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Reflections on Crossing the Boundaries between Public and Private Laws in Implementing the "European Green Deal"

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Abstract

Climate change brings global challenge. The European Union has been focal in transforming its political doctrine into hard-law standards legal system to tackle climate change. A program namely "European Green Deal" promotes sustainable development in some areas including energy, waste, transport, construction and electronic equipment sectors. European Green Deal can be implemented using an instrument called "Circular Economy" which interferes with the economic freedoms of both entrepreneurs and consumers. This paper presents the analysis of selected regulations related to "European Green Deal". These regulations were explored upon the context of private law that is traditionally less affected by environmental legislation. A dogmatic-legal analysis was used in exploring the currently binding regulations to gain better comprehension of the issue, while earlier regulations were analyzed using the historical-legal method. The use of these methods allowed setting the direction of the new law. Thorough review was performed on both national and international literature on business law, environmental law and administrative law.

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A. Introduction

In 1983, the United Nations Commission on Environment and Development introduced "Our Common Future"[1] which defines the sustainable development for the first time. Since then, sustainable development has often been referred to in international law afterwards.[2] The principles of the sustainable development have been included in the Polish Constitution as well.[3] Article 5 particularly states that "the Republic of Poland shall safeguard the independence and inviolability of its territory, ensure freedom and human and civil rights and the security of its citizens, protect the national heritage, and ensure environmental protection while following the principle of sustainable development". Sustainable development is a principle of environmental law and it relates to economic development, security, and even preservation of independence. Sustainable development is often described as a general constitutional rule or meta-principle of law.

Unfortunately, various global declarations cannot slow down global warming. The number of acts of international law and the development of international organizations is inversely proportional to the effects. In this global effort, European Union has been aggressively working as a leader in the implementation of environmental law to secure the environment for future generations.[4]

The "European Green Deal" (EGD)[5] is a new development strategy and policy designed to bring an environmentally friendly transformation of the EU economy. The EU is targeting lower emission, developing innovative technologies and innovations while at the same time protecting the environment. EU expects to become a climate-neutral area by 2050. In order to achieve this target, specific legal acts have already been adopted, including the "European Climate Law"[6] which binds all 27 EU member states. EGD thus transforms political commitments into legal commitments. A rare opportunity in the history of environmental law to equip the idea of sustainable development with hard-law instruments has been discussed. In order to achieve the goals, deep intervention in at least several sectors of the economy is required through:

- Investment in environmentally friendly technologies;
- Promotion of eco-innovation in the industry;
- Introducing cleaner, cheaper and healthier modes of transport;
- Decarbonizing the energy sector;
- Making buildings more energy efficient;
- Working with international partners to improve global environmental standards.

The EGD requires specific standards such as law for the implementation of environmental policies.[7] This is particularly important given that interventions in the aforementioned business

[1] Hans Christian Bugge and Christina Voigt, *Sustainable Development in International and National Law: What Did the Brundtland Report Do to Legal Thinking and Legal Development, and Where Can We Go from Here?* (Portland: Avosetta, 2008).

[2] These include the 1972 Stockholm Conference "Only One Earth" and the 1992 United Nations Conference in Rio de Janeiro "Environment and Development" and subsequent editions.

[3] "Constitution of the Republic of Poland," Pub. L. No. 483 of 2 April 1997, 2413 (1997).

[4] Bojar-Fijałkowski T, "On the Ideas Shaping European Union Environmental Law. Part I: From Sustainable Development," *Problemi Mižnarodnih Vìdnosin* 13 (2018): p. 148–66, https://repozytorium.bg.ug.edu.pl/info/article/UOG797cd3383d334e2e9cf1df193f729022/?ps=20&lang=en&pn=1&cid=201#.YYCw3J5BzIU.

[5] The European Commission, "European Green Deal" (2019), https://www.unido.org/sites/default/files/files/2020-11/EU_Green_Deal_2020.pdf.

