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PRESENTAZIONE DEL FASCICOLO N. 1/2021

ALFREDO MOLITERNI*

Il Green Deal europeo e le sfide per il diritto dell'ambiente

Il presente fascicolo della *Rivista Quadrimestrale di Diritto dell'Ambiente* ha carattere monografico ed è interamente dedicato al *Green Deal* europeo. Esso costituisce il primo di una serie di approfondimenti che la *Rivista* intende destinare alla trattazione delle principali questioni che stanno caratterizzando tanto i processi politico-istituzionali, quanto il dibattito scientifico sui temi ambientali.

La Sezione I del fascicolo ospita una serie di saggi in lingua inglese (coordinati da Edoardo Chiti nell'ambito delle attività del dottorato di ricerca della Scuola Superiore Sant'Anna di Pisa) che esplorano le dimensioni e le dinamiche fondamentali del *Green Deal* europeo. La Sezione III ospita un'analisi a prima lettura del recente *Piano Nazionale di Ripresa e Resilienza* (PNRR) per metterne in luce le relazioni con il *Green Deal*.

È indubbio che il progetto europeo del *Green Deal* – per la grande estensione dell'orizzonte temporale di riferimento e per la stessa ampiezza e trasversalità delle strategie di azione previste – sia destinato ad incidere in maniera significativa non solo sulla futura evoluzione della disciplina giuridica dell'ambiente (e sul relativo assetto organizzativo e istituzionale), ma, più in generale, sulla stessa portata e configurazione dell'interesse ambientale nel contesto delle democrazie pluraliste e delle stesse economie di mercato.

Nonostante si sia iniziato a parlare di *Green New Deal* già successivamente alla crisi economico-finanziaria del 2008 (a partire dal rapporto del *Green New Deal Group* del 2008 e dal rapporto UNDP del 2009 "*Rethinking the Economic Recovery: A Global Green New Deal*") e nonostante siano diversi i *Green Deals* di cui si discute a livello globale (Stati Uniti, Canada, Regno Unito, Australia, Sud America), la strategia avviata dalla

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Commissione europea con la Comunicazione dell'11 dicembre 2019 ha senza dubbio contribuito a proiettare l'U.E. nel ruolo di leader mondiale delle politiche ambientali e di contrasto ai cambiamenti climatici.

Come emerge chiaramente dai contributi raccolti nel presente fascicolo, la gravità della crisi climatica in atto è stata assunta, nello spazio giuridico europeo, a motivo e occasione per l'avvio di un percorso di trasformazione dello stesso modello economico e sociale di riferimento, fondato su un più razionale (e giusto) equilibrio tra uomo e ambiente. Secondo la Commissione, siamo dinanzi ad una «nuova strategia di crescita mirata a trasformare l'UE in una società giusta e prospera, dotata di un'economia moderna, efficiente sotto il profilo delle risorse e competitiva che nel 2050 non genererà emissioni nette di gas a effetto serra e in cui la crescita economica sarà dissociata dall'uso delle risorse». In questa prospettiva, il macro-obiettivo del raggiungimento della neutralità climatica al 2050 (in relazione al quale è in via di definitiva approvazione il nuovo Regolamento europeo sul clima) diviene il *vettore* che condiziona, a cascata, la definizione delle strategie di azione di molteplici ambiti e settori di intervento dell'Unione europea (energia, infrastrutture, trasporti, agricoltura, alimentazione) e, più in generale, la trasformazione del modello industriale e produttivo di riferimento (attorno al paradigma dell'economia circolare).

