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*The Involvement of the Public in the Green Deal's Regulatory Process: An
Appeal to People as 'Citizens'*



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1. *Introduction*

In September 2020, the Commission adopted the Stepping Up Europe's 2030 climate ambition Communication¹, proposing to raise the EU's ambition on reducing greenhouse gas emissions to at least 55% below 1990 levels by 2030.² The new proposal delivers on the political commitment made in the Communication on the European Green Deal³ to put forward a comprehensive plan to increase the European Union's target for 2030 towards 55%. It is the Commission's effort to keep the "promise made to Europeans"⁴ to make Europe the first climate neutral continent in the world by 2050, responding «not only to science, but also to demands for stronger action coming from citizens».

To meet these ambitious objectives, the Commission previewed a set of actions across all sectors of the European Union (EU) economy, including the

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¹ Communication from the Commission, *Stepping Up Europe's 2030 climate ambition. Investing in a climate-neutral future for the benefit of our people*, COM(2020) 562 final, 17.9.2020 [hereinafter "the Stepping Up Communication"].

² On 10 December 2020, the European Council endorsed the 55% reduction target. See <https://www.consilium.europa.eu/en/meetings/european-council/2020/12/10-11/>. Last access 12.06.2021.

³ Communication from the Commission, *The European Green Deal*, COM(2019) 640, 11.12.2019 [hereinafter "the European Green Deal"].

⁴ President von der Leyen's speech at the presentation of the 2030 Climate Target Plan, 17.9.2020: «We are doing everything in our power to keep the promise that we made to Europeans: make Europe the first climate neutral continent in the world, by 2050».

launch of detailed legislative proposals by June 2021 and the revision of existing legislative instruments.⁵ Changes required in the current policy framework, according to the Commission, can only be delivered through «a whole of government approach» and through «the involvement and commitment of the public and of all stakeholders»⁶.

The aim of this paper is to clarify the conception of public involvement that seems to underlie the Green Deal's regulatory process, in particular in which way the public is involved and what is the function of this involvement. The structure of the article is as follows. Section 2 begins with an overview of the ways in which the Commission intends to involve the public. To illustrate the issue, we will take into account a number of recent Commission's documents: in addition to the European Green Deal's Communication, the legislative proposal for a European Climate Law⁷ and the communications on the European Climate Pact⁸ and on the Conference on the future of Europe⁹; the above mentioned «Stepping Up» Communication; the legislative proposal¹⁰ and the Communication¹¹ on the improvement of access to administrative and judicial review in environmental matters. Three different ways to engage citizens will be identified: i) “bottom-up” ways of involvement; ii) participation in the development and implementation of policies; iii) empowerment through access to administrative and judicial review. Some novelties in the way in which the Commission understands the involvement of the public will also be highlighted. Section 3 will discuss the functions performed by these different forms of involvement. First, it will be argued that the “bottom-up” involvement aims to create a “sounding board” to amplify the pressure of problems. Then, we will

⁵ *Stepping Up*, cit., p. 2.

⁶ *Stepping Up*, cit., p. 12.

⁷ European Commission, Proposal for a Regulation *establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law)*, COM(2020) 80, 4.3.2020.

⁸ Communication from the Commission, *European Climate Pact*, COM(2020) 788, 9.12.2020.

⁹ Communication from the Commission, *Shaping the Conference on the future of Europe*, COM(2020) 27, 22.1.2020.

¹⁰ European Commission, Proposal for a Regulation *on amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies*, COM(2020) 642, 14.10.2020.

¹¹ Communication from the Commission, *Improving access to justice in environmental matters in the EU and its Member States*, COM(2020) 643, 14.10.2020.

stress the important legitimising function performed by participation in the development and implementation of EU policies. Finally, we will try to explain how access to justice could empower individuals, making them the «watchdogs in the democratic space». In Section 4 we will try to understand if the EU is moving towards a novel conception of public involvement. The final section will hold the concluding remarks.

2. *«The involvement and commitment of the public»: different ways to engage people in the regulatory process*

According to the Commission, citizens are and should remain «a driving force» of the green transition, and «the involvement and commitment of the public and of all stakeholders» is crucial to the success of the Green Deal.¹² The use of the term “Deal” could be interpreted by itself as a sign that the European Green Deal is intended to be an agreement between the EU and its citizens.¹³

These words clearly suggest that the process the Commission wants to trigger is an open and participatory one, which requires everyone’s collaboration. The Commission deliberately uses two broad terms («involvement» and «public»), so as to include the most diverse forms of involvement and subjects to be involved (citizens, stakeholders, civil society, NGOs). In fact, reading the various documents presented by the Commission under the Green Deal, different forms of involvement can be identified.

First, the Commission intends to give everyone a voice and space to design climate action and to scale up solutions. To this end, the duty of the Commission to engage with all parts of society to enable and empower them to take action towards a climate-neutral and climate-resilient society is inserted in the legislative proposal for a European Climate Law.¹⁴ Moreover, in December 2020, considering that «many people feel they have too little influence over crucial decisions», the Commission launched the European Climate Pact to encourage «democratic action on climate change by individuals and

¹² *The European Green Deal*, cit., p. 22.

¹³ *The European Green Deal*, cit, p. 2: «This Communication sets out a European Green Deal for the European Union (EU) and its citizens». Even if here “Deal” could mainly refer to Roosevelt’s *New Deal*, as a series of programs, projects, reforms and regulations, the first definition of *deal* is «an agreement or an arrangement». See <https://dictionary.cambridge.org/dictionary/english/deal>: last access on 12.06.2021.