[6] Council of the European Union, "Regulation (EU) 2021/1119 Establishing the Framework for Achieving Climate Neutrality ('European Climate Law')," Pub. L. No. 2021/1119, 1 (2021).

[7] Ciechanowicz-McLean J, *Prawo i Polityka Ochrony Środowiska*, ed. Anna Hara (Warszawa: Wolters Kluwer, 2009).

activities could potentially infringe on economic freedoms, which are frequently addressed by public law.

Similar environmental approach was employed during the post-Brexit negotiations between the EU and the United Kingdom. The EU has stated that the UK will only be granted access to its open market for goods and services if it continues to uphold the same high social and environmental standards as when it was a member.[8] The EU considers the adoption of lower standards by other entities as a form of unfair competition. It is reasonable to anticipate that the EU will eventually label imports from countries and regions not adhering to comparable and rigorous standards[9], particularly in terms of environmental protection, as unfair. This could lead to the imposition of justified tariffs on products made by manufacturers with weaker environmental commitments, which compete against EU goods in the market. In this scenario, environmental goals will be advanced alongside economic objectives.

During the SARS-Coronavirus- (SARS-CoV) 2 pandemic, EGD doctrine takes on added significance. In addition to ecological goals, the rebuilding of economy after the pandemic brings economic benefit. New technologies, green investments, and renewable energy are factors that can be taken into consideration in economic development to improve the quality of life of the present and future generations.[10] The economic development must be modern, resource-efficient, and competitive and zero-emission to protect the health and well-being of citizens against the risks and adverse effects of climate change.[11]

B. Discussion

1. Circular economy as part of "European Green Deal."

The "European Climate Law" orders all member states to reduce their greenhouse gas emissions by at least 55% by 2030 compared from 1990. This target has been stated in hard law which hold EU member states accountable for meeting this target followed with strict financial penalties for non-compliance with EU law.

Another element of EGD is the "Circular economy"[12] that was introduced in a waste management strategy "Towards a circular economy: a zero waste program for Europe."[13] The Circular Economy (CE) is a development strategy that promotes economic growth without increasing resource consumption and it is a profound transformation of production chains, consumption habits and transformation in industrial systems at a systemic level.[14] CE is developed upon technological, social and organizational innovation. In such system, a new range of skills and knowledge, new financial instruments, and the involvement of multiple stakeholders are required. CE can also be supported by market uptake of innovation and awareness-raising, dissemination, and internationalization.[15]

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[8] Stuart Evans et al., "Border Carbon Adjustments and Industrial Competitiveness in a European Green Deal," *Climate Policy* 21, no. 3 (2021): p. 307–17, https://doi.org/10.1080/14693062.2020.1856637.

[9] Kersty Hobson, "The Limits of the Loops: Critical Environmental Politics and the Circular Economy," *Environmental Politics* 30, no. 1–2 (2021): p. 161–79, https://doi.org/10.1080/09644016.2020.1816052.

[10] Sebastian Oberthür and Claire Dupont, "The European Union's International Climate Leadership: Towards a Grand Climate Strategy?," *Journal of European Public Policy* 28, no. 7 (2021): p. 1095–1114, https://doi.org/10.1080/13501763.2021.1918218.

[11] Nicolas De Sadeleer, "EU Environmental Law and the Internal Market," *Review of European, Comparative & International Environmental Law* 26 (2014): p. 101–2, https://doi.org/10.1111/reel.12191.

[12] Sadeleer.

[13] The European Commission, "Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions Towards a Circular Economy: A Zero Waste Programme for Europe" (2014).

[14] Zbigniew Bukowski, *Gospodarka o Obiegu Zamkniętym a Prawo Ochrony Środowiska*, ed. Bojar-Fijałkowski T (Gdansk, 2016).

[15] Nicky Gregson et al., "Interrogating the Circular Economy: The Moral Economy of Resource Recovery in the EU," *Economy and Society* 44, no. 2 (2015): p. 218–43, https://doi.org/10.1080/03085147.2015.1013353.