Alla tradizionale visione dell'ambiente come limite esterno allo sviluppo, da tenere, al più, in considerazione nella fase *attuativa* delle altre politiche settoriali (in virtù di un'idea *debole* del principio di integrazione contenuto nell'art. 11 del TFUE), sembra affiancarsi un'idea *forte* di integrazione, in cui il fattore ambientale è il presupposto del processo di definizione delle altre politiche settoriali e dei relativi obiettivi da raggiungere. Alla tradizionale prospettiva della tutela ambientale fondata su una visione tendenzialmente *antropocentrica* del rapporto tra l'uomo e la natura sembra affiancarsi una prospettiva ecologica *integrata*, in cui la protezione della natura diviene un valore in sé che non rileva solo in funzione della salute o degli interessi economici e sociali dell'uomo: di qui, la grande attenzione prestata alla questione della *dissociazione* tra la crescita e l'utilizzo delle risorse naturali e, soprattutto, al tema della *biodiversità*, attraverso la prospettazione di obiettivi giuridicamente vincolanti di ripristino degli ecosistemi marini e terrestri e di riforestazione (si veda la Comunicazione del maggio 2020 "*EU Biodiversity Strategy for 2030. Bringing nature back into our lives*").

Proprio in ragione di tutto ciò, il *Green Deal* parrebbe essere in grado di avviare, dal basso, un processo di sostanziale ridefinizione dei valori e degli obiettivi di fondo dell'ordinamento europeo, venendo ad incidere sulla stessa configurazione delle tradizionali politiche su cui si è fondata l'integrazione economica europea (libertà economiche e concorrenza nei mercati): appare significativa, da quest'ultimo punto di vista, la grande vivacità del dibattito avviato da alcune Autorità Antitrust degli Stati membri in merito all'opportunità di rafforzare gli spazi di flessibilità offerti dal diritto della concorrenza per supportare la transazione ecologica, sia in materia di intese restrittive (i c.d. "*sustainable agreements*"), sia in materia di aiuti di stato.

Al contempo, proprio la radicalità e l'ambiziosità degli obiettivi del *Green Deal* impongono di considerare attentamente la stessa adeguatezza dell'assetto istituzionale che ha sin qui caratterizzato il processo di integrazione europea. Da questo punto di vista, il *Green Deal* – venendo a rafforzare le esigenze di un più forte coordinamento sia a livello "orizzontale" tra le diverse politiche e settori dell'U.E., sia a livello "verticale" in relazione alle politiche economiche e industriali degli Stati – contribuisce a rendere ancor più evidenti i molti limiti che ancora caratterizzano l'ordinamento europeo, ma senza prospettare, almeno nell'immediato, ipotesi di concreta modifica dell'assetto istituzionale. È significativo che una delle più importanti novità istituzionali degli ultimi decenni (il *Next Generation UE*) sia stata sollecitata non già dalla radicalità degli obiettivi contenuti nel *Green Deal* ma, piuttosto, dalla gravità della crisi pandemica: sebbene, infatti, anche tale strumento di condivisione del debito sia stato fortemente orientato al supporto della transizione ecologica (come mette in luce, nel fascicolo, il contributo specificamente dedicato ai contenuti ambientali del Piano Nazionale di Ripresa e Resilienza presentato dall'Italia), si tratta comunque di una decisione transitoria e fortemente legata alla gravità dello *shock* economico e sociale generato dalla crisi pandemica.

Al di là di tali interventi eccezionali, una transizione ecologica credibile – e in grado di raggiungere gli ambiziosi obiettivi di lungo periodo prospettati dal *Green Deal* – rende imprescindibile l'avvio di un coraggioso processo di definitivo superamento della logica intergovernativa che ancora condiziona il processo di integrazione europea: e questo, sia nella prospettiva di un deciso ampliamento del bilancio europeo, sia attraverso un rafforzamento dei poteri di coordinamento sovranazionale in materia di politica economica e fiscale. D'altra parte, gli altissimi costi economici e sociali della transizione ecologica –

e i molteplici rischi sottesi alla riconversione dei modelli industriali e produttivi – non potranno essere gestiti solo all'interno dei tradizionali spazi di solidarietà delle comunità nazionali, ma richiederanno una più forte condivisione (e una maggiore solidarietà) tra gli stessi Stati membri.

