, is not one in which the action of the EU prevents Member States from acting. Instead, as a result of a refinement of the doctrine by the ECJ which distinguished among different categories of external implied powers,<sup>59</sup> environmental policy is included among those external competences that are shared between the EU and its Member States. This mixed competence opens the door to so-called mixed agreements, where the EU is a signatory to the most prominent multilateral environmental agreements together with its Member States.<sup>60</sup> This innovative institutional configuration has been facilitated by the development of some institutional tools, such as “prenegotiation positions, active involvement at the actual international negotiations, and the conclusion of postnegotiation agreements”.<sup>61</sup> Member States agree on common positions in Council meetings or in ad-hoc institutional settings. They, therefore, negotiate multilateral agreements by using a single voice. This mechanism is then reinforced by the participation of EU representatives to the negotiations. This entails that Member States’ positions in international negotiations are hardly independent from that of the EU. The commonly agreed obligations are finally implemented in a coordinated way due to post-negotiation agreements operated at EU level, often in the form of Council resolutions that assign duties to the single Member States. This institutional set-up, therefore, creates numerous constraints to the ability of Member States to pursue their

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<sup>57</sup> Jordan, Editorial Introduction...

<sup>58</sup> Craig, P. & de Búrca, G., *EU Law: Text, Cases, and Materials* (Oxford University Press, Oxford, 2011).

<sup>59</sup> Ibid.

<sup>60</sup> Sbragia & Damro, The changing role....

<sup>61</sup> Ibid, 56.

own environmental agenda at the international level. This is therefore an example of an institutional arrangement that has been created to reinforce EU's bargaining power at the international level and that ends up determining a constraint on individual Member States' action (lock-in effect).

The implied external powers doctrine, moreover, entailed far-reaching consequences also for the global environmental governance. In this latter respect, Lenschow argues that, "as international conventions are usually formal agreements between sovereign states..., this process [the EU being involved in international negotiations] involved the establishment of new procedures."<sup>62</sup> The most problematic issue was, in fact, to recognize that the EU could be entitled to enter into international agreements, given that the question of the legal personality of the EU was far from being settled.<sup>63</sup> An example of this difficulty was the refusal of the Conference of the Parties of the CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) to accept the EU accession to the Convention. In the view of some authors,<sup>64</sup> however, the rejection of the EU as a contracting party was hardly linked to the legal uncertainty over its personality. Rather, the main factor was the lack of political pressure on the part of the EU due to a scarce politicisation of the issue. The trade in endangered species was so uninfluential for the establishment of the single market or for the process of integration more generally that the EU did not bother to insist.

This is certainly not the case for the negotiations of the UN Framework Convention on Climate Change (UNFCCC). Here, the interests at stake were manifold and equally intertwined with the EU integration process. Tackling climate change, in fact, implies a change in the production and consumption patterns of national actors. This means that if the EU had not entered with a prominent role in the negotiation process, it would have most probably had a hard time in keeping control on issues like industrial production, transport, energy, agriculture, and ultimately the internal market itself (issue-linkage). It is little surprising that the EU assumed a leadership role in the development of the international regime on climate change. From an institutional perspective, the EU not only made use of the instruments developed in previous multilateral negotiations (Vienna Convention on the Protection of the Ozone Layer and its Montreal Protocol), but it secured an increased level of lock-in by consolidating the three elements that were mentioned above as characterizing the EU institutional set-up in global environmental governance, namely the pre-negotiation agreements, the direct participation of EU representatives in the negotiation process, and the post-negotiation agreements. In the words of Sbragia, "the demands of negotiating

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<sup>62</sup> Lenschow, *Environmental Policy...*, 323.

<sup>63</sup> Now, article 47 of the Lisbon Treaty, by explicitly attributing to the EU a legal personality, codifies the consistent practice of the EU becoming a party of international treaties.