¹⁴ See article 8 of the proposal for a Regulation on *European Climate Law*.

organisations».¹⁵ The Commission also announced the Conference on the future of Europe, a “bottom-up” forum accessible to all in which discuss the EU priorities and what the Union should seek to achieve, including on the fight against climate change and environmental challenges.

Second, the Commission recalls the importance of involving the public in the development and implementation of policies, mainly through public consultations before the presentation of evaluations, impact assessments and legislative proposals. In the Stepping Up Communication, for example, the Commission stated that public consultations will play a critical role in the identification of the legislative changes the Commission intends to propose by June 2021 to support the enhanced 2030 climate framework.

Third, the involvement of the public is completed by access to administrative and judicial review at EU level for citizens and NGOs who have concerns about the legality of decisions with effects on the environment. To this end, the Commission has proposed to revise the Aarhus Regulation,¹⁶ broadening the possibilities available to NGOs to seek administrative review.

To sum up, at least three main types of «involvement of the public» are foreseen by the Commission: a) bottom-up or grassroots initiatives; b) participation in the decision-making process; c) empowerment through access to administrative and judicial review.

The Commission does not only describe the ways in which it intends to involve the public, but also suggests that this involvement is something different from the past, a change of perspective in the EU's approach to its citizens. For example, on the occasion of the inauguration of the European Climate Pact, Frans Timmermans, Vice President of the Commission, spoke about a Pact which «appeals to people as citizens and not as consumers».¹⁷ Mariya Gabriel, Commissioner for Innovation, Research, Culture, Education and Youth, called for specific actions «to engage with citizens in *novel* ways».¹⁸ The Conference on the future of Europe Communication imagines «new forms of participation», in

¹⁵ *European Climate Pact*, cit., p. 7.

¹⁶ Regulation (EC) no 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

¹⁷ <https://audiovisual.ec.europa.eu/en/video/I-200050?lg=INT>, min. 00:26:51. Last access on 12.06.2021.

¹⁸ https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1669. Last access on 12.06.2021.

which «all Europeans should be given an equal opportunity to engage».¹⁹

The next Sections, devoted to the functions performed by the three different forms of participation, will try to clarify what this change of perspective – if it really exists – actually entails.

3. *The functions of the involvement of the public*

3.1 *The bottom-up involvement: creating a “sounding-board”*

The bottom up involvement of citizens could be seen as a way of creating transnational alliances on an issue which transcend borders, mobilizing the sentiments of belonging to an EU political community and reinvigorating civic life. This form of involvement is mostly based on the model of EU “citizens’ dialogues”, conceived as open door events inviting citizens to share their views in “town hall”-style meetings across the Union, with the aim of contributing to the development of a “European Public Space”.²⁰

The EU is therefore providing «real and virtual spaces» to enable people to scale up solutions to tackle climate change, solutions which spontaneously emerged within civil society over the last years. It is about the creation of a space outside (but in connection with) the institutions, in which views and opinions can be developed in relation to EU-wide matters of public concern: an habermasian “sounding board” to «amplify the pressure of problems, that is, not only detect and identify problems but also convincingly and influentially thematize them, furnish them with possible solutions, and dramatize them in such a way that they are taken up and dealt with by parliamentary complexes».²¹ A way to develop a European public sphere which enables citizens «to take positions at the same time on the same topics of the same relevance».²²

¹⁹ *The Conference on the future of Europe*, cit., p. 4.

²⁰ European Commission’s Report, *Citizens’ Dialogues as a Contribution to Developing a European Public Space*, COM(2014) 173, 24.3.2014, p. 5. See, with reference to citizens’ dialogue, L. DAMAY – F. DELMOTTE, *Les Dialogues Citoyens de la Commission Européenne. Renforcer l’appartenance ou confirmer l’impuissance*, in *Politique européenne*, 62, 4, 2018, pp. 120-150. See also, with reference to the development of a “European Public Space”, T. RISSE, *European Public Spheres: Politics is Back*, Contemporary European Politics, Cambridge University Press, Cambridge, 2014.

²¹ J. HABERMAS, *Between facts and norms. Contributions to a discourse theory of law and democracy*, Cambridge, 1996, p. 359.

²² J. HABERMAS, *Remarks on Dieter Grimm’s: Does Europe Need a Constitution?*, in *European*

In 2010 Pierre Rosanvallon spoke about a «myopie démocratique», i.e. «tendances court-termistes» of democracy²³: democratic institutions are unable to face «le souci du long terme», namely tackling long-term issues such as those related to climate change²⁴. In Rosanvallon's words, «la difficulté devient préoccupante à l'heure où les questions de l'environnement et du climat obligent à penser dans des termes inédits nos obligations vis-à-vis des générations futures».²⁵ According to the French historian, it is precisely the establishment of public forums mobilizing the attention and participation of citizens («forums de l'avenir») one of the most effective ways to correct that *myopie*²⁶, enabling

Law Journal, 1995, vol. 1, n. 3, p. 306: «there can be no European Federal state worthy of the name of a democratic Europe unless a European-wide, integrated public sphere develops in the ambit of a common political culture».