È questa una delle più importanti sfide che il *Green Deal* pone non solo alla disciplina e allo studio del diritto dell'ambiente, ma allo stesso futuro del progetto di integrazione europea.

SAGGI

EDOARDO CHITI[*]

Introduction to the Symposium: Managing the Ecological Transition of the European Union

The European Green Deal is an innovative project aiming at making Europe 'the world's first climate-neutral continent' by 2050.[1] Its macro-objective, 'the irreversible and gradual reduction of greenhouse gas emissions and enhancement of removals by natural or other sinks in the Union',[2] clearly falls within the boundaries of climate and environmental action. Its ambitions, however, go much beyond such commitment. Climate neutrality is indeed a target provided with a highly transformative force, one pointing to the establishment of a new European society, which the Commission describes at the same time as fair and prosperous, sustained by a more advanced growth model and founded on a positive and harmonious relation between human beings and the environment.[3] Beneath the surface of the apparently technical goal of climate neutrality lurks a re-orientation of the fundamental mission of the European integration project.

Four aspects of such process of functional re-orientation of the European project are prominent and deserve to be highlighted. To begin with, the Green Deal is a long-term regulatory project, that is a process triggered by the Green Deal Communication, adopted by the Commission in 2019 as the first manifestation of 'a Europe that strives for more', and relying on a great number of subsequent measures having different regulatory forms (legislative proposals, such as that for a 'European Climate Law'; sectoral strategies, exemplified by the European Industrial Strategy and the Strategy for EU biodiversity, adopted respectively in March and May 2020; and various types of policy-documents, such as the Circular Economy Action Plan and the European Green Deal

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[1] U. VON DER LEYEN, *A Union that strives for more: My agenda for Europe. Political Guidelines for the Next European Commission 2019-2024*, available at https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf

[2] 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, Article 1.

[3] 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.

Investment Plan), all presented in the 'timeline' available on the Commission's website.[4] The Green Deal, in other terms, is a regulatory process launched by the Green Deal Communication, continuously animated by the Commission and far from concluded.

Second, the Green Deal may be interpreted as a process managing a transition from one phase of the European integration process to another. In particular, it may be understood as an attempt to move out from the current phase of European integration - that of the European multidimensional crisis, which was opened by the 2008 financial crisis and reaches out to present, exacerbated by the pandemic emergency[5] - and to open a new and more positive phase, ultimately leading to the establishment of a new societal order. From this point of view, this is a defining moment of the European Union (EU) history and the Green Deal Communication adopted in December 2019 is a constitutive document, equivalent, for idealist ambitions and potential practical impact, to the Schuman Declaration of May 9, 1950.

Third, the new phase is not a mere updating and modernization of the traditional European construct. While building on the deep values of such construct (starting with the triptych of peace, prosperity and supranationalism), the Green Deal departs from it in one remarkable way: it redesigns the traditional and constitutive value of prosperity in a way which recognizes that human beings are part of Earth's life systems and that their social and economic behaviors are ecologically bound. The type of transition that the Green Deal aims at managing is essentially an ecological one.

Finally, the new societal order that the Green Deal aims at establishing has a marked global nature. Far from being exclusively European, limited to the relationships between the subjects of the EU legal and political order, the Green Deal is a project inextricably linked to the main results of inter-state cooperation in the field of climate change, represented by the various measures adopted within the UN framework. In particular, it aims at the same time at implementing and substantially developing the UN legal framework, a double feature which characterizes the European Green Deal as an executive initiative, instrumental to

[4] See https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.
[5] See e.g. E. CHITI-A.J. MENÉNDEZ-P.G. TEIXEIRA (eds.), *The European Rescue of the European Union? The Existential Crisis of the European Political Project* (Recon Report, 2012); and E. NANOPOULOS–F. VERGIS (eds.) *The Crisis Behind the EuroCrisis: On the Multi-Systemic Failure of the EU*, Cambridge University Press, Cambridge, 2019.

