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Substantiating or Formalizing the Green Deal Process? The Proposal for a European Climate Law

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1. *Introduction*

On March 2020, in an atmosphere of great enthusiasm and political euphoria, the European Commission has presented its proposal for a European Climate Law[1]. The proposal represents the first legislative formalization of the EU's political ambition to become the first climate-neutral continent, expressed by the Commission in December 2019 and lying at the heart of the European Green Deal[2]. Indeed, the proposal adopted by the Commission aims to establish the legal framework to achieve the ambitious goal of climate neutrality, enshrining the net-zero greenhouse gas emission target by 2050 in legislation and committing both the European Union (EU) institutions and the Member States to take all necessary measures to collectively achieve it[3]. The political commitment of the EU to climate neutrality is transformed into a formal and binding legal obligation.

The proposal is motivated by the intention to provide a clear direction by drawing a path to climate neutrality, in order to ensure the predictability, legal certainty and transparency of the EU's action for all actors involved in the ecological transition process: businesses, investors, workers, consumers, citizens

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[1] Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (*European Climate Law*), COM(2020) 80 final of 4 March 2020.
[2] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal*, COM (2019) 640 final.
[3] Article 2 (1) and (2) of the proposal.

and civil society. As declared by the President of the Commission, the European Climate Law «gives legal form to our political commitment […], providing predictability and transparency for European industry and investors. It also gives a clear direction to our green growth strategy and ensures a smooth and fair transition»[4].

Yet, how is this intention translated into law? Through which regulatory instruments and techniques? Does the proposal for a European Climate Law represent a real and effective step forward in achieving climate neutrality? Or is it still, to some extent, an ongoing "masked" regulatory project, suffering from a lack of effectiveness?

Tackling this dilemma is crucial to understand if, beyond the enunciation of the climate neutrality objective and its legislative formalization, the European Climate Law surrounds it with an adequate governance system and efficient implementing mechanisms capable of leading to its achievement.

In order to address these questions, we will proceed as follows. First, the features of the concept of climate neutrality as it emerges from the provisions of the European Climate Law will be briefly presented (§ 2). Then, we will analyze the specific provisions of the proposal and the main regulatory tools and techniques adopted to achieve the climate neutrality target, according to a functional taxonomy (§ 3). In the third part, some elements of weakness of the proposal will be highlighted (§ 4). Finally, some concluding remarks will be presented.

2. *Objective: Climate Neutrality as a Multi-Faceted Concept*

Climate change is the main issue of the European Green Deal and climate neutrality is the macro-objective of the transformative regulatory process triggered by the Commission. Given the pivotal role played by the concept, it is appropriate to clarify first what a climate-neutral EU means and implies.

The European Climate Law proposal immediately provides a legal and technical definition of climate neutrality, to be intended as «the irreversible and gradual reduction of greenhouse gas emissions and enhancement of removals by natural or other sinks in the Union»[5], which entails in turn that «Union-wide

[4] The statement was made by Ursula von der Leyen on the occasion of the presentation of the European Climate Law proposal, on 4 March 2020, and it is available at ec.europa.eu.
[5] Article 1 (1) of the proposal.

emissions and removals of greenhouse gases regulated in Union law shall be balanced at the latest by 2050, thus reducing emissions to net zero by that date»[6]. The basic idea that emerges by reading the two definitions in combination is that, since today more carbon dioxide is emitted that can be absorbed (thus contributing dramatically to global warming), a new balance must be found to compensate anthropogenic emissions: on the one hand, by reducing gas emissions and keeping them under control; on the other, by compensating the emissions we cannot avoid, promoting the removal of greenhouse gases through natural or technological solutions[7].

The strategy of the Commission is thus twofold, and the two actions, albeit different, are functionally interlinked. Even if it might be criticized for the development model it seems to embrace and advocate[8], the Commission's approach to climate neutrality can be considered as a pragmatic and *Realpolitik* one: while greenhouse gases emission should be avoided at source as a priority, it is nonetheless crucial to promote their removal in order to compensate those sectors in which decarbonization is much more complex (e.g. steel, textiles, plastics).