²³ P. ROSANVALLON, *Le souci du long terme*, in D. BOURG – A. PAPAUX (eds.), *Vers une société sobre et désirable*, Presses Universitaires de France, Paris, 2010, p. 151, who argues that «[l]es régimes démocratiques ont du mal à intégrer le souci du long term dans leur fonctionnement». See also, in general, J. J. LINZ, *Democracy's Time Constraints*, in *International Political Science Review*, 19, 1, 1998, pp. 19-37; D. F. THOMPSON, *Democracy in Time: Popular Sovereignty and Temporal Representation*, in *Constellations*, 12, 2, 2005; A. M. JACOBS, *Governing the Long Term: Democracy and the Politics of Investments*, Cambridge University Press, New York, 2011; ID., *Policy Making for the Long Term in Advanced Democracies*, in *Annual Review of Political Science*, 19, 2016, pp. 433-454.

²⁴ This issue is linked to the legitimation of current democratic governments to manage issues that affect future generations. Someone argued that democratic governments are not authorized to act in the name of future generations, recalling in some way the famous argument by Thomas Jefferson, when writing to James Madison (*The Papers of Thomas Jefferson*, Princeton University Press, 1958, pp. 392-398), who argues that «the earth belongs always to the living generation ... The constitution and the laws of their predecessors extinguished then in their natural course with those who gave them being. This could preserve that being till it ceased to be itself, and no longer. Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right». See, for example, P. M. WOOD – L. WATERMAN, *Sustainability Impeded: Ultra Vires Environmental Issues*, in *Environmental Ethics*, 30, 2008, p. 159. Others argue that said argument - according to which the time horizon of politicians is constituted by the mandate received by voters - should be corrected: concern for the future, in fact, constitutes for them not a legitimizing factor or an option, but a responsibility and (now) a normative constraint, on the basis of the fact that public policies must take into consideration, especially in environmental matters, the principle of *sustainable development*. See F. FRACCHIA, *Sviluppo sostenibile e diritti delle generazioni future*, in *Rivista Quadrimestrale di Diritto dell'Ambiente*, n. 0/2010, p. 31, who defines sustainable development as a bridge towards a future which exceeds the limits of the mandate received from the voters (un «ponte verso un futuro che eccede i limiti del mandato ricevuto dagli elettori»).

²⁵ P. ROSANVALLON, *Le souci du long terme*, cit., p. 151.

²⁶ ID., *op. ult. cit.*, p. 161: «[ces forums] doivent aussi pouvoir procéder d'initiatives décentralisées multiples ... Mais la formalization et la "dramatization" de certains d'entre eux permettraient cependant de donner un poids accru au débat citoyen à l'occasion de la détermination de certaines

citizens to appropriate and dramatize these issues and to create a «tension permanente» over democratic institutions.

Therefore, the EU initiatives described above are a clear expression of a period, like the present one, characterized by an «élargissement de l'expression de la conscience citoyenne» in environmental matters,²⁷ as confirmed also by some important national experiences. Think about, for example, the *Convention citoyenne pour le climat* in France²⁸, which demonstrated the importance of including and empowering citizens when addressing a complex public problem such as the reduction of carbon emissions.

3.2 Participation in the development and implementation of the policies: legitimising the process

As clearly stated by the Commission, citizens' participation «will increase legitimacy and trust in our Union and complement its representative democracy»²⁹, in particular through the active involvement of the public in the development and implementation of EU policies.

The idea that public participation is intended to enhance government legitimacy is not new.³⁰ In the context of EU governance, mechanisms of

grandes orientations en termes de politiques publiques ou de prises de position dans des négociations internationales».

²⁷ *Id*, *ibidem*.

²⁸ Its task was to «définir une série de mesures permettant d'atteindre une baisse d'au moins 40% des émissions de gaz à effet de serre d'ici 2030 (par rapport à 1990) dans un esprit de justice sociale». For more information on the *Convention*, see <https://www.conventioncitoyennepourleclimat.fr>. Last access on 12.06.2021.

²⁹ *Conference on the Future of Europe*, cit., p. 4. See also, with reference to participatory democracy in the European Union, E. DE MARCO, *Elementi di democrazia partecipativa*, in P. BILANCIA – M. D'AMICO, *La nuova Europa dopo il Trattato di Lisbona*, Giuffrè, Milano, 2009; U. ALLEGRETTI, *Democrazia partecipativa: un contributo alla democratizzazione della democrazia*, in *Id*. (ed.), *Democrazia partecipativa. Esperienze e prospettive in Italia e in Europa*, Firenze University Press, Firenze, 2010, pp. 5-45; V. CUESTA LOPEZ, *The Lisbon Treaty's provisions on democratic principles: a legal framework for participatory democracy*, in *European Public Law*, 16, 1, 2010, pp. 123-138; M. MORELLI, *La democrazia partecipativa nella governance dell'Unione europea*, Giuffrè, Milano, 2011; C. MARXSEN, *Participatory Democracy in Europe: Article 11 TEU and the Legitimacy of the European Union*, in F. FABBRINI – E. HIRSCH BALLIN – H. SOMSEN (eds.), *What form of government for the European Union and the Eurozone?*, Hart Publishing, 2015, pp. 151-169; A. FISCHER-HOTZEL, *Democratic Participation? The involvement of citizens in policy-making at the European Commission*, in *Journal of Contemporary European Research*, 6, 3, 2017, pp. 335-352.