the implementation of the Paris Agreement and the 2030 Agenda for sustainable development, while at the same time giving the EU the chance to act as a global leader, by providing 'a practical example for all other regions around the world' on how accomplishing the international requirements may lead to 'a more prosperous, fair, resilient and healthy world'.[6]

Our Symposium features a collection of papers sharing such overall perspective and exploring some key dimensions and dynamics of the European Green Deal.[7] It is ideally articulated in two sections, one focusing on a number of issues of the European Green Deal as a regulatory project managing the ecological transition of the EU, another situating such regulatory project in the context of the globalized legal space.

The Symposium is opened by an article, by *Andrea Giorgi*, discussing the relevance of the proposal for a European Climate Law in the overall process triggered by the 2019 Communication: as Giorgi argues, the European Climate Law seems more an *ex post* formalization of the Green Deal's Communication than a self-sufficient legislation, although one should not overlook the incremental nature of the process. Next, *Stefano Porfido*, *Michela Biscosi* and *Filippo Venturi* analyze three important European strategies elaborated by the Commission, concerning, respectively, the European industrial sector and policy, biodiversity and the food system. By pointing to these strategies, the three articles highlight a number of key dimensions of the Green Deal. *Porfido* stresses the tension inherent in the New EU Industrial Strategy between domestic interests and a more nuanced supranational vision, reflecting a change in the idea of prosperity which is at the basis of the European integration project. *Biscosi* explores the political thinking behind the contents of the Biodiversity Strategy and juxtaposes the Strategy to the evolution of EU environmental law and policy. *Venturi* reconstructs the evolutionary, rather than revolutionary, character of the

[6] 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, *Stepping up Europe's 2030 climate ambition. Investing in a climate-neutral future for the benefit of our people*, *The European Green Deal*, COM (2020) 562 final, at p. 7.

[7] This is a rather unexplored field of research; see however some forerunners' analyses on the Green Deal and certain specific processes anticipating its launch: A. MOLITERNI, *La sfida ambientale e il ruolo dei pubblici poteri in campo economico*, in *Riv. quadrimestrale di diritto dell'ambiente*, 2020, p. 32; E. BRUTI LIBERATI-M. DE FOCATIIS-A. TRAVI, *Aspetti della transizione nel settore dell'energia: gli appalti nei settori speciali, il market design e gli assetti di governance*, Wolters Kluwer, Milano, 2017; J. VIÑUALES-E. LEES, *Oxford Handbook of Comparative Environmental Law*, Oxford University Press, 2019.

Farm to Fork Strategy, which aims at satisfying the urgent needs of environmental protection within the existing institutional, political and economic architecture of the EU. Thereafter, *Chiara Scissa* points to the functional connection between the Green Deal and the Aarhus Convention, and analyzes the Commission's attempts to exploit the Aarhus Convention's potentialities, in particular in light of the rather rigid case-law of the European Court of Justice. Two articles then take a more constitutional perspective: *Roberta De Paolis* emphasizes the potential impact of the European Green Deal on the ongoing constitutional discourse on the EU polity, in particular in the perspective of 'Political Constitutionalism', while *Giammaria Gotti* discusses the involvement of the public in the Green Deal's regulatory process and the appeal, made by the Commission, to people as 'citizens'.

Gürcan Çapar and *Guilherme Pratti* expand and articulate our understanding of the European Green Deal by positioning it in the wider context of the global governance, where other Green Deals emerge and interact with one another. Which explanations can we give to the rise of a number of Green Deals? How do they relate to one another and to the existing pletora of international and transnational initiatives tackling climate and environmental-related challenges? How can we assess the Green Deal phenomenon? *Çapar* and *Pratti* provide different answers to those questions, both of them capable of illuminating the rationale and dynamics of the Green Deal process. Their articles represent a stimulating and instructive reading, which provides readers with a sense of perspective.