However, the aforementioned definition of climate neutrality is not the only one assumed by the proposal. Once the veil of apparent technicality and neutrality of the concept is pierced, a broader and richer formulation of climate neutrality emerges from the preamble to the European Climate Law, which cannot be reduced to the mere zeroing of emissions, but is strongly related to the health and well-being of EU citizens, the prosperity and fairness of the society, its solidarity and sense of justice and, last but not least, the competitiveness of a resource-efficient economy[9]. Climate neutrality, as conceived by the proposal

[6] Article 2 (1) of the proposal.

[7] For instance, by better managing our forests, soils and ecosystems and maintaining their absorption capacity or further developing carbon capture or storage technologies.

[8] V. RUBINO, *Sviluppo sostenibile ed effettività della governance multilivello*, in *federalismi.it*, 16 dicembre 2020, pp. 234-235 and note 95, according to which the Commission «seems to be aiming at the goal of climate neutrality not through an effective (and definitive) reduction in emissions, but through give-and-take 'accounting' mechanisms that - in fact - insist on a development model that is not yet fully aligned with the need not to pollute».

[9] The point emerges in particular from reading recital 15 of the proposal, according to which, in elaborating and adopting the measures at Union and national level to achieve the climate neutrality target, both Member States and European institutions have to «take into account the contribution of the transition to climate neutrality to the well-being of citizens, the prosperity of society and the competitiveness of the economy; energy and food security and affordability; fairness and solidarity across and within Member States considering their economic capability, national circumstances and

and *a fortiori* by the overall Green Deal, is therefore a *multi-faceted* concept, which hides a profoundly political soul behind its technical guise. And its high transformative force pushes in the direction of a functional reorientation of the European integration process, of its core values and of its ultimate mission.

3. *Regulatory Instruments: a Functional Taxonomy*

Since climate neutrality is the cornerstone of the European Climate Law, it is necessary to analyze the regulatory armoury devized at EU level to achieve this ambitious objective. Which regulatory tools and techniques are designed in order to reach the zeroing of emissions? How does the European Climate Law seek to ensure compliance with its provisions? Does it adopt a command and control approach, based upon the exercise of authority and coercion on the addressees of its rules? Or rather it embraces a different paradigm, relying on the ability to induce compliance with other governing instruments?[10]

The analysis of the proposal reveals several types of instruments and techniques. Although distinct, they complement each other (sometimes partially overlapping) and together constitute the Commission's overall strategy for the ecological transition process to take place. In the following, such instruments will be examined separately, according to a functional taxonomy, focusing on the effects that, through each of them, the European Climate Law seeks (and hopes) to achieve.

In our view, five main types of instruments can be identified:

(i) Administrative rule-making instruments

The first regulatory instrument on which the European Climate Law strongly relies in order to achieve the zeroing of emissions is represented by the administrative rule-making power of the Commission in the form of delegated legislation, called upon to supplement and complete the legislative framework.

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the need for convergence over time; the need to make the transition just and socially fair (…)». See also the Communication of the Commission, *The European Green Deal*, cit., p. 2.

[10] On the development by the EU legal order of steering and governing instruments «qualitatively different from coercive means of enforcement» and yet capable of structuring the compliance see E. CHITI, *The Governance of Compliance*, in M. CREMONA (ed.), *Compliance and the Enforcement of EU Law*, Oxford University Press, Oxford, 2012, p. 31 ss.

The Commission is required to identify, through its secondary normative power, a trajectory at Union level for greenhouse gas emission reductions, in order to achieve the 2050 climate neutrality objective. Such trajectory, which Member States have to implement and assume as a parameter of their action, needs to be progressively reviewed in order to adjust emission reduction targets[11]. Thus, in setting out a pathway towards climate neutrality, the Commission acts as a "helmsman" who indicates the course to be followed and periodically corrects it, giving gradualness and proportionality to the decarbonizing process.

The exercise of the delegation of power is regulated by the same proposal, which sets out limits and conditions in line with the general regime laid down by the Treaties[12]. Yet, while the delimitation of the objectives and purposes of the delegation is quite clear (i.e. achieving climate neutrality), that of the content is somewhat more nuanced, since the Commission is provided a wide margin of manoeuvre when drawing up the trajectory, only partially limited by some factors and parameters it has to take into account in its action[13].

The implementing phase of the process at Union level is thus dominated by the Commission, which through its secondary normative power – in the form of delegated acts – seeks to protect and ensure the predictability of European action, the confidence of all the economic and social players involved in the ecological transition process and the legal certainty that a piece of legislation alone is unlikely to fully provide.

