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SPECIAL SECTION

REGULATORY BURDENS UNDER CBAM AND ESPR IN EU LAW WITH A FOCUS ON PROPORTIONALITY AND EXTRATERRITORIALITY

Abstract

This article examines the complex legal and economic interplay between two key instruments of the European Union's environmental regulatory framework: the Carbon Border Adjustment Mechanism (CBAM) and the Ecodesign for Sustainable Products Regulation (ESPR). While each serves a distinct objective, CBAM aims to prevent carbon leakage through border carbon pricing, and ESPR promotes product circularity and sustainability via ecodesign requirements, their concurrent application may result in a disproportionate regulatory burden, particularly for non-EU exporters.

The analysis highlights how the EU's regulatory power generates a de facto extraterritorial effect, often referred to as the "Brussels Effect," by imposing substantial compliance obligations on third-country producers. These include granular emissions reporting, product traceability, and potential redesigns to meet EU market standards. Drawing on the case law of the Court of Justice of the European Union (CJEU), the article explores the legal foundations for this extraterritorial influence, rooted in the territorial nexus of market access, while also underscoring the complex legal questions that arise when EU rules govern production processes entirely situated outside the Union.

The article further scrutinises the proportionality and cost-effectiveness of CBAM and ESPR, particularly with respect to their impact on EU consumers. It evaluates the principle of proportionality in EU law and the legal requirement for comprehensive impact assessments, with reference to BSEF v Commission to illustrate the CJEU's rigorous scrutiny of regulatory balance.

In conclusion, the article reflects on the broader tension between the EU's environmental ambitions and the practical constraints faced by international trading partners and EU citizens. It proposes recommendations for improving regulatory coherence, ensuring that the EU's global standard-setting role is exercised with legal clarity, procedural fairness, and sensitivity to the cumulative burden imposed on global supply chains and consumers.

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SUMMARY

1 Introduction

The European Union is advancing its regulatory framework to support the transition toward a more sustainable, climate-resilient economy. This process is increasingly shaped by the interaction of legal instruments aimed at transforming the way goods are produced and marketed within the internal market. Two of the most prominent of these instruments, the Ecodesign for Sustainable Products Regulation (ESPR)[1] and the Carbon Border Adjustment Mechanism (CBAM)[2], reflect the Union's dual approach: fostering sustainability within its internal market through stringent product standards, while also addressing the carbon intensity of imported goods.

Although each regulation is significant in its own right, their simultaneous application gives rise to a complex set of legal questions. This article explores the intersection of ESPR and CBAM, analysing the extent to which they may impose overlapping obligations, particularly on non-EU companies. It further investigates the extraterritorial dimensions of EU law and the resulting impact on both international commerce and EU consumer welfare.

The ESPR, replaces and expands the scope of the Ecodesign Directive[3]. It moves beyond the focus on energy-related products and applies to a broad range of consumer and industrial goods. The Regulation establishes a legal framework for setting ecodesign requirements applicable to products placed on the Union market. In accordance with Article 5(1)[4], such requirements may relate to specific aspects related to sustainability

[1] Council Regulation (EC) 2024/1781 of 13 June 2024 establishing a framework for the setting of ecodesign requirements for sustainable products, amending Council Directive (EU) 2020/1828 of 25 November 2020 and Council Regulation (EU) 2023/1542 of 12 July 2023 and repealing Council Directive 2009/125/EC of 21 October 2009 (Text with EEA relevance).
[2] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism (Text with EEA relevance).
[3] Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (recast) (Text with EEA relevance).
[4] The ecodesign requirements that may be set under the ESPR are the following: (a) durability, (b) reliability, (c) reusability, (d) upgradability, (e) repairability, (f) the possibility of maintenance and refurbishment, (g) the presence of substances of concern, (h) energy use and energy efficiency, (i) water use and water efficiency, (j) resource use and resource efficiency, (k) recycled content, (l) the possibility of remanufacturing, (m) recyclability, (n) the possibility of

and circularity of products. Furthermore, the Regulation imposes comprehensive information obligations, most notably the requirement to establish a Digital Product Passport, as defined in Article 2(12) of the ESPR. Implementation will follow a staged approach. Working Plans (non-binding communications) will be adopted, each identifying priority product groups. These will then be subject to delegated acts specifying detailed ecodesign criteria.

The first of these Working Plans, adopted in April 2025, identifies a range of products for which delegated acts will subsequently establish ecodesign requirements, in line with the criteria set out in Article 5(1) of the ESPR. Among the priority products listed, steel is designated as a high-priority intermediate product. A delegated act regulating steel is expected to be adopted by the fourth quarter of 2026. This development is of particular significance, given that steel is already subject to domestic carbon regulation under the EU Emissions Trading System (ETS)[5] and is simultaneously classified as a CBAM good when imported into the Union. Since this article addresses the potential for an excessive regulatory burden on economic operators under both legal frameworks, particularly with regard to the extraterritorial implications, the example of steel, which may in theory become subject to dual requirements, is especially pertinent and illustrative of the concerns raised in this analysis.

CBAM, established under Regulation (EU) 2023/956 and adopted in April 2023, is intended to equalise the carbon cost borne by EU producers, which are subject to the ETS mechanism, with that borne by international competitors. The regulation imposes a financial charge on the embedded emissions of imported goods of the categories listed in Annex I of the CBAM Regulation, including steel, as mentioned above, thereby mitigating the risk of carbon leakage and incentivising foreign producers to adopt cleaner technologies. CBAM will be phased in gradually, beginning with reporting requirements and culminating in full financial liability by January 2026.

As this article will argue, the simultaneous application of the ESPR and CBAM may create a unique and potentially burdensome regulatory challenge. For example, the regulation of intermediate products such as steel under both frameworks may result in overlapping compliance obligations. Specifically, non-EU exporters of steel may be subject to carbon pricing requirements under CBAM as well as detailed ecodesign requirements under the ESPR. Notably, the ESPR applies regardless of the product's origin, while CBAM, as discussed further below, produces legal and practical effects extending to economic operators located outside the European Union. This regulatory overlap raises important legal questions about the extraterritorial reach of EU law and the legitimacy of imposing

the recovery of materials, (o) environmental impacts, including carbon footprint and environmental footprint, and (p) the expected generation of waste.

[5] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (Text with EEA relevance).

significant compliance burdens on businesses operating beyond the EU's territorial boundaries.

The economic implications of the concurrent application of the ESPR and CBAM are also considerable. If the combined effect of these two regulatory frameworks results in a significant increase in the cost of imported goods, it may reduce market competition within the European Union and lead to higher prices for end consumers. Such an outcome raises important consumer protection concerns and prompts an inquiry into the legal remedies available to affected parties under EU law.

The ESPR will apply directly and indirectly to consumer products (once the delegate acts on selected products will be adopted), and current indications suggest that the scope of CBAM may soon be expanded to include finished products incorporating goods already covered by CBAM. As a result, consumers are likely to bear the financial burden associated with the increased compliance costs arising from the simultaneous application of both regulatory regimes.

Based on this framework, the article will focus in particular on the extraterritorial implications of these two legal instruments and their compatibility with the principle of proportionality under EU law. It will examine whether the combined application of these frameworks, which impose additional regulatory burdens on third-country operators, can be legally justified under the EU legal principles supporting the extraterritorial reach of Union regulations. The article will also explore the broader implications for EU consumers, assessing the proportionality of the new measures, analysing the relevant jurisprudence of the Court of Justice of the European Union, and considering the legal avenues available to consumers for the protection of their interests.

For the sake of clarity, the analysis will not address the broader implications of these measures under international law, focusing instead on their legality under EU law, including the obligations imposed on third-country operators.

2 The Legal Nature and Function of CBAM

At its core, CBAM is an environmental measure conceived to incentivise global decarbonization while simultaneously safeguarding the competitiveness of EU industries subject to the EU Emissions Trading System (ETS). The ETS, a cornerstone of the EU's climate policy since 2005, operates on a cap-and-trade principle, obliging energy-intensive industries within the EU to acquire allowances for their greenhouse gas (GHG) emissions. This internal carbon price, while effective in driving decarbonization within the Union, inadvertently places EU producers at a competitive disadvantage against producers in third countries that do not face comparable carbon costs.

The objective of the CBAM is clearly articulated in recital 14 of the Regulation, which states that "*the objective of the CBAM is to prevent the risk of carbon leakage*". According to the text of the law the Regulation "*would also encourage producers from*

third countries to adopt technologies that are more efficient in reducing greenhouse gas emissions, thereby generating fewer emissions. For this reason, [it is expected that] the CBAM [will] effectively support the reduction of greenhouse gas emissions in third countries."

This latter aspect, namely the incentivization of emissions reduction in third countries, is a particularly important consideration for the purposes of this analysis. Indeed, it is precisely this environmental protection objective and support for global environmental strategies that will argue may serve as the foundation for justifying the CBAM both as a non-protectionist measure and as a basis for its extraterritorial reach. Moreover, it provides a rationale for the potential compliance burdens that consumers may ultimately bear.

The narrative surrounding CBAM often oscillates between its characterisation as an environmental measure and its perception as a "protectionist" instrument. From the EU's perspective, the mechanism is fundamentally about environmental protection and a crucial tool for reaching EU climate objectives[6]. However, as previously explained, it must equally be acknowledged that the mechanism is designed to counteract the competitive disadvantage faced by EU producers subject to the ETS, thereby preventing carbon leakage and safeguarding the integrity of the Union's climate objectives. This inherently "protectionist" dimension, understood within the broader context of preserving domestic competitiveness in a decarbonising economy, creates a fundamental dichotomy with the environmental protection objective, which, from a legal perspective, as further explored below, and particularly in relation to the extraterritorial reach of EU law, cannot be overlooked.