This Symposium is the result of a collective work carried out within the context of the PhD programme in Law at the Scuola Sant'Anna, Pisa, in winter 2020. All authors are PhD candidates who have engaged in a fresh and creative discussion in a research course on the European Green Deal and the EU ecological transition. Coordinating such discussion has been a genuinely enriching experience, for which I am grateful to all authors of the following articles.

ABSTRACT

Edoardo Chiti - *Introduction to the Symposium: Managing the Ecological Transition of the European Union*

The European Green Deal implies a re-orientation of the overall mission of the European integration project. Four aspects of such process of functional re-orientation are prominent. To begin with, the Green Deal is a long-term regulatory project. Second, it may be understood as an attempt to move out from the current phase of European integration and to open a new and more positive phase, ultimately leading to the establishment of a new societal order. Third, the new phase is not a mere updating and modernization of the traditional European construct, as the Green Deal redesigns the traditional and constitutive value of prosperity in a way which recognizes that human beings are part of Earth's life systems and that their social and economic behaviors are ecologically bound. Finally, far from being exclusively European, limited to the relationships between the subjects of the EU legal and political order, the Green Deal is a project of global relevance.

KEY WORDS: *European Green Deal; European integration; ecological transition.*

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ANDREA GIORGI*

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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* I would like to thank Professor Edoardo Chiti for his valuable suggestions on the first draft of the paper.
[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.

[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.

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[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*.

STEFANO PORFIDO*

Pragmatic Considerations vs Normative Goals. The New EU Industrial Strategy

TABLE OF CONTENTS: 1. *The Green Deal: is the European Union a normative actor?* - 2. *Preparing the Ground for the New Strategy: the Quest for a Structural Change.* - 3. *Nothing New Under the Sun?* - 4. *The Normative Ethos of the Communication: Toward a New Paradigm of Prosperity?* - 5. *Behind the Tension: The Commission's Strategic Leadership*. - 6. *Conclusions*.

1. The Green Deal: is the European Union a normative actor?

Even though the European Union (EU) has embedded environmental concerns in its policies since the 1990s,[1] it is still debated whether the EU has risen as a green normative power in the global governance.[2] Indeed, while the adoption of EU strict environmental policies has brought some scholars to enthusiastically welcome the EU as a "normative actor" in the international arena,[3] others suggest a more pragmatic and context-based view. Among the latter, Falkner argues that crucial evolutions in the environmental field should be read and understood through the lens of economical political analysis.[4] As a matter of example, Falkner points out that the leading role played by the EU in granting a sever regulation on agricultural biotechnology for food purposes was

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[1] The first Community environmental competences were established by the Treaty on the European Union OJ C 191, 29.7.1992 and Treaty of Amsterdam amending the Treaty of European Union OJ C 340, 10.11.1997.

[2] See F. VON LUCKE, *Green principled pragmatism: How the EU combines normative and consequentialist motivations in its climate policy*, 2019, at https://blogs.lse.ac.uk/europpblog/2019/05/01/green-principled-pragmatism-how-the-eu-combines-normative-and-consequentialist-motivations-in-its-climate-policy/.

[3] I. MANNERS, *Normative Power Europe: A Contradiction in Terms?* in *Journal of Common Market Studies* 40(2), 2002, p. 235. The Author refers to normative power as a power of an «ideational nature characterized by common principles and a willingness to disregard Westphalian conventions», at p. 239. As such, Europe should be conceptualised as a changer of norm, acts to change norms, and should act to extend its norm at the international level (p. 252). Similarly, Welsh refers to the EU as 'principled actor' in I. WELSH, *Values, Science and the European Union: Biotechnology and Transatlantic Relations*, in S. LUCARELLI - I. MANNERS (eds), *Values and Principles in European Union Foreign Policy*, London: Routledge, 2006, p. 74.