³⁰ It is an idea which goes back to the foundation period, applied to the European Community after

participation have been seen both as alternatives³¹ to parliamentary processes as well as a way to complement representative democracy.³² It has also been said that participation has mainly served as «a defense against charges that the Commission is an unaccountable executive body, removed from the popular will»,³³ helping to legitimate the Commission's own role in the democratic process.³⁴

The Commission, in its well-known 2001 White Paper on Governance,³⁵ underlined two main reasons why EU policymaking will be more legitimate if achieved through citizens engagement: *i*) it allows gathering specialized knowledge and technocratic expertise³⁶ and *ii*) it enables to create «more

the French experience of the *Commissariat général du Plan*: see J. MONNET, *Mémoires*, Paris, Fayard, 1976, p. 278: «on ne pourra transformer l'économie française sans que le peuple français participe à cette transformation». See also K. FEATHERSTONE, *Jean Monnet and the 'Democratic Deficit' in the European Union*, in *Journal of Common Market Studies*, vol. 32, no. 2, 1994.

³¹ See, e.g., A. HÉRITIER, *Elements of democratic legitimation in Europe: an alternative perspective*, in *Journal of European Public Policy*, vol. 6, n. 2, 1999, p. 272; G. MAJONE, *Europe's 'Democratic Deficit': the Question of Standards*, in *European Law Journal*, vol. 4, n. 1, 1998, p. 24, who argues that most EU policies are regulatory rather than redistributive. This explains and legitimates the limitation of parliamentary mechanisms in the field of regulatory policies: «redistributive policies can be legitimated only by majoritarian means and thus cannot be delegated to institutions independent of the political process; efficiency-oriented policies, on the other hand, are basically legitimated by results, and hence may be delegated to institutions [insulated from the political process], provided an adequate system of accountability is in place».

³² European Commission, *Towards a Reinforced Culture of Consultation and Dialogue - General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, COM(2002)704, 11.12.2002, p. 5: «the guiding principle for the Commission is therefore to give interested parties a voice, but not a vote».

³³ F. BIGNAMI, *Three Generations of participation rights before the European Commission*, in *Legal and Contemporary Problems*, 68, 2004, p. 72.

³⁴ P. CRAIG, *Democracy and Rule-making Within the EC: An Empirical and Normative Assessment*, in *European Law Journal*, vol. 3, n. 2, 1997, p. 123: «norms emerging from the process are given some democratic sanction not only from the "top", in the form of acceptance by the Council and European Parliament, but also some species of democratic input from the "bottom", through the medium of consultation and participation». See also F. SIPALA, *La vie démocratique de l'Union*, in G. AMATO, H. BRIBOSIA, B. DE WITTE (eds), *Genèse et destinée de la Constitution européenne. Commentaire du Traité établissant une Constitution pour l'Europe à la lumière des travaux préparatoires et perspectives d'avenir*, Bruylant, Bruxelles, 2007, pp. 367 ss.

³⁵ European Commission, *European Governance: A White Paper*, COM(2001) 428, 25.7.2001. See also, for a discussion on the different sources of legitimacy in the EU context, G. DE BÚRQA, *The Quest for Legitimacy in the European Union*, in *The Modern Law Review*, 59, 3, 1996.

³⁶ COM(2001) 428, p. 18 («the Institutions rely on specialist expertise to anticipate and identify the nature of the problems and uncertainties that the Union faces, to take decisions and to ensure that risks can be explained clearly and simply to the public») and p. 20.

confidence in the end result and in the Institutions which deliver policies».³⁷

According to the “expertise rationale”³⁸, participation is valuable because it leads to better policy, enhancing mutual-learning and problem-solving. According to the “confidence rationale”³⁹, the opportunity given to people to have their say on the different policy options puts the EU in the condition to accommodate their preferences and, as a result, to promote consensus and to enhance adherence to the preferred option. As a consequence, the legitimising role of participation lays in the fact that it contributes to heighten both the *quality* and the *acceptance* of the outcome of the regulatory process.

It is a sort of «technical legitimacy»⁴⁰, a «legitimation through successful technocratic accomplishment»⁴¹, more oriented in terms of outputs and the quality of the resulting norms. Moreover, even if the words «citizens», «people», «general public» were frequently used in the White Paper, participation was clearly understood as a way to involve «stakeholders» and «interested parties», as a dialogue with the «actors most concerned» and «affected by European policies».⁴²

³⁷ COM(2001) 428, p. 8.

³⁸ Based on the supposed quality of those involved in the decision-making, the involvement of independent expertise becomes an autonomous source of legitimacy. For an early argument about the role of the so called “epistemic communities” and the “knowledge elite” in international policy coordination, see P. M. HAAS, *Introduction: Epistemic Communities and International Policy Coordination*, in *International Organizations*, 46, 1, 1992, pp. 7–16. For a version of this argument in the EU context, see of course G. MAJONE, *Regulating Europe*, Routledge, 1996, pp. 284–301.

³⁹ See F. SCHARPF, *Governing in Europe: Effective and Democratic?*, Oxford, Oxford University Press, 1999, p. 188. It has also been argued that there is a relationship between output legitimacy and democracy: an European demos - and the consequential possibility for an EU democracy - is more likely to develop when citizens feel «satisfied» with what the EU delivers. For this argument, see I. SÁNCHEZ-CUENCA, *The Political Basis of Support for European Integration*, in *European Union Politics*, 1, 2, 2000, p. 168: «the demos of the supranational democracy will come into existence if and when enough people become convinced that the benefits at the supranational level are greater than the costs derived from the loss of sovereignty».