The mechanism operates on the principle of "equivalence", whereby the charge on the embedded emissions of imported goods is intended to correspond to the charge imposed on domestic goods under the ETS. This design feature further supports the characterisation of CBAM as an environmental measure rather than a protectionist trade barrier, a distinction that is crucial for ensuring its compatibility with World Trade Organization (WTO) rules. However, as will be discussed below, the delicate balance between environmental ambition and trade compliance inherent to CBAM remains a continuous subject of legal and political scrutiny.

Academic debate has addressed the legal characterisation of this mechanism, particularly whether it can be considered, in substance, a form of taxation. Notably, the analysis by Klotz and others[7], which explored the question of whether CBAM constitutes a

[6] This environmental protection function, and the role of CBAM as an instrument for achieving both EU and global climate objectives, is clearly affirmed in recital 20 of the CBAM Regulation, which states: *"(…) the mechanism is intended to address the need to curb greenhouse gas emissions, in line with the binding environmental target under Union law, set out in Regulation (EU) 2021/1119, to reduce the Union's net greenhouse gas emissions by at least 55% compared to 1990 levels by 2030 and the objective to reach economy-wide climate neutrality at the latest by 2050."*

[7] S Klotz, SL Probst and O Hulliger, 'The Carbon Border Adjustment Mechanism – A Tax in Disguise?' (2022) 62 European Taxation 306.

disguised tax, was published even prior to the adoption of Regulation (EU) 2023/956, underscoring the significance of this question. In this context, CBAM has been described as an environmental policy instrument which nonetheless exhibits alignment with several core principles of tax law[8]. Although the European Union does not officially classify CBAM as a tax, the mechanism reflects key fiscal principles such as neutrality, legal certainty, and the polluter-pays principle, elements typically associated with taxation regimes[9]. An additional indicator suggesting a shift toward a tax-like character is the transfer of institutional responsibility for the instrument from the Directorate-General for Environment (DG ENV) to the Directorate-General for Taxation and Customs Union (DG TAXUD), the EU body responsible for taxation and tariff policy.

2.1 Objectives and Legal Design

Concretely, CBAM requires EU importers to purchase "CBAM certificates" corresponding to the embedded GHG emissions of the imported goods. The price of these certificates is directly linked to the weekly average trading price of EU ETS allowances, expressed in euros per metric tonne of CO_2 equivalent emitted[10]. This dynamic pricing mechanism ensures that the carbon cost faced by importers fluctuates in tandem with the EU's internal carbon market, maintaining the principle of equivalence. This direct linkage ensures that the cost burden on imports precisely mirrors the domestic carbon price, reinforcing the non-discriminatory argument.

The initial scope of CBAM covers a limited, yet strategically significant, number of product groups, identified through Combined Nomenclature (CN) codes. These "CBAM goods" include: (1) cement, (2) electricity, (3) fertilisers, (4) iron and steel, (5) aluminium, and (6) hydrogen[11]. This selection targets sectors with high carbon intensity and significant trade flows, maximising the impact of the mechanism in its nascent phase. The regulation explicitly provides for a review and potential expansion of product coverage by 2030, aiming to eventually include all product groups currently falling under the ETS. Article 30(3) of the CBAM Regulation specifically highlights the review of potential expansion to downstream products, such as washing machines made from steel, with a final selection expected in 2025 and a legislative proposal in Q1 2026. This potential expansion is crucial, as it would significantly broaden the scope of affected businesses and heighten the dual regulatory burden discussed later.

The CBAM is being implemented in two distinct phases to allow stakeholders sufficient time to adapt. The transitional period (1 October 2023 to 31 December 2025) is limited to

[8] S C Rodrigues Aldeia, 'The European Union Carbon Border Adjustment Mechanism as a Green Tax Policy Instrument' (2025) 12 Central European Economic Journal 85, 86-97.
[9] ibid.
[10] Article 3 (1) (24): (24) '"*CBAM certificate' means a certificate in electronic format corresponding to one tonne of CO2e of embedded emissions in goods.*"
[11] Annex I of the CBAM Regulation includes a table listing all specific CN codes corresponding to goods that fall within the product categories identified in the regulation.

reporting obligations. During this phase, importers are required to declare the greenhouse gas emissions embedded in their imports, without being subject to any financial payments. This period is intended to facilitate adaptation to the new requirements for data collection and reporting. The definitive period will commence on 1 January 2026. From that date, importers will be legally obliged to purchase and surrender CBAM certificates corresponding to the embedded emissions of their imported goods. The price of these certificates will reflect the average cost of allowances under the EU Emissions Trading System (EU ETS). Also, to avoid the risk of double carbon charges, the CBAM Regulation will provide for adjustments in cases where a carbon price has already been paid in the country of origin[12].

Crucially, CBAM applies to both direct emissions (GHG emissions from the production process of the goods) and, initially for the goods listed in Annex I, indirect emissions (emissions from the generation of electricity used in the production of the goods). This comprehensive approach aims to capture the full carbon footprint embedded in the imported products. A critical component of the CBAM mechanism, which is of particular relevance to this analysis, is the requirement for the accurate determination of embedded emissions associated to imported CBAM goods. Non-EU producers are expected to monitor and collect data relating to the emissions generated during the manufacturing of CBAM goods subsequently exported to the European Union, as this product-specific information must be submitted to the authorised CBAM declarant at the time of importation. The methodology for calculating embedded emissions, which accounts for the diversity of production processes and the complexities associated with electricity consumption, is set out in the CBAM Implementing Regulation[13] applicable during the transitional period.

2.2 Compliance Burden on Economic Operators

In the context of an analysis focused on the compliance burden placed upon economic operators, it cannot be overlooked that, despite its robust design and clearly articulated objectives, the CBAM mechanism continues to operate within a legal and practical framework marked by unresolved ambiguities, particularly as it progresses towards full implementation. These persisting uncertainties generate significant financial and compliance-related exposure for affected undertakings.

A primary concern remains the future cost of CBAM certificates. While linked to EU ETS allowance prices, the volatility of the carbon market introduces a significant variable that directly affects financial planning, investment decisions, and long-term compliance

[12] An ongoing legislative proposal (Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2023/956 as regards simplifying and strengthening the carbon border adjustment mechanism COM (2025) 87 final) aimed at simplifying the CBAM mechanism introduces a modification whereby the carbon price paid in a third country may be taken into account when calculating the number of CBAM certificates to be surrendered.

[13] Commission Implementing Regulation (EU) 2023/1773 of 17 August 2023 laying down the rules for the application of Regulation (EU) 2023/956 of the European Parliament and of the Council as regards reporting obligations for the purposes of the carbon border adjustment mechanism during the transitional period (Text with EEA relevance).

strategies for importers and, indirectly, for their third-country suppliers. The lack of a predictable pricing trajectory complicates risk management and hinders accurate cost projections.

A critical and largely unresolved issue concerns the precise methodology and criteria for recognising carbon pricing systems in third countries. The CBAM Regulation allows for a reduction in the number of certificates to be surrendered if an equivalent carbon price has already been paid in the country of origin. It is worth noting that the Proposal for a Regulation to simplify CBAM[14], which has been endorsed[15] by both co-legislators but not yet published in the Official Journal at the time of writing, will broaden this to allow the carbon price to be recognised more generally if paid in any "third country." However, the key point is that the exact standards for assessing equivalence, the process for negotiating bilateral agreements, and the mechanisms for verification remain largely undefined. This lack of clarity presents a significant challenge for countries with emerging or developing carbon pricing systems that aim to avoid the full CBAM burden on their exports to the EU.

Apart from the requirements related to purchasing CBAM certificates, which will come into force during the definitive phase starting January 2026, the obligation for third-country operators to collect and report embedded emissions data, even during the transitional phase, using often complex methodologies mandated by EU law, raises significant questions of extraterritoriality and proportionality. These rules, while technically imposed on EU importers, necessitate significant investments and changes in practices for non-EU entities operating outside the EU's direct territorial remit. While these obligations did not initially result in financial payments, they have already created economic exposures for companies needing to establish new systems for data collection and reporting[16]. In addition, the risk of sanctions introduced under Article 16(2) of Commission Implementing Regulation (EU) 2023/1773 must be taken into account. This provision establishes penalties ranging from EUR 10 to EUR 50 per tonne of unreported emissions, with fines subject to adjustment based on the European consumer price index. Against this background, although no systematic data are yet available to quantify the economic impact on affected businesses during the transitional phase, it has been observed that the added administrative complexity alone may disincentivise some importers from sourcing certain goods from outside the EU[17].

The administrative costs for small importers, excluding the actual costs associated with CBAM compliance through the purchase of certificates, were estimated, in the 2025 impact assessment accompanying the Commission's proposal for simplifying CBAM, to

[14] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2023/956 as regards simplifying and strengthening the carbon border adjustment mechanism, COM (2025) 87 final.
[15] At the time of writing, the co-legislators have reached a provisional agreement during interinstitutional (trilogue) negotiations. The text of the agreement now awaits formal endorsement by both the European Parliament and the Council through their respective internal procedures.
[16] Elisabetta Cornago, Aslak Berg, 'Learning from CBAM's transitional phase: Early impacts on trade and climate efforts' (Centre for European Reform 2024) 3.
[17] ibid 2-3.

range from EUR 5,440 to EUR 6,900 per year, for imports valued at approximately EUR 1,600[18]. These costs appear disproportionate relative to the overall value of goods imported into the EU by small operators. This concern has constituted the principal rationale for the recently proposed simplification measures, which envisage the introduction of a new de minimis rule: a CBAM threshold exemption of 50 tonnes per year. The effect of this threshold would be to exempt approximately 90% of current imports which, under the existing regulatory framework, would otherwise fall within the scope of the CBAM mechanism.