<sup>64</sup> Sbragia & Damro, *The changing role...*

UNFCCC...led the EU to innovate in its policy-making process...ministers met to draw up a Community position”.<sup>65</sup> In the case of climate change, however, the innovation is not only procedural, but also substantial. It suffices to think of the burden-sharing agreement reached among the EU Member States. This has allowed the EU to negotiate a single CO<sub>2</sub> reduction target at the negotiations of the Kyoto Protocol of the UNFCCC, calculated as an average value of the reduction obligations individually imposed on the Member States. Given this framework, the EU is collectively responsible towards the other contracting parties about reaching a common target.<sup>66</sup> At the level of the EU, instead, the Union differentiates among the obligations of the individual Member States.<sup>67</sup> The fact that the EU presented itself as a single actor in the global arena and the acceptance of substantial reduction obligations have been seen as one of the main factors explaining the success of the Kyoto negotiations. This means that Europe has been able to foster a powerful international agreement in a sector that overlaps, and sometimes collides, with important prerogatives of state sovereignty. This innovative result would have never been possible if international negotiations were conducted by Member States in their personal capacity.

Why was the EU willing to acquire this leadership position in the first place? Oberthür and Roche Kelly argue for two central reasons with reference to the EU climate change policy that can be, however, extended to explain more generally the EU external leadership in environmental matters.<sup>68</sup> First, this leadership fosters legitimacy of European institutions in the eyes of European citizens, who are demanding more environmental protection. Hence, it becomes an indirect driver of European integration. Second, it contributes to reinforce more generally the EU position as a global actor in the international arena. This means that the EU can enjoy an initiator advantage that allows for a protection of its fundamental interests and values.

What emerges, in conclusion, is a framework where Member States are willing to step back in international environmental negotiations. This can be explained to a great extent through the reference to the institutional mechanisms that have been illustrated above. Member States, therefore, are locked-in in the implementation of targets that are not solely negotiated by

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<sup>65</sup> Sbragia, *Environmental Policy...*, 313.

<sup>66</sup> For further information on the reduction targets, see: [http://unfccc.int/kyoto\\_protocol/items/3145.php](http://unfccc.int/kyoto_protocol/items/3145.php). Please, note that the burden-sharing agreement included countries that were not yet been admitted in the EU club (Bulgaria, Czech Republic, Estonia, Latvia, Lithuania, Romania, Slovakia, and Slovenia), together with countries that have never applied for EU membership (Liechtenstein, Monaco, and Switzerland).

<sup>67</sup> On the national targets, please see: [http://ec.europa.eu/clima/policies/g-gas/kyoto/index\\_en.htm](http://ec.europa.eu/clima/policies/g-gas/kyoto/index_en.htm).

<sup>68</sup> Oberthür, S. & Roche Kelly, C., “EU Leadership in International Climate Policy: Achievements and Challenges”, 43 *The International Spectator* (2008).

them but are mediated by the EU. As clarified above, this has both procedural (negotiation arrangements) and substantive effects (targets). Notwithstanding the powerful internal lock-in effect (of the EU on its national units), it is highly unlikely that the EU could ensure a comparable lock-in effect on its international partners, as demonstrated by the failure of reaching a post-Kyoto agreement. The leadership role in the international arena, in fact, is nothing to be taken for granted. Instead, it is an element that needs to be secured at each and every negotiation.

#### 4. Conclusion

In this essay, I showed that the evolution and consolidation of EU environmental policy can be read in light of the paradigm of unintended consequences, as framed by neo-functionalism and neo-institutionalism. In the first part, the neo-functionalist logic of spill-over has proved highly enlightening as far as the first developments of the selected policy are concerned. The lack of explicit reference to environmental competence has not prevented the adoption of a series of environmental regulations, which in turn have contributed to consolidate an *acquis* in this field. This was no automatic process and it required, instead, the active commitment of supranational actors, such as the Commission. The Council, from its side, contributed to the sustained growth of the policy, also due to the not entirely predictable impact of this new strand of legislation on the national constituencies. Two elements can, therefore, be identified here, namely the logic of functional and cultivated spill-over, and the influence of unintended consequences.