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[11] Article 3 (1) of the proposal. The trajectory shall be reviewed every five years and its revision shall be aligned with the Paris Agreement timelines, at the latest within six months of each "global stocktake" (i.e. the process through which the parties periodically take stock of the implementation of the Paris Agreement in order to assess the collective progress made towards achieving its long-term goal). Interestingly enough, the European Climate Law seeks to establish a kind of coordination with the Paris Agreement, in order to increase the consistency and the effectiveness of the overall action against climate change.

[12] *Inter alia*, the possibility of amending or supplementing only the non-essential elements of the legislative act; the legislative delimitation of the objectives, content, scope and duration of the delegation of power; the revocability at any time of the delegation and the need to consult experts designated by Member States before the adoption of a delegated act. See Article 9 of the proposal and Article 290 (1) and (2) TFEU.

[13] These factors, which partially correspond to the sub-objectives in which is articulated the Green Deal, are listed by Article 3 (3) of the proposal. Specifically: cost effectiveness and economic efficiency; competitiveness of the EU's economy; best available technology; energy efficiency, energy affordability and security of supply; fairness and solidarity between and within Member States; the need to ensure environmental effectiveness and progression over time; investment needs and opportunities; the need to ensure a just and socially fair transition; the best available and most recent scientific evidence.

(ii) Governance instruments based on assessment and reporting mechanisms

A second relevant regulatory instrument emerging from the proposal is the construction of a system of assessment and reporting centred on the Commission, whose periodic monitoring and evaluations cover both the consistency of national measures adopted in accordance with the aforementioned trajectory, the collective progress achieved by the Member States and the effectiveness of the measures elaborated by the EU, in the light of the climate neutrality target and the elaboration and implementation of adaptation strategies and plans[14].

The mechanism of assessment and reporting built around the Commission confers it a strong supervisory role: not only it designs – through its non-legislative rule-making power – the trajectory towards climate neutrality, it also monitors its overall compliance, assessing both national and European performance. However, while the evaluation of the conduct and measures taken by Member States represents a traditional *modus operandi* of the Commission (as the guardian of EU treaties), the power of also evaluating the behaviour and measures of other European institutions is a far from obvious or neutral development. Indeed, the supranational institution guarantees itself the right to challenge the European Parliament and Council in light of the climate neutrality objective, thus altering in some way the institutional architecture and balance and exposing itself to possible reactions from monitored institutions.

(iii) Governance instruments relying on non-authoritative measures

A third governing instrument that plays a cardinal role within the proposal are the recommendations (non-authoritative measures) adopted by the Commission in order to induce Member States' compliance in case of

[14] The proposal devotes Article 4 to adaptation to climate change, stressing the need for the European institutions and Member States «to ensure continuous progress in enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change in accordance with Article 7 of the Paris Agreement». In addition, Member States are required «to develop and implement adaptation strategies and plans that include comprehensive risk management frameworks, based on robust climate and vulnerability baselines and progress assessments».

unsatisfactory performance. Indeed, if the Commission, in its periodic assessments, finds the national measures inconsistent or inadequate or considers the progress insufficient, it may issue recommendations to the Member State, making them publicly available and thus increasing the pressure on the addressee. The latter has to take due account of the recommendation, in a quite evocative «spirit of solidarity»[15] and loyal cooperation between Member States (horizontal dimension) and towards the EU (vertical dimension), and if it decides not to address the soft law measure, has to provide the Commission its reasoning[16], according to a comply or explain regulatory approach.

Thus, the governance instrument conceived by the European Climate Law is a non-binding measure that relies on the Commission's ability to drive and steer compliance rather than on coercive means of enforcement[17], envisaging that some kind of political or reputational sanction may follow in case of violation of the EU standards by national public powers[18].