As the definitive phase approaches, and these initial efforts translate into substantial financial commitments, the question of whether such stringent pre-obligations for non-EU entities are entirely proportionate will likely gain increasing prominence in legal discourse. The framework established by the mechanism, which demands significant involvement from third-country operators, combined with regulatory uncertainties arising both from the complexity of the legislative framework, including an excessive reliance on secondary legislation even for core aspects of the Regulation, is creating an excessive regulatory burden for both EU and non-EU companies. These factors acquire particular relevance for the present analysis insofar as they affect the justifiability of such burdens and their potential susceptibility to legal challenge, both in relation to the extraterritorial scope of the obligations imposed and their broader impact on third parties beyond the business sector, including consumers.

3 The ESPR and the Expansion of Product Regulation

The ESPR marks a significant development in the European Union's product policy framework, shifting the focus from primarily energy efficiency to broader circular economy goals. It repeals and replaces Directive 2009/125/EC[19] (the Ecodesign Directive), which had mainly applied to energy-related products. The Regulation substantially broadens the scope of regulated goods and introduces more rigorous sustainability requirements, with key provisions expected to take effect between 2027 and 2028. The most salient innovation introduced by the ESPR is the significant broadening of its material scope. Whereas the former Directive applied only to energy-using and energy-related products, such as lighting, household appliances, and electronic displays, the ESPR is intended to cover "almost all goods" placed on the EU market. Only a limited number of goods are expressly excluded under the Regulation, as specified in Article 1(2), including motor vehicles, food and feed products, and medicinal products.

[18] Commission Staff Working Document accompanying Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2023/956 as regards simplifying and strengthening the carbon border adjustment mechanism, SWD(2025) 58 final, para 2.1.
[19] Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of ecodesign requirements for energy-related products (recast) [2009] OJ L 285, 31.10.2009, p. 10.

This near-universal coverage reflects the Union's ambition to integrate sustainability considerations systematically into product design across the internal market and evidences a policy commitment to comprehensive lifecycle regulation. The regulatory framework established under the ESPR has been deliberately structured to ensure adaptability and responsiveness to evolving market conditions and technological developments.

The ESPR operates through a two-tiered model. Products subject to specific ecodesign requirements are not enumerated within the Regulation itself. Rather, the European Commission will adopt triennial "Working Plans," identifying priority product groups based on criteria such as environmental impact, potential for improvement, and economic significance. The first ESPR Working Plan (2025–2030), formally adopted in April 2025, outlines the Commission's strategic orientation for the initial implementation phase. It includes both final and intermediate goods, as well as horizontal sustainability requirements.

Based on these Working Plans, the Commission will adopt delegated acts that establish binding ecodesign requirements for designated product categories, in accordance with the list set out in Article 5(1) of the ESPR. These acts will specify standards related to durability, reparability, recyclability, and the disclosure of product information, among other criteria.

The first Working Plan (2025–2030) identifies the following priority areas:

- **Final Products**: High-volume consumer goods such as textiles (including clothing and footwear), furniture, tires, and mattresses.
- **Intermediate Products**: steel, and aluminium. These materials will initially be subject to mandatory information requirements concerning their sustainability attributes.
- **Horizontal Requirements**: Cross-cutting measures applicable to multiple product groups. These include:
  - **Repairability**: Especially in relation to consumer electronics and household appliances, intended to extend product lifespan and reduce waste.
  - **Recycled Content and Recyclability**: Especially for electrical and electronic equipment, with a view to facilitating the use of secondary raw materials and promoting circular material flows.

The ESPR represents a significant shift in EU product regulation by placing circularity at the core of legal requirements for goods marketed within the Union. Its broad scope, emphasis on the entire product lifecycle, and mix of general and product-specific rules are poised to reshape how products are designed, manufactured, and sold. Manufacturers, including those outside the EU, will need to familiarize themselves early with these new obligations and take proactive measures to ensure compliance in order to maintain access to the EU market. Notably, the ESPR introduces stringent sustainability requirements across a wide range of product categories, impacting not only companies based within the EU but also third-country producers who must adhere to these rules to sell their goods in the Union.

3.1 Compliance Burden on Economic Operators

As observed in relation to the CBAM mechanism, the ESPR likewise entails the risk of imposing an excessive burden on economic operators falling within its scope, including those established in third countries seeking to export products to the European Union. In this regard, it is noted that such operators, in the absence of comparable domestic legislation mirroring the ESPR, may lack the requisite production and monitoring mechanisms necessary to ensure the circularity of goods.

A key point is that the regulation itself acknowledges the risk of imposing a disproportionate administrative burden on economic operators. This concern arises specifically in connection with Article 5(1), which allows for limitations based on the product's circularity due to the presence of so-called "substances of concern." This is expressly addressed in Recital 31, final paragraph, which provides as follows: "*In order to take into account the criteria to be met by ecodesign requirements, and in particular to avoid a disproportionate administrative burden for economic operators, the Commission should be able, as appropriate for the product group concerned, to set thresholds on the concentration of substances in the product or relevant components triggering the tracking requirement, set differentiated application deadlines and, in duly justified cases, provide derogations from the tracking requirement.*"

This reference is indicative of the legislator's awareness of the potentially burdensome nature of environmental compliance obligations. This concern is reiterated in the operative part of the Regulation, notably in Article 5(10)(f), which expressly states that no disproportionate administrative burden should be imposed on manufacturers or other actors in the value chain.

However, while the Regulation acknowledges the risk of such burdens being placed on economic operators, it does not provide concrete mechanisms to mitigate this risk, nor does it offer any form of redress or exemption in cases where the obligations ultimately prove to be unduly onerous. Economic operators will be required to comply with an as-yet undetermined number of ecodesign requirements, across the thematic areas identified in Article 5(1), which are formulated in broad and generic terms and could therefore give rise to far-reaching obligations.

As mentioned above, this regulatory burden is further compounded by overlapping obligations stemming from other EU environmental legislation, most notably the CBAM, raising the risk of duplicative regulatory coverage of the same final or intermediate goods.

Using steel once again as a representative example, it is evident that such an intermediate product may be subject to circularity-related requirements under the ESPR, such as minimum recycled content, resource efficiency criteria, or disclosure obligations concerning substances of concern, while simultaneously being captured by the CBAM due to its emissions profile and carbon intensity.

4 The Extraterritorial Reach of EU Environmental Law: Unpacking the 'Brussels Effect' of CBAM and ESPR

The simultaneous introduction and application of CBAM and ESPR give rise to a complex and unprecedented intersection of legal frameworks. Although each instrument is designed to pursue distinct yet complementary environmental objectives, their concurrent application, particularly in relation to specific categories of goods, creates the risk of a cumulative regulatory burden.

The concurrent application of CBAM and ESPR to producers located outside the European Union raises fundamental questions about the extraterritorial reach of EU law. Although these manufacturers operate beyond the Union's direct jurisdiction, they are effectively compelled to comply with stringent EU standards and data-collection requirements. To maintain access to the EU market, non-EU exporters must align their production processes and information-management systems with the regulatory framework established by these measures. This phenomenon, commonly referred to as the "Brussels Effect"[20] or the European Union's regulatory power, arises from the considerable size and appeal of the EU internal market, which compels multinational corporations to adopt EU regulatory standards as *de facto* global norms.

As observed by Anu Bradford, the European Union establishes global regulatory benchmarks across various sectors, including food safety, chemical regulation, competition law, and data protection, exerting a tangible influence on the daily lives of individuals not only within the European Union but also across the globe[21]. The EU justifies this reach on the basis of preventing carbon leakage (for CBAM – see recital 10 of the CBAM Regulation) and promoting sustainable consumption within its market (for ESPR – see recital 7 of the ESPR), implying that these are legitimate environmental objectives that necessitate a border adjustment or product standard, irrespective of the product's origin.

However, the cumulative impact of CBAM and ESPR compliance costs could lead to significant market distortions and effectively create *de facto* trade barriers for non-EU exporters. For some non-EU companies, particularly smaller enterprises or those from developing countries with less developed environmental infrastructures, the combined compliance burden might be prohibitively high. This could lead them to opt out of exporting to the EU altogether, thereby increasing entry barriers for certain products and reducing diversity of supply. This could inadvertently stifle economic development in certain regions and limit global trade flows.

The extraterritorial impact of CBAM is perhaps the most evident. While the direct legal burden for reporting and surrendering carbon certificates rests with the EU importer, this necessarily creates a significant economic and administrative impact on third-country

[20] This definition was given by A Bradford, 'The Brussels Effect' (Columbia Law School Scholarship Archive 2012) <https://www.almendron.com/tribuna/wp-content/uploads/2018/08/the-brussels-effect.pdf> accessed 20 June 2025.
[21] ibid 3.

producers. For multinational groups with subsidiaries in Europe, the impact is direct, as an EU-based company within the corporate structure bears the financial and reporting obligations for goods imported from its non-EU sister companies. However, even where there is no corporate affiliation, the introduction of a carbon tariff on imported goods intrinsically raises their cost. This regulatory-induced price increase makes products manufactured in third countries economically less attractive, creating a strong market incentive for non-EU producers to reduce their embedded emissions, effectively aligning their production processes with EU carbon pricing principles, regardless of their geographical location.

Beyond the financial implications, third-country operators are indirectly subjected to stringent reporting obligations. The requirement to track and verify embedded emissions, often necessitating adherence to complex methodologies detailed in EU implementing acts (such as those for the CBAM transitional period), has already posed considerable challenges[22]. These difficulties, arising from EU-mandated methodologies for data collection and reporting (informed by Annex IV of the CBAM Regulation), are highly likely to persist into the definitive period. The very precise and intricate requirements for determining embedded emissions, for instance, demand a level of data granularity and verification processes that may not exist in all third countries, forcing non-EU operators to adopt EU-centric accounting and monitoring practices. This creates a *de facto* administrative burden that transcends geographical borders.