⁴⁰ A. ALEMANNI, *Unpacking the Principle of Openness in EU Law Transparency, Participation and Democracy*, in *European Law Review*, vol. 39, n. 1, 2014, p. 15.

⁴¹ J.H.H. WEILER, *European Democracy and the Principle of Constitutional Tolerance: the Soul of Europe*, in F. CERUTTI – E. RUDOLPH (eds.), *A Soul for Europe*, vol. 1, Peeters, Leuven and Sterling, 2001, p. 41.

⁴² P. MAGNETTE, *European Governance and Civic Participation: Beyond Elitist Citizenship?*, in *Political Studies*, vol. 51, 2003, p. 149. It is the so called *functional participation*, i.e. the participation of specifically defined interests - generally those which are identified as being most directly engaged by the subject matter at hand - within the governance process. In this regard, see S. SMISMANS, *Law Legitimacy And European Governance: Functional Participation In Social Regulation*, Oxford University Press, 2004. However, it always seems problematic to identify who

Looking at the ways in which the Commission intends to involve the public in the context of the EU Green Deal, the “expertise rationale” seems to still be present: for example, when the Commission invites “stakeholders” to «identify and remedy inconsistencies in current legislation» and «identify problematic cases»⁴³, or when it undertakes to consult them in the preparation of technical documents such as evaluations or impact assessments.⁴⁴ What is needed here seems to be knowledge and proficiency of expert actors, rather than ordinary citizens’ opinions.

As for the “confidence rationale”, the language used by the Commission (an appeal to people «as citizens and not as consumers»: see Section 2) suggests a change of perspective in the conception of the “public” to involve: that people are engaged as active *citizens* in the political process, and not just as consumers of the Commission policies. We will come back to this point in Section 4, trying to understand if there are really some novelties.

3.3 Access to administrative and judicial review: empowering individuals as «watchdogs in the democratic space»

As anticipated above, another way to empower citizens is through access to administrative and judicial review. It aims to create the necessary “checks and balances” to ensure that acts and decisions can be checked for compliance with environmental legislation. According to the Commission, this is an important support measure to help deliver the European Green Deal transition and a way to strengthen the role of individuals as «watchdogs in the democratic space». However, it is disputable that citizens have at their disposal all the necessary means to perform effectively this function.

In October 2020, the Commission adopted a Communication encouraging Member States to «improve» access to judicial review, and a legislative proposal to revise the above-mentioned Aarhus Regulation, broadening the possibilities available to NGOs to seek administrative review.

are the ‘interested parties’ by an act or a policy. See, in this regard, B. KINGSBURY – M. DONALDSON, *From Bilateralism to Publicness in International Law*, in U. FASTENRATH and others (eds), *From Bilateralism to Community Interest. Essays in Honour of Bruno Simma*, Oxford University Press, Oxford, 2011, p. 86: «constituting a public on the basis of susceptibility to being affected by a regulation or decision is not only practically unwieldy, but normatively questionable».

⁴³ *European Green Deal*, cit., p. 19.

⁴⁴ The *Stepping Up* Communication, cit., p. 12.

Whereas currently an administrative review can only be requested for acts of «individual scope», the proposal provides for an extension of NGOs' administrative review to acts of «general scope». It is also proposed that any administrative act that contravenes EU environmental law may be subject to review, irrespective of its policy objectives (no longer just those acts contributing to environmental policy objectives).

The system of remedies is completed by access to the CJEU under Article 263(4) TFEU and access before national courts, which are «Union courts» linked to the CJEU through the system of preliminary references established under Article 267 TFEU.

The first remedy, however, is subject to considerable limits,⁴⁵ according to which individuals can only challenge «acts of individual concern to them»: think about the *Carvalho* case (known also as *People's Climate* case⁴⁶), in which the General Court declared inadmissible an action brought by individuals to claim that EU law does not limit greenhouse gas (GHG) emissions as strictly as is required by international law. The Court argued that climate change affects every individual in one manner or another⁴⁷ and established case law requires that individuals are affected by the contested act in a manner that is «peculiar to them» and distinguishes them individually.⁴⁸

The second remedy allows any individual to immediately invoke – subject to some conditions⁴⁹ – a European provision before a national court. In the past, Weiler argued that individuals in real cases and controversies became the principal «guardians» of the legal integrity of Community law within Europe:

⁴⁵ Under the fourth paragraph of Article 263 TFEU, individuals can bring direct challenges to the CJEU for: *i*) acts addressed to them; *ii*) acts of direct and individual concern to them; and *iii*) regulatory acts of direct concern to them which do not entail implementing measures.

⁴⁶ See G. WINTER, Armando Carvalho and Others v. EU: *Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation*, in *Transnational Environmental Law*, vol. 9, n. 1, 2020, pp. 137-164.

⁴⁷ CJEU, *Carvalho and others v. Parliament and Council*, case T-330/18, order of 8 May 2019, par. 50: «It is true that every individual is likely to be affected one way or another by climate change, that issue being recognised by the European Union and the Member States who have, as a result, committed to reducing emissions. However, the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application». An appeal was lodged in October 2019 (case C-565/19 P), and it is still pending.

⁴⁸ See, e.g., judgments of 15 July 1963, *Plaumann v. Commission*, 25/62, p. 223.