(iv) Organizational instruments based on centralized governance

A fourth regulatory technique that can be identified is the centralization of the governance model in the Commission, which emerges as the real "control room" for the whole process. Admittedly, rather than being a conceptually autonomous instrument, it represents the projection and declination on the institutional side of the last two instruments analyzed. According to this regulatory solution, the Commission is called upon to regularly assess both national and European performance in the light of the climate neutrality target and to induce and drive Member States' compliance with non-coercive means,

[15] Interestingly enough, the proposal's use of the word «spirit» rather than the more canonical term principle seems almost to evoke that spirit of the Treaty repeatedly mentioned by the Court of Justice in *Van Gend en Loos* (ECJ, 5 February 1963, Case 26/62), one of the founding judgments of the European integration process.
[16] Article 6 (3) of the proposal.
[17] The development of this regulatory technique within the EU legal system is underlined by E. CHITI, *The Governance of Compliance*, cit., p. 31 ss.
[18] Admittedly, this is the one of the rationales behind the use of soft law in the European legal order, whereas soft law is intended as «general rules of conduct laid down in instruments which have not been awarded legal force as such, but which nevertheless have certain legal effects and which are directed at and may produce practical effect». The accurate definition is of L. SENDEN-S. PRECHAL, *Differentiation in and Through Community Soft Law*, in B. DE WITTE-D. HANF-E. VOS (eds.), *The Many Faces of Differentiation in EU Law*, Intersentia, Antwerpen, 2001, p. 185.

thus following a rationale not dissimilar to that behind the soft governance instrument known as Open Method of Coordination (OMC)[19].

From an institutional architecture point of view, the highly centralized administrative implementing model designed by the European Climate Law seems to be only partially mitigated by the allocation of an auxiliary – but no less relevant – role to a decentralized «information agency»[20] without rulemaking powers (i.e. the European Environment Agency), in charge of assisting the Commission in the preparation of its assessments and of providing it with highly qualified environmental information and scientific reports[21].

(v) Empowering and enabling instruments

The last regulatory tool, which is less immediate but no less important in the economy of the proposal, is represented by the empowerment of citizens and civil society, whose proactive and conscious commitment is deemed as indispensable for achieving the climate neutrality objective. Admittedly, it is a regulatory instrument conceptually different from those previously examined, which enriches the Commission's strategy with an additional and partly new element. Its underlying rationale is that laws and regulations, although fundamental, are not enough alone: for the ecological transition process to take place, a new deal with the overall society is needed, according to the same logic that permeates the Green Deal itself[22] and that recently resulted in the approval of the European Climate Pact[23].

[19] Yet, in the European Climate Law the objective of climate neutrality has a binding nature. On the Open Method of Coordination see C. DE LA PORTE, *Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?*, in *European Law Journal*, Vol. 8, No. 1, March 2002, p. 38 ss.; E. SZYSZCZAK, *Experimental Governance: The Open Method of Coordination*, in *European Law Journal*, Vol. 12, No. 4, July 2006, p. 486 ss.
[20] E. CHITI, *European Agencies' Rulemaking: Powers, Procedures and Assessment*, in *European Law Journal*, Vol. 19, No. 1, January 2013, pp. 98-99.
[21] Article 7 of the proposal.
[22] Communication of the Commission, *The European Green Deal*, cit., p. 22, where the «involvement and commitment of the public and of all stakeholders» is deemed crucial to the success of the EU Green Deal project.
[23] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *European Climate Pact*, COM (2020) 788 final, 9 December 2020. In the words of the Commission (p. 3), the European Climate Pact «will offer ways for people and organisation to learn about climate change, to develop and implement solutions, and to connect with others to multiply the impact of those solutions. The Pact

Thus the Commission, by promoting and facilitating multi-level inclusive processes and open mechanisms for public participation and discussion[24], openly calls for the intervention and help of the EU citizens and lays foundations for strong political mobilization. It enables society, organizations and citizens – operating as a sort of Commission's decentralized agents – to contribute to the Green Deal's ambitious goal, by giving them rights and awareness and providing them spaces to discuss, share ideas and best practices and develop climate-conscious solutions.

4. *Criticalities: the "Unbearable Lightness" of Governance and the Lack of Effectiveness*

Given such regulatory framework, one might wonder whether it is really capable of achieving the new climate target. Indeed, the proposal does not lay down a robust governance system, the chain of administrative implementation is quite unclear and the success of the project largely depends on the measures adopted in key policy fields by Member States[25], which are required to implement at administrative level the greenhouse gas emission reduction targets periodically set by the Commission.

The system devized, in particular, relies on (reinforcing) existing monitoring mechanisms such as the one represented by the Governance of the

will create a lively space to share information, debate and act on the climate crisis. It will offer support for a European climate movement to grow and consolidate».