A similar rationale applies to the ESPR. While the specific ecodesign criteria are yet to be fully specified through delegated acts, it is clear that any entity wishing to market goods in the EU will have to make additional efforts to comply with these new sustainability requirements. Be it an economic effort (e.g., investing in new materials or production techniques to meet recycled content targets), an administrative effort (e.g., establishing systems to track Substances of Concern throughout the supply chain for the Digital Product Passport), or both, new processes will have to be implemented outside the EU's geographical territory, solely in response to a law adopted within the Union. This means that a factory in Asia or the Americas, producing goods in scope of the ESPR (e.g., textile and tyres) destined for the EU market, must effectively integrate EU ecodesign principles into its product design, material sourcing, and information management systems. The market access leverage exerted by the EU effectively externalises its regulatory standards globally.

[22] As discussed above, even in the absence of official economic data quantifying the impact, several commentators have drawn attention to the challenges faced by companies already during this transitional phase. For a detailed analysis, see Elisabetta Cornago and Aslak Berg, 'Learning from CBAM's Transitional Phase: Early Impacts on Trade and Climate Efforts' (Centre for European Reform 2024).

4.1 Territorial Extension in EU Law

The discussion surrounding the extraterritorial reach of EU law is not new, particularly in the realm of competition law[23]. This phenomenon has recently gained traction in the context of environmental legislation, particularly in relation to CBAM, which has attracted significant scrutiny for its contribution to longstanding debates concerning the legality of unilaterally imposed trade-related measures. In this context, CBAM has been described as giving rise to a form of "territorial extension," and, by implication, as having potentially coercive effects under World Trade Organization (WTO) law[24].

It has been observed that[25], in the EU context, the term *extraterritoriality* lacks a common or settled definition. Rather, it remains an ambiguous and contested concept. Legal literature frequently employs the term inconsistently, often using it to refer to a range of divergent legal phenomena[26]. For the purposes of this analysis, we will distinguish between pure extraterritoriality and territorial extension, in line with established legal scholarship. As Joanne Scott explains[27], a measure is regarded as extraterritorial when it imposes obligations on persons who lack any meaningful territorial connection to the regulating state. By contrast, *territorial extension* refers to situations where the application of a legal measure is contingent upon a territorial link, such as access to the domestic market, while the substance of the obligations it imposes is determined, as a matter of law, by conduct or circumstances occurring outside the territory of the regulating state. It is this latter category of territorial extension that forms the core focus of the present analysis, which examines the normative and structural justifications for the application of EU law beyond the Union's borders. The regulatory frameworks established by the ESPR and the CBAM exemplify this model. Their application is triggered by a territorial nexus, namely, the placing of goods on the EU internal market, yet the content of the obligations under both instruments is shaped by extra-EU factors, particularly the production processes and emissions profiles of third-country operators.

[23] See for example: Lena Hornkohl, 'The Extraterritorial Application of Statutes and Regulations in EU Law' (2022) MPILux Research Paper Series 1/2022 <https://www.mpi.lu/fileadmin/mpi/medien/research/WPS/MPILux_WP_2022_1__Extraterritorial_Application_LH.pdf> accessed 15 September 2025, and Marek Martyniszyn, 'Extraterritoriality in EU Competition Law' in Nuno Cunha Rodrigues (ed), *Extraterritoriality of EU Economic Law* (Springer 2021); and Hannah L Buxbaum, 'The Extraterritorial Application of U.S. and E.U. Competition Law: A Comparative Analysis' (2009) 29 Northwestern Journal of International Law & Business 33.

[24] Ilaria Espa, Joseph Francois and Harro van Asselt, 'The EU Proposal for a Carbon Border Adjustment Mechanism (CBAM): An Analysis under WTO and Climate Change Law' (2022) WTI Working Paper No 06/2022 4. On this matter, see also: review of European Community and International Environmental Law 131; Reinhard Quick, '"Border Tax Adjustments" in the Context of Emission Trading: Climate Protection or 'Naked' Protectionism?' (2008) 3(5) Global Trade and Customs Journal 163; and Joel P Trachtman, 'WTO Law Constraints on Border Tax Adjustment and Tax Credit Mechanisms to Reduce the Competitive Effect of Carbon Taxes' (2017) 70(2) National Tax Journal 469.

[25] Hornkohl (n 23).

[26] ibid.

[27] Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law' (2014) 62 (1) American Journal of Comparative Law 87, 90.

This conceptual distinction is not merely academic. As Hannah L. Buxbaum has observed, notions of territoriality and extraterritoriality are legal constructs that serve to "reinforce or resist claims to authority."[28] The inherent fluidity of these concepts highlights the contested nature of jurisdictional assertions, especially where the threshold for a sufficient territorial connection is open to interpretation. As Scott also notes[29], territorial extension is often embedded within the very design of EU legislative instruments. One strategy employed by the Union to shield such measures from legal challenge, or to provide a normative justification for their extraterritorial effects, is to ensure that those effects are structurally integrated into the legal framework from the outset, rather than introduced as incidental or post hoc consequences[30].

Scholars have argued that the EU's capacity to project its legal norms beyond its borders rests on the size and attractiveness of its internal market, combined with its regulatory expertise and institutional capacity[31]. The EU has become a global regulatory actor, shaping, both deliberately and inadvertently, markets and governance regimes in diverse areas such as competition policy, digital regulation, public health, and environmental protection[32]. According to this approach, this regulatory gravitation enables the EU to impose legal obligations on third-country actors that, while not territorially situated within the Union, maintain a substantial economic interest in accessing its market[33]. This regulatory dynamic is especially pronounced under the European Green Deal (EGD), which forms the cornerstone of the EU's ambition to lead in global climate governance. Beyond the CBAM and ESPR, this ambition is reflected in other legislative initiatives, such as the extension of the EU Emissions Trading System (ETS) to maritime transport, the Deforestation Regulation, the Corporate Sustainability Due Diligence Directive, and the Methane Regulation, all of which incorporate elements of extraterritorial application[34].

In this broader setting, some scholars have posited that the concept of the EU's regulatory power offers a useful framework for observing the Union's attempts to influence greenhouse gas emissions and other regulatory domains beyond its jurisdictional borders[35]. By adopting ambitious legislative instruments with effects extending beyond the EU, the latter actively seeks to harness the "Brussels Effect" to foster the global diffusion of its regulatory standards[36]. As a result, even in the absence of binding legal

[28] Hannah L Buxbaum, 'Territory, Territoriality, and the Resolution of Jurisdictional Conflict' (2009) 57 Americn Journal of Comparative Law 631, 635.
[29] Scott (n 27) 107.
[30] ilbid.
[31] Sebastian Otto, 'The External Impact of EU Climate Policy: Political Responses to the EU's Carbon Border Adjustment Mechanism' (2025) 25 International Environmental Agreements 177,180.
[32] ibid.
[33] ibid.
[34] ibid.
[35] Goldthau A and Sitter N, 'Regulatory or Market Power Europe? EU Leadership Models for International Energy Governance' in J M Godzimirski (ed), *New Political Economy of Energy in Europe* (Springer 2019) 27–47, 30.
[36] Sebastian Otto, 'The External Impact of EU Climate Policy: Political Responses to the EU's Carbon Border Adjustment Mechanism' (2025) 25 International Environmental Agreements 177, 180.

obligations, there may be both *de facto* and *de jure* extensions of EU law[37]. Multinational corporations may align with EU standards voluntarily to retain market access, and non-EU jurisdictions may converge towards EU norms to avoid regulatory divergence[38]. The European Green Deal has marked a significant evolution of this strategy. As Smith, Overland, and Szulecki have observed, the EGD is distinctive in articulating a binding commitment to carbon neutrality and in integrating climate policy objectives across a wide range of internal and external policy domains, having the potential to consolidate the Brussels Effect in climate and environmental governance[39]. However, the real test of the EU's global regulatory aspirations lies in the practical implementation of the EGD and the extent to which its institutional capacity, and the underlying political consensus, can match its ambitions for leadership in the green transition[40]. This observation is especially relevant in relation to the justification for the territorial extension embedded in the regulatory instruments under discussion. If the normative and institutional basis for such extraterritorial effects were to be weakened, whether through inconsistent implementation, inadequate enforcement, or loss of legitimacy, the EU's capacity to impose obligations on private entities located outside its territorial jurisdiction would be significantly undermined. Ultimately, the legitimacy of extending the reach of EU law beyond the Union's borders rests primarily on the credibility, coherence, and effectiveness of the EU's broader environmental and climate policy framework, first and foremost within the Member States, and, through the mechanism of territorial extension, for those external actors seeking access to the EU internal market.

Although not directly within the scope of the present analysis, it is useful to note, for the sake of completeness, that under customary international law, there are generally recognised bases upon which a state may assert extraterritorial jurisdiction. These principles include nationality, territoriality, and universality. In simplified terms, the nationality principle allows a state to exercise jurisdiction when its nationals, whether individuals or corporations, are either the victims (passive nationality) or the perpetrators (active nationality) of certain conduct[41]. The territoriality principle may be invoked when the conduct in question occurs within a state's borders (subjective territoriality) or when its effects are felt within those borders (objective territoriality)[42]. The universality principle is typically limited to serious international crimes such as piracy, genocide, and crimes against humanity[43]. These bases for extraterritorial jurisdiction are, as is evident

[37] ibid.
[38] Bradford A, *The Brussels Effect: How the European Union Rules the World* (OUP 2020).
[39] Smith, I D, Overland I and Szulecki K, 'The EU's CBAM and Its "Significant Others": Three Perspectives on the Political Fallout from Europe's Unilateral Climate Policy Initiative' (2023) 62 (2) Journal of Common Market Studies 603.
[40] See also Bloomfield J and Steward F, 'The Politics of the Green New Deal' (2020) 91 The Political Quarterly 770; Katharina Rietig and Claire Dupont, 'Climate Policy Integration in the EU: Policy Effectiveness and Coherence' in Tim Rayner and others (eds), *Handbook on European Union climate change policy and politics* (2020).
[41] Danielle Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?' (2012) 13 Melbourne Journal of International Law 9.
[42] ibid.
[43] ibid.

from their characterisation, predominantly relevant in the field of criminal law. Moreover, they pertain primarily to questions of jurisdictional competence rather than to the matter of the territorial extension of substantive regulatory rules. As such, their direct applicability to the present analysis remains limited.