Key goals of the CE include minimizing the materials needed to deliver a particular service and enhancing product longevity, thus emphasizing durability. It calls for a reduction and recycle of in both energy and material usage during the production and usage phases for greater efficiency. The creation of markets for secondary raw materials based on specific standards and new public procurement regulations are also in the plan of achieving CE objectives. COM/2014/0398 also points to the need to design products that are easier to maintain, repair, upgrade, rework or recycle, referred to as "eco-design", and the need to maintain and repair products rather than instant disposal. Consumers' behavior is also expected to change as renting or sharing services offer efficient alternatives to the ownership of products in terms of costs, information, contractual conditions and insurance.

EU has set regulations aiming to enforce mindful consumption and better products into its legislation. The 2005 Ecodesign Directive[16] established ecodesign requirements for energy-using products. However, it did not directly bind the requirements of personal products. It is currently focusing on ensuring the free movement of these products on the internal market considering their life cycle. In the European Commission's view, incentives for green public procurement have been insufficient. It was previously stressed that voluntary measures would strengthen green public procurement, today, yet *ius cogens* standards are already being called for in this respect.[17] Legislation is currently underway to implement Circular Economy (CE) principles in several key areas, including waste management, packaging and its waste, waste storage, as well as the management of end-of-life vehicles, batteries and accumulators, and waste electrical and electronic equipment to reduce waste and improve resource efficiency.[18]

Against this legislative framework, Commission Regulation (EU) 2019/2019 of 1 October 2019[19] establishes ecodesign requirements for the placing on the market or putting into service of mains-operated refrigerating appliances of 10 liter in size. It can be implied from the Annex II of Regulation 2019/2019, the manufacturer or importer may not offer and market equipment that does not meet the requirements of energy efficiency, functionality, resource efficiency, availability of spare parts[20] and efficient delivery time.[21]

[16] European Parliament and Council, "Directive 2005/32/EC of the European Parliament and of the Council of 6 July 2005 Establishing a Framework for the Setting of Ecodesign Requirements for Energy-Using Products and Amending Council Directive 92/42/EEC and Directives 96/57/EC and 2000/55/EC ," Pub. L. No. 191, 22.7.2005, 29 (2005).

[17] The European Commission, "EU Green Public Procurement Criteria for Road Lighting and Traffic Signals" (2018).

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[19] The European Commission, "Laying down Ecodesign Requirements for Refrigerating Appliances Pursuant to Directive 2009/125/EC of the European Parliament and of the Council and Repealing Commission Regulation (EC) No 643/2009," Pub. L. No. (EU)2019/2019, 2019 187 (2019).

[20] The regulation states that manufacturers, importers of refrigeration appliances or their authorized representatives shall keep at the disposal of professional repairers for at least seven years after the last unit of the model concerned has been placed on the market the following spare parts: thermostats, temperature sensors, printed circuit boards handles, door hinges, trays and baskets for a period of at least seven years and door seals for a period of at least 10 years after the last model has been placed on the market; manufacturers shall ensure that those spare parts can be replaced with commonly available tools without permanent damage to the appliance; a list of spare parts and the procedure for ordering them shall be made publicly available on the manufacturer's, importer's or authorized representative's website accessible to the public at the latest two years after the first unit of a given model has been placed on the market and until the end of the availability period of those spare parts.

[21] Maximum delivery time for spare parts: the manufacturer, importer or authorized representative shall ensure the delivery of spare parts for refrigeration appliances within 15 working days of receipt of the order. For spare parts available only to professional repairers, this availability may be restricted to professional repairers.

2. Modern EU environmental regulations between public and private law

Based on the categorization of law, private law is a set of norms that form the relationship between legal entities, taking into account the principle of equality, autonomy and freedom in shaping legal relations. In this context, private law lacks of possibility for one party to a legal relationship to exercise sovereign influence over the other party regarding its rights and obligations.[22] With the same criteria, public law should be regarded as a set of norms regulating the organization and behavior of public administration bodies. Public law involves subjects that are not under its authority, enabling the use of state power. This allows these entities to often have the duty to intervene in the domain of rights and obligations of these subjects, and to unilaterally shape them.