[24] According to Article 8 of the proposal, in order to promote effective public participation in climate change issues, the Commission is required to engage with all social partners, citizens and civil society to enable them to commit their efforts towards a climate neutral and resilient society, by facilitating a multi-level inclusive and accessible process for the exchange of best practices and the identification of the most appropriate actions to the achievement of climate neutrality. In addition, the Commission may also make use of the multilevel climate and energy dialogues (established by Member States in accordance with Regulation (EU) 2018/1999), where all the public and private actors and relevant stakeholders can actively engage and discuss the achievement of the climate neutrality objective and the different scenarios envisaged for energy and climate policies, analyzing and reviewing at the same time the progress made. On the need to ensure the participation of civil society in order to increase the «legal credibility of the energy transition» see G. BELLANTUONO, *I modelli e gli strumenti della programmazione energetica: un'analisi comparata*, in L. CARBONE, G. NAPOLITANO, A. ZOPPINI (eds.), *La Strategia energetica nazionale: «governance» e strumenti di attuazione. Annuario di diritto dell'energia 2019*, il Mulino, Bologna, 2019, p. 77 ss.

[25] In a wider perspective, on the crucial role played by public powers in reorienting the economic system towards environmental and ecological objectives see recently A. MOLITERNI, *La sfida ambientale e il ruolo dei pubblici poteri in campo economico*, in *RQDA*, No. 2, 2020, p. 32 ss.

Energy Union and Climate Action established by Regulation (UE) 2018/1999[26], which is partly borrowed, amended and adapted to the new and more ambitious goal. It is certainly not by chance that the Commission has to present the results of its assessments (on national measures and collective progress) to the other European institutions together with the State of the Energy Union Report and, even more, that national public powers have to adopt their measures on the basis of the Integrated National Energy and Climate Plans[27], representing *de facto* the only parameter on which Member States can rely in elaborating their strategy.

The proposal, however, does not outline any mechanism to be relied upon for implementing the decarbonizing process, nor does it identify or design any (strategic) project or public-private partnership functionally oriented to the achievement of climate neutrality[28]. It refrains from setting out specific or concrete measures to be adopted by national public powers, which are left with considerable autonomy and discretion, showing almost a lack of interest in the phase of administrative execution and enforcement[29] (perhaps assuming a set of implementing mechanisms already existing in other sectors and policy fields)[30].

This system of «experimentalist governance»[31] is basically built around the Commission and its ability to progressively set feasible emission reduction

[26] According to Article 1 of Regulation (UE) 2018/1999, the governance mechanism set up aims to implement strategies and measures to achieve the EU's energy and climate objectives, encourage cooperation between Member States, ensure the quality of information and help provide greater regulatory and investor certainty. On the importance of the energy transition see E. BRUTI LIBERATI, M. DE FOCATIIS, A. TRAVI (eds.), *La transizione energetica e il winter package. Politiche pubbliche e regolazione dei mercati*, AIDEN, Wolters Kluwer, Milano, 2018.

[27] National Integrated Energy and Climate Plans are referred to in the Regulation (EU) 2018/1999. The development and implementation of such plans are the result of an iterative and interlocutory process between the Commission and the Member State. On this topic see A. PRONTERA, *Il PNIEC nella governance europea e nazionale*, in *Energia*, No. 2, 2020, pp. 66-71.

[28] For instance: what instruments and mechanisms will be used to mobilize and direct the investments necessary to achieve the ecological transition process? How the Commission intends to concretely support national public powers in planning, elaborating and implementing decarbonization projects (also in the light of Article 197 TFEU)?

[29] In a broader perspective, the risks of neglecting the enforcement phase are underlined by A. SIKORA, *European Green Deal – legal and financial challenges of the climate change*, in *ERA Forum 21*, p. 684, according to which «once the EGD objectives translated into legal instruments, one should not lose of sight the enforcement level, in particular, the issue of judicial enforceability of environmental commitments expressed therein».

[30] Indeed, one possible explanation is that the Commission relies on and refers to some economic sectors (such as the energy one) where there are already a number of implementing tools and patterns of joint administration.

[31] The reference is to the concept elaborated by C.F. SABEL, J. ZEITLIN, *Learning from Difference: the New Architecture of Experimentalist Governance in the EU*, in *European Law Journal*, No. 3,

targets, to regularly assess Member States' performance and to structure their compliance through non-authoritative means. Within this mechanism, national public powers are responsible for the administrative execution of the trajectory indicated by the Commission, without, however, being subject to coercive measures (such as infringement proceedings) and sanctions in case of bad performance[32]. Indeed, the governance instrument chosen by the proposal is a recommendation (soft law) that relies on the Commission's ability to steer and induce compliance rather than on administrative enforcement and judicial control.