4.2 Judicial Approaches to Extraterritoriality: From Competition Law to Environmental Regulation

The CJEU has historically grappled with the boundaries of its prescriptive jurisdiction, employing various interpretative approaches to justify the reach of EU law beyond its strict geographical confines or beyond cases typically falling under direct EU competence.

In competition law, outside the area of merger control, the CJEU has largely endorsed an "implementation" test, under which the EU may exercise jurisdiction when an anticompetitive agreement, decision, or concerted practice is implemented within the EU, even if carried out by companies not established in the Union. For example, in *Ahlström Osakeyhtiö and Others v. Commission* (Woodpulp I)[44], the Court asserted jurisdiction over non-EU undertakings based on the impact of their anti-competitive practices on the EU market. It is worth noting, however, that the Advocate General Darmon in *Woodpulp I* advocated a more restrictive approach, requiring that the effects be "*direct, substantial and foreseeable*" to justify the assertion of jurisdiction[45].

This concept has been clearly articulated by the CJEU, not explicitly in *Woodpulp I*, but in other judgments which have similarly recognised that effects-based jurisdiction aligns with principles of public international law where foreign conduct produces "*immediate and substantial effects*" within the EU (see, for example, Case T-102/96 *Gencor*)[46].

The CJEU further developed, in an earlier judgment, a test focused on assessing the effects of a single undertaking that is part of a larger group. This test permits the attribution of the presence of one undertaking within the EU to related firms located abroad, thereby enabling the Court to establish jurisdiction over the latter, based on the effects on the EU market of that single undertaking (Case 48/69 *ICI v. Commission*)[47].

These precedents in competition law demonstrate a nuanced approach, generally seeking to tie EU competence to activities that directly manifest or produce effects within the EU legal order. The EU's preference for territorial extension over pure extraterritoriality is significant because it reflects a commitment on the part of the EU to respect the limits on prescriptive jurisdiction laid down by public international law. As

[44] A. Ahlström Osakeyhtiö and others v Commission Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 [1993] ECR I-1307.
[45] Opinion of AG Darmon, Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 [1988] ECR 5193, para 53.
[46] Gencor Ltd v Commission Case T-102/96 [1999] ECR II-753, Para 90.
[47] Imperial Chemical Industries Ltd v Commission Case 48/69 [1972] ECR 619. Para 127 -146.

such, and notwithstanding the unilateral nature of many of the measures at stake, it forms part of the broader international orientation which pervades EU measures of this kind.

In fields outside competition law, the territorial extension that grounds the applicability of European law generally relies not on effects, as previously discussed, but rather on an objective territorial connection to the beneficiary of a right or a person deserving protection, or on a territorial nexus justifying the applicability of a European legislative framework with all its attendant legal consequences and interests involved. The first of these scenarios, protection of persons holding a legitimate interest or otherwise deserving protection, is exemplified by the CJEU's judgment in Case C-561/20, *Q, R & S v United Airlines Inc.*[48], which further clarified this expansive approach in the context of consumer protection. Notably, the CJEU confirmed that Regulation (EC) No 261/2004, concerning air passenger rights, applies to passengers departing from an airport located within an EU Member State, even where the operating air carrier is non-EU, and subsequent travel occurs outside the Union. The Court held that departure from an EU airport establishes a sufficient territorial connection, irrespective of any effects within the EU (paras 47–49). It further clarified that such an application does not constitute an extraterritorial effect, as the relevant link is established at the point of departure from EU territory (para 53). The second scenario concerns the full applicability of an EU legislative framework, with all its associated legal implications, and does not aim primarily to protect an individual or specific interest. In *Case C-366/10, Air Transport Association of America and Others*[49], which addressed the inclusion of aviation activities in the EU Emissions Trading System (EU ETS), the Court confirmed that Directive 2008/101/EC validly applies to flights departing from or arriving at EU airports, including flights to or from third countries. The Court's justification rested on the fact that charges for emissions are levied within the EU (paras 125–129) and that the regulatory scope is limited to emissions linked to operations at EU aerodromes (paras 143–147, 151–156). While acknowledging the global nature of emissions, the Court emphasised the territorial connection to EU airspace.

Another important angle to consider, drawing upon both regulatory frameworks and judicial interpretation, is the territorial extension of EU law as articulated in Article 3 of the General Data Protection Regulation (GDPR)[50], which expressly defines the territorial scope of the Regulation. Under Article 3(1), the GDPR applies to the processing of personal data "in the context of the activities of an establishment" of a controller or processor in the Union, regardless of whether the processing itself takes place within the EU. This reflects the intention on the part of the EU to extend the reach of EU data protection law

[48] Q and Others v United Airlines Inc (C-561/20, ECLI:EU:C:2022:269).
[49] Air Transport Association of America and Others v Secretary of State for Energy and Climate Change Case C-366/10 [2011] ECR I-13727.
[50] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) [2016] OJ L 119/1.

beyond the Union's physical territory, where a sufficient functional connection exists with an EU-based entity[51].

This provision has also been examined by the CJEU in earlier case law under the Data Protection Directive (DPD)[52], the predecessor of the GDPR. In the landmark *Google Spain* judgment (Case C-131/12) [53], the CJEU held that data processing carried out by a search engine operator established outside the EU could nonetheless fall within the scope of EU data protection law if it occurred "in the context of the activities" of an EU-based establishment (paragraph 50). In that case, Google Spain, the EU-based establishment, promoted and sold advertising space in Spain. The Court found these activities to be "inextricably linked" to the data processing carried out by Google Inc. in the United States (the search engine operator and controller), as they rendered the search engine economically viable (paragraph 56). The Court thus embraced a broad construction of the territorial nexus, anticipating the principle subsequently codified in Article 3(1) of the GDPR. It affirmed that even an indirect, yet economically significant, connection may suffice to bring data processing activities conducted outside the EU within the scope of EU data protection law.

This case constitutes a significant illustration of the extraterritorial application of EU regulatory norms and offers a useful point of comparison. However, it is submitted that the model developed in *Google Spain* may have limited direct relevance to the frameworks established under CBAM and ESPR. The Court's reasoning in *Google Spain* relied on the existence of a direct and functional relationship between the non-EU entity and an EU-based establishment. Such a relationship is not necessarily present in the context of CBAM, where the connection between a third-country exporter and an EU-based importer may exist in practice but is not inherent to the regulatory design. The analogy is even less applicable under ESPR, where the legal focus is on the placing of products on the EU market. In such cases, the involvement of an EU-based importer is not strictly required for the transaction to take place, thereby weakening the territorial nexus that underpinned the *Google Spain* judgment. Second, and perhaps more importantly, the GDPR expressly codifies its extraterritorial scope in Article 3(1), reflecting a deliberate and explicit regulatory choice. By contrast, neither the ESPR nor the CBAM frameworks contain similarly clear provisions extending their application beyond EU borders, indicating a more implicit or functional approach to territorial reach.

A further legislative development deserving close attention is the Artificial Intelligence Act (AIA)[54]. Like the GDPR, the AIA adopts a functional and effects-based approach to

[51] See on this point Christopher Kuner, 'Territorial Scope and Data Transfer Rules in the GDPR: Realising the EU's Ambition of Borderless Data Protection' (Working Draft, April 2021) Paper No 20/2021, 11.
[52] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.
[53] *Google Spain SL v Agencia Española de Protección de Datos (AEPD)* C-131/12, ECLI:EU:C:2014:317.
[54] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU)

territorial scope. Under Article 2(1)(a), (c), the AIA applies not only to providers and users of AI systems located within the Union, but also to those established in third countries where the output of the AI system is used in the EU. What matters, therefore, is not the physical location of the provider or the user, but the place of deployment or use of the AI system's output. This approach is notably a-territorial, as it does not distinguish between actors located within or outside the EU for the purposes of establishing regulatory jurisdiction[55].

That said, although the AIA may provide a valuable benchmark for the future territorial extension of EU law, including potentially for the ESPR and CBAM, two key limitations must be acknowledged. First, as previously noted in relation to the GDPR, neither the ESPR nor the CBAM frameworks currently contain explicit provisions addressing territorial extension, which limits the direct applicability of the AIA as a comparator. Second, while the AIA is an adopted and binding legal instrument, its interpretation by the Court of Justice or other judicial bodies remains pending. Further judicial clarification will therefore be crucial to ascertain how its territorial scope will be construed and applied in practice, and to determine whether such judicial interpretation could serve to justify a similar territorial extension of EU law within the regulatory frameworks considered in this article.

4.3 The Unique Challenge of CBAM and ESPR: Beyond Direct Territorial Nexus

The case law and regulatory framework analysed support the proposition that EU regulatory obligations may validly extend beyond the Union's borders where a concrete territorial nexus exists. As discussed above, in the field of competition law this jurisdictional reach has been grounded in the existence of effects within the internal market. By contrast, in other areas of EU law, extraterritorial application has been justified through a more objective territorial link, either to the person entitled to protection under the legislation or to the activity to which the regulatory framework is addressed.

This distinction is critical when considering the instruments examined in this contribution. Unlike in competition law, where "effects" refer to distortions of the competitive structure of the internal market, CBAM and ESPR do not concern anticompetitive conduct by undertakings operating outside the EU. Rather, these instruments impose regulatory obligations on entities in third countries simply by virtue of their intention to place goods on the EU market. In principle, one might argue that CBAM indirectly addresses a competitive imbalance by ensuring that imported goods reflect carbon costs comparable to those borne by EU producers under the EU Emissions

2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) [2024] OJ L, 2024/1689.