Theoretically the boundaries of public and private law in practice are increasingly blurred, intertwined, mixed to create the hybrid version. E. T. Szuber-Bednarz and R. Paczuski contend that the shift from traditional public administration and private law action forms is driven by the overarching socio-economic framework. This shift leads to the execution of contracts following administrative proceedings[23], an increased emphasis on mediation in public law processes, commercial law companies undertaking highly regulated activities due to their ownership structures, and entities with restricted contractual freedom.[24]

The blending of public law norms with private law norms is clearly observed in the realms of real estate management law and environmental law. For example, aspects such as civil liability, the economic activities of the state and local self-governments, and public management demonstrate this blending by incorporating instruments originally created and refined within private administration into the sphere of public administration.[25] The blending does not imply that the public law is being superseded.[26]. As explained by J.S. Langrod, public law extracts from older and more developed private law legal constructs that are helpful in public administration activity.[27]

It is imperative to underscore that concurrently with the process of substituting or supplanting public law by private law, there exists a reciprocal phenomenon. This phenomenon, termed by M. Safjan as the "publication of civil law," [28] signifies a deviation from the foundational tenets of classical civil law, accompanied by an augmented intervention of the public sector within the domain of individual autonomy. This includes a reduction in the applicability of private law methodologies in favor of regulations grounded in public law. Consequently, alongside an enhanced involvement of civil law within the activities of public administration, one observes a pronounced influence of public administration on the configuration, initiation, and fulfillment of private-law contracts. This interaction is especially prominent within the context of public business law, where the precepts of administrative law increasingly govern legal relationships, thereby restricting the principles of contractual freedom and entrepreneurial independence.

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[22] Safjan M, *Pojęcie i Systematyka Prawa Prywatnego*, ed. M. Safjan (Warszawa: Wolters Kluwer, 2007).

[23] The Republic of Poland, "Polish Code of Administrative Procedure" (1960), http://www.parliament.am/library/varchakaniravaxaxtum19/lehastan.pdf.

[24] Bojar-Fijalkowski T and Cern G, *Ograniczenia Działalności Gospodarczej Spółki Komunalnej - Uwagi Krytyczne [Restrictions on the Economic Activities of a Municipal Company - Critical Remarks*, ed. A. Pławska M. Geryk (Gdansk: WSZ, 2016).

[25] Bojar-Fijałkowski T, *O Wypieraniu Norm i Instrumentów Administracyjnoprawnych Przez Normy i Instrumenty Cywilnoprawne w Prawie Publicznym*, ed. B. Bajor and P. Saganek (Warszawa: EWSPA, 2018).

[26] Szuber-Bednarz E. T and Paczuski R, *Wypieranie Prawa Administracyjnego Przez Prawo Cywilne Czy Także Wspomaganie Osiągania Celów Administracyjno-Prawnych Drogą Stosowania w Coraz Szerszym Zakresie Umowy Jako Cywilnoprawnej Formy Działania?*, ed. A. Doliwa and S. Prutis (Warszawa: Wolters Kluwer, 2012).

[27] Langrod J. S, *Zarys Prawa Administracyjnego: Zarys Części Ogólnej* (Kraków: Wolters Kluwer, 2003).

[28] Safjan M, *Pojęcie i Systematyka Prawa Prywatnego*.

The modern European Union legislature also engages in limiting the freedom of contract, freedom of entrepreneurship, values crucial for civil law, including commercial law, through numerous conditions, standards, procedures and limitations. In pursuing the objectives of the CE, interferences on the design of goods, their supply chain, durability, repairs, delivery times for spare parts are necessary. Previously, the quality control of a product, including its safety, materials, and durability, was primarily governed by the market and the entrepreneur's business partners. In contrast, contemporary EU legislation actively intervenes in these areas, notably through the introduction of the European Green Deal (EGD), the prohibition of certain energy solutions, or the imposition of significant fees and taxes. Such interventions render these solutions less competitive and lead to a decline in customer base.