⁴⁹ EU legal norms must be clear, precise, and self-sufficient (not requiring further legislative measures by the authorities of the EU or the Member States).

«Member States violating their Community obligations would be faced with legal actions before their own courts at the suit of individuals within their own legal order».⁵⁰ It was due to the well-known *Van Gend en Loos* and *Costa* judgements (the principles of primacy and direct effect) and their progeny, which have helped «to put the individual person ... at the heart of European law», making it «a direct participant in the European integration process».⁵¹ One of the main consequences was «to transform state duties in the economic sphere into individual rights, thus allowing private parties to *drive forward* the process of market integration».⁵² The EU law concept of *direct effect* itself attempts «to transform objective principles into subjective rights».⁵³ Accordingly, in the future, a similar transformation of environmental principles and EU/Member States' obligations in subjective «ecological» and «environmental» rights⁵⁴ may allow us to imagine individuals as an essential *driving force* of the new “green” process.

4. *Towards a novel conception of public involvement?*

As previously pointed out, the Commission claims that the involvement of the public in the context of the Green Deal is something different from the past, a change of perspective in the EU's approach to its citizens. It is now necessary to analyse whether these forms of involvement of the public are really novel ways to engage citizens.

Taken together, the different forms of involvement described above are complementary phases of a unique and complex process of involvement: first, the

⁵⁰ J.H.H. WEILER, *The Transformation of Europe*, in *The Yale Law Journal*, 1991, p. 2414.

⁵¹ B. DE WITTE, *Direct effect, primacy and the nature of the legal order*, in P. CRAIG – G. DE BÚRQA (eds), *The evolution of EU law*, Second edition, Oxford, p. 358. For further readings on these issues see inter alia the different contributions in M.P. MADURO - L. AZOULAI (eds), *The Past and Future of EU Law: The Classics of EU law Revisited on the 50th Anniversary of the Rome Treaty*, Hart Publishing, Portland, 2010, especially P. PESCATORE, *Van Gend en Loos, 3 February 1963 - A View from Within*, p. 1, B. DE WITTE, *The Continuous Significance of Van Gend en Loos*, p. 9 and I. PERNICE, *Costa v. ENEL and Simmenthal: Primacy of European Law*, p. 47.

⁵² B. DE WITTE, *Direct effect*, cit., p. 359.

⁵³ N. REICH, *A European Constitution for Citizens: Reflections on the Rethinking of Union and Community Law*, in *European Law Journal*, vol. 3, no. 2, 1997, p. 133.

⁵⁴ ID., *op. ult. cit.*, p. 152: «[environmental] responsibilities are transformed into obligations which, in turn, may become rights of the citizen». On this issue, see also L. KRÄMER, *EC Treaty and Environmental law*, 2nd edition, Sweet & Maxwell, London, 1995 pp. 146 e ss.; H-W. MICKLITZ – T. ROETHE – S. WEATHERILL (eds), *Federalism and Responsibility. A study on Product Safety Law and Practice in the European Community*, Graham & Trotman, 1994, p. 35.

public is given the opportunity to publicly discuss and scaling up solutions, creating a sort of “sounding board” to dramatize problems; second, the public is involved in the development and implementation of policies, thus legitimising the decision-making process; finally, the public can resort to administrative and judicial review, watchdogging EU and Member States’ activities.

As for the first and the second phases, when Mr. Timmermans speaks about an «appeal to people as citizens and not as consumers», he seems to suggest a radical change of perspective, far from the idea of an «invasion of a market mentality into the sphere of politics whereby citizens become *consumers* of political outcomes rather than active participants in the political process». ⁵⁵ A considerable shift from Romano Prodi’s narrative: «at the end of the day, what interests them [the citizens] is not who solves these problems, but the fact that they are being solved». ⁵⁶

When elaborating the above mentioned 2001 White Paper, the Commission was clearly influenced by an «elite-top-heavy understanding of the European politics» ⁵⁷, and the involvement of the public was meant to create «more confidence in the end result and in the Institutions which deliver policies».

In the context of the EU Green Deal, the involvement of the public could be more about the creation of channels allowing citizens to actively engage and monitor the overall process, empowering them to hold policymakers accountable, rather than a mere procedural step aimed at providing technical legitimacy of policy decisions. This goal could be achieved by considering participation no longer exclusively as instrumental to the improvement of the quality of the decision-making process, but also as a source of pressure exercised directly into it.

Another change of perspective could be in the public the Commission wants to involve: it is not only about acquiring knowledge from “stakeholders”

⁵⁵ J.H.H. WEILER, *European Democracy and the Principle of Constitutional Tolerance: the Soul of Europe*, cit., p. 41. See also P. ROSANVALLON, *La contre-démocratie. La politique à l’âge de la défiance*, Éditions du Seuil, Paris, 2006, p. 258, according to which «le citoyen s’est mué en un *consommateur* politique de plus en plus exigeant; renonçant tacitement à être le *producteur* associé du monde commun».

⁵⁶ Speech given by the President-designate of the European Commission to the European Parliament, 21 July 1999.