[55] See H Ruschemeier, 'AI as a challenge for legal regulation – the scope of application of the artificial intelligence act proposal' (2023) 23 ERA Forum 361, 371.

Trading System (ETS). However, while not wholly unfounded, this argument appears analytically weak: the link to competition law's effects-based reasoning is tenuous at best.

Instead, the more plausible jurisdictional basis for both CBAM and ESPR lies in the territorial connection created through the importation or placing on the market of goods within the EU. In the case of CBAM, this connection is constituted by the act of importing goods into the EU customs territory. As in *Case C-366/10*, where the CJEU upheld the application of the EU ETS to flights arriving at or departing from EU airports, the Court considered emissions occurring outside the Union to be relevant because the charging event, takeoff or landing, occurred within the EU. Similarly, the trigger for CBAM obligations is the importation of goods into the EU, notwithstanding that the production process, including emissions generation, occurs entirely outside EU territory.

The same logic applies to the ESPR, where the placing of a product on the EU market activates compliance obligations, including with respect to product design and information disclosure. Again, it is the destination of the goods, the EU market, that supplies the territorial connection necessary to justify the application of Union law.

However, the analogy to the cases cited above has limits. In both *C-561/20* and *C-366/10*, the relevant activity began or ended with a tangible territorial anchor: physical departure from an EU airport or the occurrence of emissions within EU airspace. By contrast, CBAM and ESPR regulate products whose core attributes and production processes are determined entirely outside the EU, prior to any interaction with the internal market. While the EU undoubtedly possesses jurisdiction to regulate access to its market, the more controversial aspect lies in the depth and reach of the obligations it imposes on third-country operators merely seeking to place goods on that market.

This is where the truly extraterritorial dimension arises. The legal issue is not the imposition of conditions for market access per se, which is within the EU's competence, but rather the extent to which the Union may demand compliance with complex and resource-intensive procedures, such as emissions accounting or sustainability disclosures, from entities over which it exercises no prescriptive authority outside of the importation act itself. In this respect, the territorial connection created by the mere arrival of a product in the EU may be a necessary condition for jurisdiction, but arguably not a sufficient one to justify such expansive regulatory demands.

Put differently, the extraterritorial dimension of CBAM and ESPR raises more complex legal questions as to whether importation or market placement alone constitutes a sufficiently robust territorial nexus to justify the imposition of far-reaching obligations under EU law, especially in cases where the regulated conduct takes place entirely outside the Union and prior to the product's entry into the EU market.

Given that the territorial connection underpinning CBAM and ESPR may be considered relatively weak, some scholars[56] have argued that the legal justification for the EU far-

[56] Scott (n 27) 124-125.

reaching extraterritorial implications should not rest exclusively on immediate jurisdictional links. Rather, it may more plausibly lie in the global objectives these instruments seek to pursue. These objectives, while not confined within territorial boundaries, reflect pressing global concerns and are increasingly recognised in international environmental governance.

Scott has observed that the legitimacy of regulatory measures with extraterritorial effects may derive from their alignment with global or transboundary problems for which there exists international consensus regarding the importance of the underlying objectives[57]. In her view, such alignment may justify the EU's regulatory intervention, not as an attempt to export its standards, but as part of a broader effort to initiate interactive processes with third countries[58]. According to the author, these processes aim to identify and evaluate the various approaches that might be adopted to achieve shared regulatory goals[59].

From this perspective, the EU's assertion of jurisdiction through instruments like CBAM and ESPR can be seen not merely as unilateral action but as a contribution to the development of transnational regulatory dialogue in service of collectively endorsed environmental imperatives. This rationale is overtly manifest across numerous legislative files within the EU's Green Deal political strategy, particularly the "Fit for 55" package. In this context, the EU positions itself as a global leader, exporting its regulatory standards as a means to achieve broader environmental goals, such as those enshrined in the Paris Agreement. The underlying premise is that global problems require global solutions, and the EU, through the power of its single market, can be a catalyst for such solutions.

Crucially, the presence of these measures serving to address global or transboundary problems (such as climate change), in relation to which international agreement on the importance of the underlying objective has been reached, becomes the very justification for such territorial extension, thereby buttressing its legality.

However, it must be noted that recent political developments, and more concretely the legislative turn represented by the so-called *omnibus proposals*[60], reflect a discernible shift in the EU's strategic priorities towards enhancing the competitiveness of European industry. This reorientation, arguably at the expense of some core ambitions of the European Green Deal, raises questions about the continued credibility of the Union's historical role as a normative leader in global environmental governance.

If the Union's emphasis transitions from the export of universal environmental standards to the protection of domestic industrial interests, the normative clarity and

[57] ibid 124.
[58] ibid.
[59] ibid 125.
[60] We're specifically referring here to the proposals within the Omnibus I package, dated 26 February 2025. These include: Commission, Omnibus I COM(2025) 80 (26 February 2025); Commission, Omnibus I COM(2025) 81 (26 February 2025); Commission, Omnibus I COM(2025) 87 (26 February 2025); Commission, Omnibus I – Annexes COM(2025) 87 (26 February 2025).

perceived legitimacy of its external regulatory influence may become increasingly contested. This tension is particularly evident in the case of the CBAM, which, although formally grounded in environmental objectives, functions in practice as an instrument to protect EU industries from the risk of carbon leakage. In such a context, the EU's claim to act as a global standard-setter motivated by collective environmental concerns may appear, at least in part, self-interested.

Nonetheless, it must also be acknowledged that the design of CBAM includes a provision to exempt imports from countries where a comparable carbon price has been effectively paid. This feature, while arguably reflecting a strategic economic interest in incentivising alignment with EU standards, simultaneously contributes to the global diffusion of carbon pricing mechanisms. As such, CBAM's impact extends beyond market protection, fostering convergence with EU regulatory objectives in a manner that, even if pragmatically motivated, may still serve broader climate policy goals.

To conclude, while the case law of the Court of Justice of the European Union, such as *Case C-561/20* and *Case C-366/10*, demonstrates an evolving acceptance of extraterritorial effects where a clear territorial nexus exists, the application of these principles to instruments such as CBAM and ESPR presents a novel and legally complex frontier. In the case of both CBAM and ESPR, it will be difficult to argue that a sufficient territorial connection is present, particularly where production occurs thousands of kilometres outside the European Union and involves companies with no physical or legal presence within the Union. In such instances, the European Union's normative leverage may instead rest, as some have argued[61], on its role as a global leader in achieving environmental objectives, particularly where those objectives are reflected in international agreements or treaties.

As discussed above, the GDPR and the AIA, particularly in light of case law on data protection, such as *Google Spain*, offer a different perspective on extraterritoriality, broadening the concept beyond its traditional scope. While the limits of this approach in the present case have already been noted, the extension of such norms to non-EU entities nonetheless raises potentially significant developments. This is especially true when considering the rationale underlying *Google Spain*, namely the presence of an economic interest linked to activities taking place within the EU. By analogy, it could be argued that the placing of products on the EU market constitutes a comparable scenario, insofar as it reflects a direct and substantial connection between the non-EU operator's activity and the EU's internal market.

That being said, it cannot be overlooked that the European Union is increasingly orienting its regulatory tools toward protecting the competitiveness and interests of its own industries. This shift risks undermining the Union's environmental objectives and diminishing its legitimacy in imposing obligations with extraterritorial effects.

[61] See for example Scott (n 27) 124-125.

Justifications for such obligations, as previously noted, rely heavily on the European Union's normative leadership in global environmental governance. It is therefore foreseeable that the tension between the European Union's environmental ambitions and the established principles of international jurisdiction will become a focal point of legal scrutiny in the coming years.

5 Proportionality in EU Law and Possible Avenues for Consumer Protection

Another important issue that requires careful analysis is the potential burden these regulatory measures may place on consumers, particularly in relation to reduced purchasing power and the extent of available legal protections. This concern may materialise if high compliance costs discourage non-EU exporters from entering the EU market. A decline in the number of suppliers could weaken competitive pressure, leading to increased market concentration among EU-based producers or a limited selection of compliant non-EU sellers. This reduction in competition may result in higher prices for consumers within the Union, undermining the internal market principles of open competition and fair pricing. The simultaneous application of the CBAM and the ESPR raises not only considerable compliance challenges for businesses but also important legal questions regarding the proportionality and broader economic implications of these instruments. In this context, it becomes essential to examine the role of proportionality as a general principle of EU law, the legal obligations surrounding the conduct of impact assessments, and relevant case law concerning sustainability-related regulation.

The principle of proportionality constitutes a fundamental general principle of Union law, serving as an indispensable safeguard against legislative or administrative actions by EU institutions that might exceed what is permissible[62]. As enshrined in Article 5(4) TEU, it mandates that "*the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*. The proportionality principle applies both to legal acts adopted by EU institutions and to those of the Member States when implementing Union law. However, its application differs depending on the level at which it is invoked, with distinct thresholds and interpretative approaches employed in assessing proportionality at the EU and national levels[63]. In support of this interpretation, De Búrca and Jans have argued that the proportionality principle can be employed with varying degrees of judicial deference, depending on the context and nature of the measure under review[64].

[62] Schwarze considers proportionality to be the most significant general principle in the realm of EU economic law, particularly given the absence of a comprehensive EU administrative law framework. In his view, the principle serves as a standard for evaluating the relationship between the objective pursued and the means employed. See Schwarze J, *European Administrative Law* (revised edn, Sweet & Maxwell 2006) 664–65.

[63] Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 20 Maastricht Journal of European and Comparative Law 440.

[64] de Búrca G, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 Yearbook of European Law 105, 126.

As observed by Vasiliki Kosta, the principle of proportionality in EU law is a constitutional principle invoked to review the legality of any Union action, whether legislative, administrative, or executive in nature[65]. Its constitutional character is also emphasised by Sauter, who argues that proportionality, as a constitutional principle, enables courts to reconcile conflicting rights and norms through a process of balancing. This involves assessing the relative weight of competing interests and applying requirements such as necessity and the least restrictive means (LRM) test[66].