Assessing the changes currently taking place is challenging. In one hand, crossing the boundaries between the sphere of the individual and the sphere of the dominion of state authority raises concerns and doubts. Meanwhile, the discussion about the competencies of the common authorities of the EU over the member states continues. The topic of extending the scope of shared EU regulations might also be a part of the discussion. Member states are beginning to question such measures, although this does not yet directly concern climate action. Doubts should also be raised related to the stability and homogeneity of the legal system.

On the other hand, crossing the boundaries between public and private law has previously happened, while climate change requires immediate effective action. Traditional divisions do not necessarily correspond to the challenges of today's dynamic society and economy. Instead hybrids can function equally well in technology, economics and law. The theory must adjust to society rather than the other way round.

Hence, in the author's opinion, crossing the boundaries between private and public law by the new EU law implementing the EGD policy does not deserve the criticism. Only by putting these actions into practice can we determine whether they are a temporary effort or if they establish new, enduring trends and standards, relegating existing legal divisions to history.

C. Conclusion

The above study entitles to the following conclusions, assessments and *de lege ferenda* postulates:

The "European Green Deal," previously a political doctrine, is transitioning into common law. Furthermore, the EU legislator is raising standards and limits to lower greenhouse gas emissions wherever possible. This effort is being further accelerated by the SARS-CoV-2 pandemic and the ambition to utilize the EGD not only for climate-related objectives but also to stimulate and rebuild the economies of EU member states. The implementation of the EGD will impact numerous legal fields and activity sectors, including primary business operations. Through this process, the concept of sustainable development will, more than ever, manifest into tangible forms and concrete legal standards within the European Union.

Renewable energy and the development of the "Circular Economy" occupy an important place among the instruments for achieving the targets. Therefore, the EU legislator is transitioning towards practical economic measures, clearly highlighting the environment's critical importance as a mandate for business law and potentially for public law as a whole. In this area, regulations have already been created as a new concept equipped with *ius cogens* norms. Preparatory work is underway in the sectors of public procurement, competition law, construction, and transport. Efforts are being made to develop standards that promote a wider and improved range of consumer choices through leasing, renting, or sharing services, while also protecting consumer interests in terms of costs, safety, information, contractual conditions, and insurance.

At the same time, modern law does not fit into traditional divisions. The combination of private and public law institutions, hybrid entities become more acceptable. The penetration of

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private law into the traditional public-law sphere and public law into the sphere of relations hitherto are covered by freedom of contract and freedom of entrepreneurship. Preparatory efforts are in progress across public procurement, competition law, construction, and transport sectors. Initiatives are focused on creating standards aimed at expanding and enhancing consumer options through leasing, renting, or sharing services, simultaneously safeguarding consumer rights concerning costs, safety, information, contractual terms, and insurance.

The process of supplanting or replacing public law norms with private law norms is evident in real estate management law, public procurement, environmental law, municipal management, public management. The constitutional principle of economic freedom and postulates of new trends in public administration aim at increasing public participation in administration. At the same time, the visual interpretation of private and public law in the activity of public administration bodies does not have to be carried out in displacement of public law.

EU lawmakers are often crossing the boundaries between individual rights and the state authority. The question of widening the scope of standard EU regulations might also be considered. Additionally, concerns regarding the stability and uniformity of the legal system as it currently stands should be addressed. On the other hand, traditional divisions do not necessarily correspond with the challenges of today's dynamic society and economy. In such situation, theory must follow society rather than the other way round and hybrid solutions need to be allowed. Furthermore, crossing the boundaries between private and public law does not deserve criticism, close attention and observations. The implementation of new EU law under the EGD policy will reveal whether these efforts are temporary measures.

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