[4] R. FALKNER, *The European Union as a 'Green Normative Power'? EU Leadership in International Biotechnology Regulation*' 2006 at https://core.ac.uk/download/pdf/148847672.pdf.

due to consequentialist reasons deeply rooted in domestic economic interests concerning agricultural production, trade and competition with the far more developed USA's industrial power in the field.[5] Therefore, any attempt to conceive the EU as a green normative power, this is Falkner's point, should be first tested against geo-political and economic considerations.

The adoption of the EU's Green Deal, the ground-breaking political document core of the new EU Commission president Ursula von der Leyen's Agenda,[6] is doomed to fuel this debate even more. Presented as Europe's hallmark, the Green Deal finds fertile political ground in the rampant quest for more environmental justice stemming from civil society, as the young generations movement 'Friday for Future' has made clear by capturing the political scene worldwide. Together with very ambitious normative goals, the most notable of which is the achievement of climate neutrality by 2050,[7] the Green Deal seems to be characterised also by more pragmatic concerns, among which on how to preserve the EU economic and geo-political interests vis-à-vis global competitors, mainly USA and China.[8]

This paper aims to discuss the tension between pragmatic considerations and normative goals in the framework of the EU Commission's 'Communication for the New Industrial Strategy', that addresses a sector, i.e. the industrial one, which is fundamental for the achievement of the climate neutrality by 2050.[9] More analytically, this article will first discuss the reasons behind the quest for a structural change in the EU's approach to industry. Coherently with this background, in part three the article argues that the Strategy is mainly propelled by context-based and state-centric interests. However, part four will also claim that the Strategy pushes for a nuanced supranational vision on a different way of production, and that this vision reflects a normative change in the conception of prosperity. Part five suggests that the tension between States' interests and

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[5] ID., *ibidem*.
[6] URSULA VON DER LEYEN, *A Union that strives for more – My Agenda for Europe' Political guidelines for the Next European Commission*, 2019-2020.
[7] The hallmark for Europe, in von der Leyen's words. ID., *op. ult. cit.*, (n 6).
[8] See S. SUBOTIC, *A Geopolitical Commission – What's in the Name?*, 2019 at https://cep.org.rs/en/blogs/a-geopolitical-commission; S. BISCOP, *A Geopolitical European Commission: A Powerful Strategy?*, in *Clingendael Spectator*, 2019 at https://spectator.clingendael.org/en/publication/geopolitical-european-commission-powerful-strategy.
[9] M. Lucchese – M. Pianta, *Europe's alternative: A Green Industrial Policy for sustainability and convergence*, 2020 at https://mpra.ub.uni-muenchen.de/98705/.

supranational vision reflects the Commission's strategic approach for preserving its leading role in pushing for ambitious climate policies in fields that are very sensitive to member states. In light of this role, part six concludes by outlining two main challenges that the Commission has to tackle in order to direct industrial policies toward the fulfilling of the Green Deal's objectives.

2. Preparing the Ground for the New Strategy: the Quest for a Structural Change

The EU Commission released its 'Communication on the New Industrial Strategy for Europe' (the Communication) in March 2020.[10] The strategy pursues the twin challenge to ensure climate neutrality and digital leadership. To reach such goals, several mutually intertwined sub-objectives are outlined, namely: deeper and more digital single market; global level playing field; supporting industry towards climate neutrality; building a more circular economy; embedding a spirit of industrial innovation; skilling and reskilling; investing and financing the transition.[11]

The 'Communication on the New Industrial Strategy' is primarily based upon economic and political considerations, the roots of which can be traced in the European industrial approaches over the past decades.[12] That of European industry is a story of technological decline.[13] Following the triadic structure of industrial policy as encompassing trade, competitiveness, and technology,[14] this last side has been put aside for the sake of enhancing competitiveness regulations and the European single market. This was particularly true during the 1990s, when the faith in the market as an entity that could have channelled investments in technology proved to be flawed, public investments being dramatically