The definition of "proportionality" offered by Alison L Young and Gráinne de Búrca provides a clear and comprehensive account of this principle, particularly in explaining the relationship between the objective pursued and the rights that may be limited in the process. The authors argue[67] that proportionality is primarily aimed at controlling outcomes by ensuring that any restriction on rights is justified and balanced. Specifically, it requires that the benefits and burdens of a measure are proportionately distributed, and that, in pursuing a legitimate objective, the chosen means impose the least possible restriction on the affected rights, or, put differently, that the least restrictive means necessary to achieve the intended outcome are employed[68].

Their definition is grounded in the general principle underlying proportionality in EU law, namely that any act or measure must not exceed what is appropriate or necessary to achieve a legitimate objective. This implies that, where multiple means are available to pursue a given objective, the EU is required to adopt the least onerous option capable of achieving the intended result[69]. Within this framework, the Court of Justice of the European Union (CJEU) plays a central role in conducting both procedural and substantive reviews of proportionality. Procedurally, the Court ensures that the institution or body adopting the measure provides a reasoned justification for its chosen means. Substantively, the CJEU assesses whether the evidence relied upon is factually accurate, internally consistent, and sufficiently robust to support the conclusions reached[70].

Kosta further elucidates that the principle acts as a "*tool that assesses the legality of the exercise of power where a legitimate aim is pursued but another interest deserving of legal protection (typically a right) is damaged.*"[71] Crucially, proportionality necessitates a balancing of conflicting interests, as it is "*not an independent principle of review, since it refers not to any particular free-standing substantive value*"[72]. This inherent requirement for balancing conflicting interests forms the bedrock of the present

[65] Vasiliki Kosta, 'The Principle of Proportionality in EU Law: An Interest-based Taxonomy' [2017] SSRN 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3368867> accessed 15 September 2025.
[66] Sauter (n 63) 439.
[67] Alison L Young and Gráinne De Búrca, 'Proportionality' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law. European and Comparative Perspectives* (Hart Publishing 2017) 137.
[68] ibid.
[69] ibid 138.
[70] Vasiliki Kosta, 'The Principle of Proportionality in EU Law: An Interest-based Taxonomy' in Joana Mendes (ed), *EU Executive Discretion and the Limits of Law* (Oxford University Press 2017) 1.
[71] ibid 2.
[72] ibid1.

analysis. Indeed, there is a legitimate concern that, in the context of environmental legislation, the aforementioned balancing act risks erring in favour of environmental objectives, potentially at the expense of other equally or more deserving interests, such as those pertaining to consumers.

To ascertain compliance with the principle of proportionality, a three-pronged test is generally applied by Union courts, as outlined by Kosta:

- **Suitability (or Appropriateness):** The action or measure must be suitable for pursuing a legitimate aim.
- **Necessity:** The action must not extend beyond what is necessary to achieve the legitimate aim; that is, no less-restrictive yet equally effective means should be available.
- **Proportionality *stricto sensu* (or Balancing):** Even if the action is suitable and necessary, the interference with a protected right or interest must be justified in light of the gain resulting from pursuing the legitimate aim[73].

his third limb, proportionality *stricto sensu*, requiring that the interference with a protected right or interest be justified by the legitimate aim pursued, is particularly susceptible to future legal challenges concerning measures such as the ESPR and CBAM. These instruments, *inter alia*, are likely to increase, at best, the price of products sold within the EU. The potential resultant diminution of consumers' purchasing power may leave them without adequate protection, thereby arguably undermining the proportionality of the measures.

As Kosta aptly notes regarding Article 5(4) TEU, stating that "*the form and content of Union action shall not go beyond what is necessary to achieve the objectives of the Treaties*," such a formulation, in isolation, "*does not make much sense as it fails to identify what interest it serves*."[74] This underscores the contention that merely adhering to the Treaties does not inherently ensure a balanced assessment of all interests at stake. This author concurs with Kosta's assertion that "*the fact that there exists proportionality as a free-standing heading of judicial review in EU law (free-standing proportionality) makes it difficult to identify what interest it serves*."[75] Similarly, Sauter contends that the application of the proportionality test in EU law lacks consistency. He characterises the principle as a balancing act, not only between competing legal principles but also across different levels of governance, between the residual competencies of Member States and the integrative aims of the Union, and between policy objectives and the protection of individual rights[76].

Consequently, judicial clarification remains paramount. It will therefore likely fall upon consumers or consumer associations, subject to the limitations discussed below regarding the admissibility of actions brought by consumers under Articles 263 or 267 TFEU[77], to

[73] ibid 3.
[74] ibid 6.
[75] ibid 21.
[76] Sauter (n 63) 466.
[77] Treaty on the Functioning of the European Union (TFEU) [2008] OJ C115/47.

potentially initiate legal challenges against ESPR and CBAM measures to seek protection. Indeed, EU courts consistently review Union measures, including environmental and product regulations, for their adherence to the principle of proportionality. While the EU legislature enjoys a broad margin of discretion, particularly in policy areas involving complex economic, social, and environmental choices where scientific uncertainty may prevail, this discretion is not unconstrained. The courts will intervene where a measure is found to be manifestly disproportionate, that is, demonstrably unsuitable, unnecessary, or imposing an excessive burden, or where the Union institution has committed a manifest error in its assessment of the relevant facts or in the balancing of the competing interests.

5.1 Judicial Oversight in Proportionality Assessments

Our analytical inquiry into the proportionality of Union measures, particularly those stemming from environmental and product policy, necessitates a direct examination of the statutory provisions mandating impact assessments. This is a crucial feature prominently observed within the legal frameworks under analysis, especially concerning the rules setting ecodesign requirements.

Specifically, the Ecodesign Directive (Directive 2009/125/EC) explicitly stipulates the European Commission's obligations when preparing a draft implementing measure. Article 15(4)(b) of that Directive provides that the Commission shall: "*carry out an assessment, which shall consider the impact on the environment, consumers and manufacturers, including [small and medium-sized enterprises (SMEs)], in terms of competitiveness – including in relation to markets outside the [EU] – innovation, market access and costs and benefits*."

These provisions are integral to ensuring that the principle of proportionality is effectively embedded within the legislative process. They compel the Commission to undertake a comprehensive evaluation of a broad spectrum of effects before adopting legally binding requirements. Article 15(4)(b) of the Ecodesign Directive unequivocally demonstrates a deliberate legislative intent to balance multiple, and often competing, objectives by explicitly requiring consideration of environmental, economic, and social concerns. Crucially, it makes clear and express reference to the interests of consumers.

However, it is pertinent to note that while Directive 2009/125/EC expressly mandates a detailed assessment of the impact on consumers as part of its regulatory framework, the legislative text of its successor, the ESPR, although it makes repeated references to the principle of proportionality, particularly in relation to economic operators and with explanatory emphasis in Recital 31, does not consistently articulate an equally explicit concern for consumer protection in evaluating the proportionality of its measures. While the Regulation refers to the need to avoid imposing disproportionate administrative

burdens on manufacturers and other actors in the value chain, such considerations are not uniformly extended to the impacts on end-users[78].

This distinction highlights a potential area of ambiguity regarding the precise weight accorded to consumer interests within the broader proportionality assessment, particularly when economic burdens are considered, which may form a basis for future legal scrutiny.

In the sphere of European Union regulatory compliance, the principles of proportionality (Article 5(4) TEU) and the stringent statutory requirement for comprehensive impact assessments (notably Article 15(4)(b) of Directive 2009/125/EC, the Ecodesign Directive) constitute pivotal benchmarks through which not only industry stakeholders, but also consumers and their representative associations, may seek judicial review of EU legislative measures. Challenges frequently contend that the European Commission has failed to adequately reconcile ambitious environmental objectives with the attendant economic burdens placed upon businesses and, crucially, with potential adverse ramifications for consumer welfare and purchasing power.

A salient illustration of the General Court's jurisprudential approach in this domain, particularly regarding the vital role of consumer impact assessment, is *Case T-113/20, Bromine Science Environmental Forum (BSEF) v European Commission*, delivered on 16 March 2022[79]. In this action, BSEF, representing producers of halogenated flame retardants (HFRs), sought the annulment of Commission Regulation (EU) 2019/2021, which imposed a ban on HFRs in the enclosure and stand of electronic displays. Crucially for our analysis, BSEF alleged that the Commission had failed to adequately assess the impacts on consumers, particularly concerning fire safety, and the overall cost-effectiveness of the ban.

The judgment is of particular interest for this analysis as it scrutinised the Commission's fulfilment of its obligations concerning impact assessments and proportionality. The Court underscored that ecodesign measures must be predicated upon robust technical, economic, and environmental analyses, necessitating a delicate balance between environmental factors and considerations of competitiveness and product functionality. The Court recalls in the judgment that *"(…) according to Article 15(4)(b) of the Ecodesign Directive, 'in preparing a draft implementing measure the Commission shall … carry out an assessment, which shall consider the impact on the environment, consumers and manufacturers, including SMEs, in terms of competitiveness – including in relation to markets outside the Community – innovation, market access and costs and benefits'. Furthermore, pursuant to Article 15(5)(a) of the Ecodesign Directive, implementing measures are to meet the criterion that 'there shall be no significant negative impact on the functionality of the product, from the perspective of the user'"* (paragraph 95).

[78] According to article 5 (10) (f) "there shall be no disproportionate administrative burden on manufacturers or other actors in the value chain, including SMEs, in particular microenterprises".

[79] *Bromine Science Environmental Forum (BSEF) v European Commission* T-113/20, EU:T:2022:154.