⁵⁷ F. BIGNAMI, *Three Generations of participation rights before the European Commission*, cit., p. 76. See also C. JOERGES, “Economic Order” – “Technical Realization” – “The Hour of the Executive”: *Some Legal Historical Observations on the Commission White Paper on European Governance*, Jean Monnet Working Paper No. 6/01.

but engage with *all* citizens.⁵⁸ This could be explained by the fact that - as AG Sharpston noticed⁵⁹ - «the natural environment belongs to us all» and its protection is a matter of collective responsibility: here the “holders” of the “stake” are all citizens, they are all “interested parties”. It is hard to accept, if the Commission argues for the engagement with people in novel ways, that it continues to deal with individuals as “stakeholders”: citizens are not just «persons who own a share in a business» or «persons who are involved with an organization and therefore have responsibilities towards it and an interest in its success». ⁶⁰ Public participation is not aimed at giving individuals the opportunity to defend their own *private* interest and success, while waiting for their “stake” (their “share”) to gain more value: rather, it is about involving citizens in the construction of the *public* good. This is also the meaning of the “sounding board” mentioned above and of a “European public sphere”, to the development of which the Commission intends to contribute.

As for the third phase, if individuals will be able to perform their function as “guardians” and “watchdogs” of the new green process will largely depend on how the Council and the European Parliament will decide to revise the Aarhus Regulation, on how much the CJEU will be open to revise its case-law on article 263 TFEU and also on how much *national courts* will support citizens in their attempts to be the “supervisors” of the legality of the process.⁶¹

⁵⁸ *The Conference on the future of Europe*, cit., p. 4: «all Europeans should be given an equal opportunity to engage – *whether knowledgeable about the Union or not*».

⁵⁹ Opinion of Advocate General Sharpston, delivered on 12 October 2017 in Case C-664/15, *Protect Natur*, par. 77. See also, in this regard, the beautiful paper by C. D. STONE, *Should trees have standing? Toward legal rights for natural objects*, in *Southern California Law Review*, 45, 1972, pp. 450-501, who argues that «the problems we have to confront are increasingly the world-wide crises of a global organism: not pollution of a stream, but pollution of the atmosphere and of the ocean. Increasingly, the death that occupies each human’s imagination is not his own, but that of the entire life cycle of the planet earth, to which each of us is as but a cell to a body».

⁶⁰ These are the first two definitions of “stakeholder”: <https://dictionary.cambridge.org/dictionary/english/stakeholder?q=stakeholders> Last access on 12.06.2021.

⁶¹ With reference to the role of national courts, see the speech given by Laurent Fabius, President of the French Constitutional Council, at the European Court of Human Rights in Strasbourg, 25 January 2019, available at https://www.echr.coe.int/Documents/Speech_20190125_Fabius_JY_ENG.pdf. Mr. Fabius argued that «[c]ourts are receiving an increasing number of requests from citizens, associations, NGOs, companies and towns, seeking to ensure that the States comply with their obligations in terms of environmental protection ... As environmental threats worsen and certain politicians demonstrate a lack of ambition, we can all sense that human-rights litigation as applied to the environment will

Moreover, it should be assessed whether citizens would better exercise this watchdogging function individually or collectively (through, for example, environmental associations, NGOs and political parties⁶²) and which role could be played by new technologies (e.g. blockchain technology⁶³). In this last regard, it can be said that the development of new technologies could not only help the public to engage more easily in environmental decision-making (for example through the use of online platforms⁶⁴), but it could help also *all* citizens – not just experts or “interested parties” – to become more “knowledgeable” about environmental issues, thus increasing the pressure on public decisionmakers. As Allena argues, «ordinary members of the public (often associated within local or community groups) can now collect enormous quantities of data in real time concerning for example the climate, air and water quality, the location of marine debris as well as bird migratory routes. This can moreover be done without any need for specific expertise or supporting organizational structures (and for this reason is referred to as “citizen science”».⁶⁵

grow in importance, making the courts, even more than they are at present, *major players in the construction of environmental justice*» [emphasis added].

⁶² It could be of some interest to look at the Brazilian's experience: according to articles 102-103 of the Brazilian Constitution, political parties are entitled to bring actions before the Federal Supreme Court concerning the violation of a «fundamental precept». For an effective overview of recent environmental actions brought by some Brazilian political parties before the Federal Supreme Court, see G. PRATTI, *Brazil is entering its decade of watershed caselaws on climate action and inter-legality can play a key role in it*, Center for Inter-legality Research, available at <https://www.cir.santannapisa.it/issue>. The role of political parties as actors through which citizens may play their watchdogging function in environmental matters is something which requires further investigation. The EU and its Member States are not moving in this direction yet, but maybe the time is ripe to start thinking about a similar mechanism which may work in the EU, according to which political parties can help citizens in the performance of said function.

⁶³ See M. ALLENA, *Blockchain Technology for Environmental Compliance: Towards a “Choral” Approach*, in *Environmental Law Review*, 50, 4, 2020.

⁶⁴ The European Commission has been using online platforms for a long time to carry out, for example, public consultations. See on this topic C. QUITTKAT, *The European Commission's Online Consultations: A Success Story?*, in *Journal of Common Market Studies*, 49, 3, 2011, pp. 653-674.

⁶⁵ M. ALLENA, *Blockchain Technology*, cit., pp. 1075-1078. The author recognizes that «data of this type also raise a whole series of problems: for example, it is a known fact that, in particular due to their low level of technical and scientific training, various local or community groups tend to overstate the importance of certain situations, and also tend to shift the focus of their attention quickly from one crisis to another». Anyway, the author adds that «technological development and the experience of the direct involvement of the general public in ambient monitoring are for the time being the only options available, imperfect as they may be, for making up for the limits and mitigating the costs borne by the authorities (and ultimately by society as a whole) of a function that is generally managed exclusively by public agencies».