In the second section, I described the delicate passage from the so-called command-and-control approach to the adoption of market-based instruments. This passage is piloted once again by the Commission that decided to respond to the increasing demand of states and sub-national actors for more flexibility and subsidiarity. This change, however, has not triggered a rolling-back of integration in the field of environmental policy, since the *acquis* had developed to such an extent that retreating from integration was not an option. The element of unintended consequences, therefore, can be read here in terms of the lock-in effect theorized by neo-institutionalism.

Finally, in the third section, I argued that the expansion of environmental policy derives also from the will of the EU to act as a global environmental leader. To this end, the EU has developed sophisticated institutional mechanisms that constrain Member States' action in the environmental field even in the international arena. This has been particularly evident in the negotiations of the multilateral climate change regime. In this last respect, the EU commitment to fight against climate change, demonstrated by the collective reduction target negotiated by the EU as a whole, brokered a very ambitious deal in Kyoto. Unintended consequences in the form of institutional constraints, thus, are also able to explain the activism of the EU at international level.

To the framework outlined above, however, I would like to add some final remarks. The first one concerns the role of institutions. In this essay, I decided to omit the greening role of the European Parliament. This is mainly due to the fact that, when the policy was first created in the 1970s, the role of the European Parliament was not so developed as to influence either the content or the institutional settings of the policy itself. Moreover, the aim of this essay was not to investigate the issue of the legitimacy of environmental policy. Rather, the analysis was focused on the institutional balance that has allowed the policy to initially develop and consolidate. Instead, if one takes into account the incremental role of the European Parliament in the legislative process, what can be observed is a greener attitude of the legislation adopted,<sup>69</sup> rather than a clear impact on the level of integration of the policy.

The second remark I would like to make concerns the internal evolution of the policy. From what I have shown in this essay there is a clear evolution from the integration of technical aspects experienced in the first phases of the policy to a more decisive leaning towards issues that involve a change in the patterns of production/consumption of Member States, such as the fight against climate change. A radical change of the industrial paradigm of Member States should allow to reconsider the “technocratic bias of the European Union”<sup>70</sup> in favour of a remarkable tendency of the EU to deal with highly political issues. The evolution of EU environmental policy, therefore, can be also read in terms of an internal spill-over. In other words, the Monnet’s method of incremental steps can be seen as an internal dynamic of EU environmental policy that has evolved from technical instruments and piecemeal legislation to more political issues and integrated/holistic approach.

Are there elements of EU environmental policy, however, that cannot be accommodated by neo-functionalism and neo-institutionalism? Although this question is too broad to be addressed here, I would like to put forward a last argument so as to demonstrate that the framework I traced in this essay holds even when it is apparently not the case. The ongoing economic crisis, for instance, could be seen as a critical juncture that would eventually disrupt the institutional constraints developed until now, even in fields that go beyond EU environmental policy. What is relevant here is that critical junctures are theorized both by neo-functionalists (it suffices to think of the spill-back à la Schmitter)<sup>71</sup> and by neo-institutionalists.<sup>72</sup> From an empirical perspective, moreover, the figures of the new financial framework 2014-2020

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<sup>69</sup> Burns, C. et. al., “Enlargement and the Environment: The Changing Behaviour of the European Parliament”, 50 *Journal of Common Market Studies* (2012).

<sup>70</sup> Weale, *European environmental policy...*, 39.

<sup>71</sup> Schmitter, *Neo-Neofunctionalism...*

<sup>72</sup> Pollack, *The New Institutionalism and EU Governance...*



show that EU environmental policy still holds its grip.<sup>73</sup> The main conclusion that can be drawn from the present analysis is that, although EU environmental instruments have changed, the policy has dramatically gained in importance. As it has been shown in this essay, this is the result of a number of elements that can be explained in terms of unintended consequences, as framed by neo-functionalism and neo-institutionalism.

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<sup>73</sup> The provisional Multiannual Financial Framework indicates that the budget for environmental programmes is still substantial, with a particular focus on climate change actions and on mainstreaming environmental policy into the other policy sectors. The 2020 strategy (with its objectives of reducing the green-house gas emissions, increasing energy efficiency, and increasing the share of energy production from renewables by 20% by 2020), moreover, will guide policy action for the next decade.

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