The *BSEF* judgment serves as a robust affirmation of the EU courts' disposition to uphold ambitious environmental legislative measures, provided that they are within the scope of the empowering directive. Concurrently, the judgment reaffirms the stringent judicial oversight of the Commission's adherence to procedural requirements, particularly regarding comprehensive impact assessments and proportionality analyses. In this judgment, the Court ultimately upheld the Commission's measure, confirming the ban's relevance to the legitimate ecodesign objectives of resource efficiency and recyclability. While cost-effectiveness and consumer impact remain potent grounds for legal challenge, the Court ultimately deferred to the Commission's broad technical and policy discretion, dismissing the applicant's claims as unfounded[80]. What is noteworthy for the purposes of this analysis is that, although the Court ultimately found the Commission's intervention to be proportionate, its reasoning places particular emphasis on the interests of consumers when assessing the proportionality of a measure. At the same time, the judgment offers another important insight: even where consumer impacts are recognised as highly relevant, the threshold for establishing a manifest error of assessment sufficient to justify annulment remains high.

Crucially, in the context of emerging legislation such as the CBAM and the ESPR, the insights drawn from the BSEF judgment become especially relevant for consumer protection. As previously observed, while Directive 2009/125/EC expressly required a detailed assessment of consumer impact pursuant to Article 15(4)(b), the successor regulation, the ESPR, noticeably reduces this emphasis. It lacks an equally explicit reference to consumer interests in the proportionality assessment of its measures. The CBAM framework appears to offer even less direct consideration of consumer-related proportionality concerns.

This legislative posture suggests that, at present, the likelihood of consumers or their representative organisations successfully challenging these frameworks on the grounds of disproportionate impact may be limited and legally complex.

Nonetheless, the reasoning adopted by the Court in BSEF underscores the importance that can be placed on consumer interests when evaluating the proportionality of legislative intervention. It therefore cannot be excluded that similar legal challenges might in the future arise in relation to the ESPR and CBAM frameworks analysed in this paper.

It is also important to consider that judicial interpretation evolves in response to changing societal priorities and political developments. We are currently observing a potential shift in the regulatory landscape, where environmental protection, although still paramount, is increasingly examined in light of its socio-economic implications. Given that the Court of Justice is ultimately responsible for interpreting and applying the principle of proportionality, it is conceivable that future rulings, influenced by these evolving

[80] ibid paragraph 145.

concerns, could create new legal opportunities for contesting certain provisions on the basis of consumer protection. The final determination as to whether the Commission's balance is proportionate will continue to rest with the judiciary.

5.2 Admissibility of Legal Actions Brought by Consumers

It should also be noted that there exists a significant issue regarding the admissibility of legal actions brought by_ consumers that must be taken into account in this context. Specifically, under the current legal framework, consumers as such may not be considered as having standing (locus standi) to bring actions directly before the CJEU. The TFEU provides two principal mechanisms for judicial review aimed at ensuring that the institutions, bodies, offices, and agencies of the Union act within the limits of their legal authority. These mechanisms are set out in Article 263 TFEU, which governs direct actions for annulment, and Article 267 TFEU, which establishes the preliminary reference procedure for indirect judicial review via national courts[81]. The TFEU not only permits EU institutions to challenge the legality of Union acts but also grants access to so-called "non-privileged" applicants, including natural and legal persons, under the conditions set out in Article 263(4) TFEU. According to this provision, non-privileged applicants may only bring an action for annulment if they meet one of the following criteria: (1) they are the addressee of the contested act; (2) the act is of direct and individual concern to them; or (3) the challenge is brought against a regulatory act that is of direct concern to them and does not entail implementing measures[82].

In order to determine whether an individual or a group of individuals, such as consumer associations, meets the conditions set out under Article 263(4) TFEU, the Court of Justice of the European Union has developed a specific legal test. This was articulated in the Judgment of 15 July 1963 in Case 25/62, *Plaumann & Co. v Commission*, and is commonly referred to as the Plaumann test. According to this test, an applicant is considered to be individually concerned by a measure if it affects them "*by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons*".[83]" This is a particularly stringent standard, and it is precisely this threshold that consumer associations generally fail to meet. In particular, it may prove difficult for consumer associations to demonstrate the existence of specific attributes or circumstances that are unique to them, since their membership consists of a broad and shifting group of individuals whose identities and situations vary over time. As a result,

[81] Peers S and Costa M, 'Court of Justice of the European Union (General Chamber) Judicial Review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 Inuit Tapiriit Kanatami and Others v. Commission & Judgment of 25 October 2011, Case T-262/10 Microban v. Commission' (2012) 8 European Constitutional Law Review 82, page 1.
[82] Kucko M, 'The Status of Natural or Legal Persons According to the Annulment Procedure Post-Lisbon' (2017) 2 LSE Law Review 101.
[83] *Plaumann & Co v Commission* 25/62 [1963] ECR 95, page 108.

they are rarely able to demonstrate the level of individual concern required to establish standing under Article 263(4) TFEU.

However, where applicants do not meet the standing criteria under Article 263(4), an alternative route for legal redress remains available under Article 267 TFEU[84]. In such cases, individuals or associations may bring proceedings before national courts, arguing that a particular provision of EU law adversely affects their rights. National courts may then refer questions to the CJEU for a preliminary ruling under Article 267(b) TFEU, which specifically allows the Court to assess the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. This mechanism thereby offers an indirect, but nonetheless meaningful, pathway for judicial scrutiny of Union acts that may otherwise be insulated from direct review by non-privileged applicants.

Against this backdrop, it should also be noted that certain strands of legal scholarship have criticised the Plaumann case law as excessively restrictive, arguing that it fails to provide adequate access to justice[85]. These critiques have been particularly prominent in the context of climate change, a phenomenon that affects all individuals, including both current and future generations. In such cases, the general nature of the harm results in a paradoxical outcome: the more serious and widespread the damage, the less likely it is that the corresponding legal acts can be challenged under the Plaumann test[86]. The paradox lies in the notion that the gravity and universality of the impact may itself preclude standing under Article 263(4) TFEU. This line of reasoning has prompted growing calls for a reconsideration of the current standing criteria, particularly in cases involving global environmental challenges. A potential shift in judicial approach, especially in litigation related to climate change, could have important implications for access to justice more broadly, including the possibility of extending standing to consumer associations in appropriate cases.

6 Conclusion

The CBAM and the ESPR represent ambitious expressions of the European Union's intent to lead the global transition to a sustainable, low-carbon economy. These regulatory instruments are not solely directed at decarbonizing the internal market; they are designed to exert external influence, encouraging global convergence around higher environmental standards, what is often termed the Brussels Effect.

However, this assertive normative posture raises increasingly complex legal, political, and economic questions. The very legitimacy of the EU's extraterritorial regulatory

[84] Among the established case law on the matter see: *Telefónica SA v European Commission* C-274/12 P, ECLI:EU:C:2013:852, para 59.
[85] Lena Hornkohl, 'The CJEU dismissed the People's Climate Case as inadmissible: the limit of Plaumann is Plaumann' (*European Law Blog*, 6 April 2021) <https://www.europeanlawblog.eu/pub/the-cjeu-dismissed-the-peoples-climate-case-as-inadmissible-the-limit-of-plaumann-is-plaumann/release/1> accessed 15 September 2025.
[86] ibid.

ambitions, particularly when they impose *de facto* obligations on third-country operators, hinges on a delicate equilibrium between environmental necessity, proportionality, and respect for the sovereignty of external jurisdictions.

The success of this ambitious regulatory project will depend not only on the robustness of the legislative texts, but on the quality of implementation, the clarity and transparency of secondary legislation, and the degree of cooperation secured with international partners. Equally vital will be the capacity of the EU to maintain internal cohesion and external credibility.

We find ourselves at a pivotal juncture in the history of EU regulatory governance. Increasingly, the rigor of the EU's environmental legislation is being questioned not only by third countries but from within the Union itself. This is evidenced by a growing tendency toward de-regulatory recalibration, as exemplified by the emergence of multiple omnibus legislative packages currently under adoption. These developments are not merely political in nature, they also carry substantial legal implications.

Politically, this recalibration may signal a retreat from the EU's previously undisputed role as a global leader in environmental rulemaking. The Green Deal, once the flagship of the Union's international agenda, now appears more fragile, its credibility challenged both by shifting domestic priorities and mounting external resistance.

Legally, the implications are profound. The EU's authority to project its environmental norms beyond its territory, through instruments like CBAM and ESPR, has thus far been predicated on the assumption that such measures serve a legitimate environmental objective, recognized and respected by the international community. If that perception of environmental leadership wanes, the foundational justification for the extraterritorial application (or, more precisely, extension) of EU law weakens considerably.

In such a scenario, CBAM risks being perceived less as an instrument of environmental governance and more as a mechanism of disguised protectionism, raising serious concerns under WTO law and principles of international comity. Similarly, ESPR, if it goes too far in prescribing detailed design and compliance requirements for goods originating in fundamentally different industrial and economic contexts, may be challenged as an overreach, potentially incompatible with international trade norms.

This raises a fundamental legal and normative question that lies at the heart of the EU's global regulatory strategy: In the absence of sustained international recognition of the EU's environmental leadership, can the Union still justify the imposition of legally binding obligations on jurisdictions and actors that, subject to legal interpretation, may be considered to fall outside its legal competence? The answer to this question will shape not only the future trajectory of CBAM and ESPR, but the very viability of the EU's broader attempt to leverage market power into regulatory influence on the world stage.

The European judiciary will inevitably play a central role in navigating this uncertain terrain. It will fall to the Court of Justice of the European Union to assess whether these

instruments respect the limits of EU competence, comply with principles of proportionality, and are underpinned by sufficiently rigorous impact assessments.

In conclusion, the EU must approach this moment not with complacency, but with critical self-awareness and strategic foresight. Its continued ability to act as a credible and effective global standard-setter depends not only on the ambition of its environmental agenda, but on its commitment to legal precision, procedural fairness, and regulatory humility.