5. *Final remarks*

Our analysis, which focused on the different types of public involvement the Commission intends to promote in the context of the Green Deal and the functions performed by each of them, leaves open a number of additional questions, which can only be answered by following closely the future developments of the regulatory process.

Firstly, one could try to understand how the participatory and open mode of action described above will impact the dynamics of the Green Deal: for example, whether it can promote the Commission's *leading role* in the development of said regulatory process.

In addition, one could explore whether the types of public involvement described above are just internal techniques of the Green Deal or, on the contrary, they reflect a wider institutional trend.

Today, citizens involvement is a typical way through which environmental problems are addressed by public authorities, both at the supranational and national level.⁶⁶ In fact, the implementation of policies that tackle climate change may clash with the democratic preferences of citizens. This explains, for example, the Commission's emphasis on the need for a socially «just transition»⁶⁷ and its commitment to listen to the demands coming from citizens. Public involvement aims precisely to lead citizens to shift their preferences, facing with new information and evidence about pressing issues, enhancing their grasp of complex problems and confronting their points of views with those of others.⁶⁸ An idea of public engagement which recalls what is known as

⁶⁶ We recalled the example of the French *Convention citoyenne pour le climate*: see above, note 28. With reference to public participation in environmental matters and the so called “environmental democracy”, see in general G. BANDI (ed.), *Environmental democracy and Law. Public participation in Europe*, Europa Law Publishing, 2014; J. S. DRYZEK - H. STEVENSON, *Democratizing Global Climate Governance*, Cambridge, 2014; with a specific regard to the Italian experience, M. CALABRÒ, *Potere amministrativo e partecipazione procedimentale. Il caso ambiente*, Editoriale Scientifica, Napoli, 2004, spec. p. 186 e ss.; M. FEOLA, *Ambiente e democrazia. Il ruolo dei cittadini nella governance ambientale*, Giappichelli, Torino, 2014, p. 1 e ss.

⁶⁷ *The European Green Deal*, cit., p. 16.

⁶⁸ See D. HELD, *Models of Democracy*, Polity Press, Cambridge, 2006, p. 233: «democratic theory must direct itself to constitutional designs which help build in to the process of politics itself the opportunity to learn and to test publicly citizens'view».

deliberative democracy, whose key objective is «the transformation of private preferences via a process of deliberation into positions that can withstand public scrutiny and test».⁶⁹ Accordingly, «an effective and just action on climate change depends upon a continuing involvement of citizens in the making and delivery of policy»⁷⁰; while representative democracy's traditional mechanisms could be insufficient ways to achieve this alone.⁷¹

In this regard, it could be useful to read the documents analyzed in the preceding sections in connection with the recent European Democracy Action Plan⁷², in which the Commission committed to promote «participatory and *deliberative* democracy», supporting «democratic engagement and active participation beyond elections».⁷³

Even if the period we are living in looks particularly promising, it shall be yet checked - beyond the long list of good intentions and attractive declarations - whether the conception of public involvement underlying the Green Deal's regulatory process will live up to the expectations raised by the Commission's «appeal to citizens».

ABSTRACT

Giammaria Gotti – *The Involvement of the Public in the Green Deal's Regulatory Process: An Appeal to People as 'Citizens'*

The paper intends to clarify the conception of public involvement that seems to underlie the Green Deal's regulatory process, in particular in which way the public is involved and what is the function of this involvement. Taking into account a number of recent Commission's documents, three different ways

⁶⁹ *Id.*, *op. ult. cit.*, p. 237. On this issue, see also G. SMITH, *Deliberative Democracy and the Environment*, London, 2003, p. 1 e ss.

⁷⁰ See D. HELD – A. F. HERVEY, *Democracy, climate change and global governance. Democratic agency and the policy menu ahead*, Policy Network Paper, 2009, available at <https://core.ac.uk/download/pdf/22877395.pdf> Last access 12.06.2021.

⁷¹ This could explain the emphasis put by the Commission on public participation, leading us to reflect on the delicate balance between participatory and representative democracy, namely to what extent is appropriate to somewhat oppose the “public” to their elected representatives (the European Parliament) and how much it might strengthen the role of the “executive” (the European Commission) to the detriment of parliamentary procedures.

⁷² Communication from the Commission, *European democracy action plan*, COM(2020) 790, 3.12.2020.

⁷³ Communication from the Commission, *European democracy*, *cit.*, pp. 8-9.

in which the Commission intends to involve the public can be identified: “bottom-up” ways of involvement; participation in the development and implementation of policies; empowerment through access to administrative and judicial review. The “bottom-up” involvement aims to create a “sounding board” to amplify the pressure of problems, while participation in the development and implementation of EU policies plays an important legitimising function. Moreover, access to justice aims to empower individuals, making them the «watchdogs in the democratic space». The Commission also suggests that these forms of involvement are something different from the past, a change of perspective in the EU’s approach to its citizens. For example, on the occasion of the inauguration of the European Climate Pact, Frans Timmermans, Vice President of the Commission, spoke about a Pact which «appeals to people as citizens and not as consumers». Therefore, this analysis aims at understanding if the EU is really moving towards a novel conception of public involvement.

KEY WORDS: *European Green Deal; Climate Action; Public Involvement; Participation; Democratic Legitimacy.*