As already pointed out, the governance model framing the relations between the two levels is the Open Method of Coordination (OMC), with all the limits and shortcomings that such a regulatory solution may encounter when applied to monitor and assess the gradual reduction of gas emissions and functionalized to achieve a target as ambitious as the climate neutrality one[33]. Whether and to what extent this flexible regulatory solution is capable of working, is a highly relevant question, which does not necessarily have a positive answer.

Unsurprisingly, some scholars have attempted to identify potential remedies to the structural lack of effectiveness of this regulatory approach as applied within the context of the European Climate Law and, more generally, of the overall Green Deal: on the one hand, advocating the adoption of a «closed method of coordination», based on the assumption of legally binding obligations by national public powers and the use of coercive means by European institutions in case of non-compliance (e.g. barred access to EU green funds)[34]; on the other, assuming forms of indirect coercion of national conduct that deviate from the trajectory outlined by the Commission – and thus are capable of compromising

2008, pp. 271-327, whose distinctive features are the setting of a provisional goal at EU level, a wide discretion of local units (Member States) in pursuing the objective, regular reporting on the performance and the adoption of corrective measures.

[32] Admittedly, two factors may have influenced this regulatory option: on the one hand, the difficulty of identifying a legal basis in the Treaties for introducing sanctions against Member States that do not comply with greenhouse gas emission limits as set by the Commission's trajectory; on the other, the lack of political consensus to sanction a "disobedient" Member State.

[33] L. LIONELLO, *Il Green Deal europeo. Inquadramento giuridico e prospettive di attuazione*, in *JUS- Online*, p. 127 ss.

[34] L. LIONELLO, *op.cit.*, p. 130. The expression «close method of co-ordination» was used within the framework of economic governance in the EMU by F. AMTENBRINK, J. DE HAAN, *Economic Governance in the European Union – Fiscal Policy Discipline Versus Flexibility*, in *Common Market Law Review* 40, 2003, p. 1086 ss.

the achievement of the final binding objective of climate neutrality – on the basis of the general duty of loyal cooperation incumbent on Member States (Article 4, par. 3 TEU) and on the judicial enforceability of their (broadly interpreted) environmental procedural obligations[35].

5. *Conclusions: Looking to the Future in Legal Terms*

From an institutional perspective, the European Climate Law certainly strengthens the powers and role of the Commission, in line with the overall approach of the Green Deal. While in the latter, the Commission presents itself as the key political innovator, in the former it empowers itself as the key regulator, monopolizing the implementing phase of the regulatory process and emerging as the real "direction cabin" for it. Indeed, it indicates the trajectory towards climate neutrality through its secondary normative power (delegated legislation); it controls and evaluates Member States' performance; it assumes to steer their compliance through soft law measures (recommendations); and it enables citizens to contribute to the Green Deal's ambitious goal, by giving them rights and providing them arenas to debate.

As to the regulatory tools and techniques adopted by the proposal, some of them are part of the traditional repository of the EU legal order (delegated acts, non-binding measures, open coordination), others – as conceived and for the rationale behind them – more innovative (empowerment of citizens and call for political mobilization) and open to further interesting development (Commission's assessment of other EU institutions' behaviour). Yet, a tension seems to exist between strong regulatory instruments (in the form of delegated legislation) and legally weak ones (in the form of recommendation).

At the beginning of the inquiry one more question was raised: whether the European Climate Law represented a real step towards climate neutrality or whether it was still, to some extent, a "disguised" regulatory project. The answer, in our view, is nuanced.

[35] V. RUBINO, *op.cit.*, p. 226 ss. In a wider perspective, focusing on the overall Green Deal project A. SIKORA, *op.cit.*, p. 684, notes that «judicial protection and enforcement of environmental procedural and substantive rights and to the certain extent environmental principles might be enhanced by the EGD rationale». On the role of procedural standards in EU environmental law see A. EPINEY, *EU Environmental Law: Sources, Instruments and Enforcement*, in *Maastricht Journal of European and Comparative Law*, 2013, p. 414 ss.

From a strictly legal point of view, of legal positivism, the ambitious goal of achieving climate neutrality by 2050 has left the perimeter of the soft regulation in which it was previously confined and has entered into that of the hard law. Admittedly, this is a remarkable step forward: the political commitment of the EU is transformed into a formal and precise legal obligation to comply with. The administrative rule-making of the Commission, through delegated legislations, further contributes to enhancing legal certainty, predictability and confidence for all the actors involved in the ecological transition process, conferring it proportionality and gradualness.

Yet, this process also presents several shortcomings: it is not sustained by an appropriate governance; the chain of administrative implementation is far from clear and the success of the overall mission depends largely on the Member States, on their respect for the principle of loyal cooperation (*rectius*: on their «spirit of solidarity») and on the capacity of their national administrations to implement the emission reduction target periodically set by the Commission's trajectory.

In this respect, the European Climate Law seems more an *ex post* formalization of the Green Deal than a self-sufficient legislation[36]: it takes a first necessary step and looks at the future in legal terms, launching in turn a regulatory process whose outcomes are highly uncertain. One should not underestimate the administrative and enforcement deficit it suffers, which may undermine its overall effectiveness and jeopardize the achievement of its ambitious goal. The risk, in other words, is that if achieving climate neutrality «remains merely an objective without efficient legal instruments of enforcement, its impact is compromised since the very beginning»[37].

Yet, in order to mitigate the sense of partial dissatisfaction that may legitimately arise after reading the draft, it must be remembered that we are still in the middle of a process, which will require the adaptation and revision of several EU policies and disciplines[38], the updating and adoption of numerous

[36] Interestingly enough, from the point of view of the legislative technique adopted, the proposal is quite atypical. Its provisions are pretty broad, general and somewhat vague (we are very far from a command and control approach), while usually EU regulations are quite specific and detailed. The regulatory technique adopted and the (broad) nature of the provisions inevitably affect the implementation phase at national level.
[37] A. SIKORA, *op.cit.*, p. 684.
[38] On the role and implications of State aid discipline for the energy sector, also in the light of the new energy and climate targets, see recently E. BRUTI LIBERATI, M. DE FOCATIIS, A. TRAVI (eds.),

regulations and the strengthening of certain implementing mechanisms capable of producing an impact on the decarbonization target[39].

Gli aiuti di Stato: profili generali e problematiche energetiche, AIDEN, Wolters Kluwer, Milano, 2021.

[39] Examples may include the proposal to set up a Carbon Border Adjustment Mechanism (CBAM) to reduce the risk of "carbon leakage", by adjusting the price of imported goods to the amount of carbon used in their production outside the EU, or the revision and strengthening of the Emission Trading System (ETS), on which the Commission recently intervened with an implementing regulation (2021/447 of 12 March 2021) to revise the benchmarks for free allocation of greenhouse gas emission allowances. On these profiles see L. LIONELLO, *op.cit.*, p. 113 ss.; G. CLAEYS, S. TAGLIAPIETRA, G. ZACHMANN, *How to make the European Green Deal work*, in *Policy Contribution*, Issue No. 13, November 2019, pp. 5-6.

ABSTRACT

Andrea Giorgi – *Substantiating or Formalizing the Green Deal Process? The Proposal for a European Climate Law*

After presenting the concept of climate neutrality as it emerges from the European Climate Law – a multi-faceted concept that, behind its technical appearance, hides a deeply political soul – the paper dwells on the regulatory and institutional armoury devized at European level and formalized in the European Climate Law to achieve the goal of net-zero greenhouse gas emissions by 2050. In particular, a functional taxonomy is used to identify and critically analyze the main regulatory techniques and instruments designed by the European Climate Law to achieve the ambitious target of decarbonization. Although the law undoubtedly represents a step forward in the direction of climate neutrality – transforming the EU's political commitment into a formal and precise legal obligation and conferring certainty, predictability and proportionality to the ecological transition process – it does not seem to be supported by appropriate governance, the chain of administrative implementation is still unclear and great reliance is placed on the capacities of national public powers to implement the decarbonization targets. Thus, rather than substantiating the Green Deal process, the European Climate Law to some extent still remains a "disguised" regulatory project, whose outcomes are uncertain.

KEY WORDS: *Green Deal*; *European Climate Law*; *climate neutrality*; *regulation of the ecological transition process*; *regulatory instruments and techniques*; *European climate governance*; *administrative implementation and enforcement*.