[10] COM (2020) 102.
[11] Communication, §3.
[12] For an overview of industrial policies, see K. AIGINGER - D. RODRIK, *Rebirth of Industrial Policy and an Agenda for the Twenty-First Century*, in *Journal of Industry, Competition and Trade*, 2020, p. 189.
[13] See F. MOSCONI, '*The New European Industrial Policy. Global Competitiveness and the Manufacturing Renaissance*', Routledge, 2015.
[14] As defined by E. J. COHEN - H. LORENZI, *Politiques Industrielles pour l'Europe - Rapport 26*, Conseil d'analyse économique, Paris, 2000.

reduced due to withdraw of states' role in steering risk-based technological developments for industries.[15]

The EU has never been able to fully recover from such a decline. The 2008 crisis has further mined public investments in technologies also due to austerity policies put in place to counter public debts crisis.[16] This contributed to a manufacturing collapse on many 'southern' European economies, increasing disparities among member states.[17] Globally, the European industry has faced violent and unbalanced competition by industrial interventionist policies such as those of China and the USA,[18] that had consequently benefited more from the so-called Manufacturing Renaissance wave. As such, and even though the EU is still a strong industrial hub,[19] the lack of a global level playfield has turned competitiveness rules into detrimental constraints for European industries to compete globally. The highly controversial Commission decision to reject the merger between Alstom and Siemens in 2019 in the name of competition imperative, thus impeaching the creation of a global European champion, is paradigmatic of such tensions.[20]

The Franco-German Manifesto,[21] approved late 2019 by France and Germany in the wake of the Alstom-Siemens affair, acknowledges such limits and fiercely quests for a structural change of the European approach to industry. Massive investments in technology at the EU level, austerity measures loosened, market barriers put in place against external competitors and above all competitiveness rules revised as to allow State interventions are aspects urged by

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[15] For a detailed account of different phases of the European industrial policies see F. MOSCONI, *The New European Industrial Policy*, cit. at n 13, p. 10 *ff*. See also M. LANDESMANN – R. STÖLLINGER, *The European Union's Industrial Policy* in *The Oxford Handbook of Industrial Policy*, OUP, 2020.

[16] R. VEUGELERS, *The World innovation landscape: Asia Rising?,* Issue 2003/02, Bruegel policy contribution, 2004.

[17] See M. PIANTA – M. LUCCHESE – L. NASCIA, *The policy space for a novel industrial policy in Europe* in *Industrial and corporate change*, Vol 3, No. 29, OUP, 2020, p. 780.

[18] The USA, far from rejecting interventionism, have kept industrial policy common at the federal and national level. In this respect, K. AIGINGER - D. RODRICK, *Rebirth of Industrial Policy*, cit. at n 12, p. 194.

[19] See Report McKinsey, *Manufacturing the Future: The Next Era of Global Growth and Innovation*, 2012, at https://www.mckinsey.com/business-functions/operations/our-insights/the-future-of-manufacturing#; *Scenario* Report, Centro Studi Confindustria (CSC), 2013.

[20] See European Commission, Press Release 6/12/2019, at https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881.

[21] https://www.gouvernement.fr/en/a-franco-german-manifesto-for-a-european-industrial-policy-fit-for-the-21st-century.

the Manifesto and can be found in the Communication. Political and economic motivations underpin such quests, rather than the purely normative ambitions.

3. Nothing New Under the Sun?

With this background in mind, the 'Industrial Strategy' appears propelled by pragmatic domestic interests rather than supranational normative aims. Particularly, the Communication's focus on new technologies is coherent with the political-economic context-based aim to reverse the EU industry structural technological stagnation and hence to ensure the long-term global competitiveness of EU industry. This is indeed confirmed by the text of the Communication, which § 3 states that innovation is urged in all policy making, to invert the European industrial decline on research and development while the U.S.A. and Chinese counterparts increased. Furthermore, Communication's § 4 is entirely dedicated to pragmatic geopolitical considerations as to ensure industrial and strategic autonomy.[22]

In this respect, while it is true that research and innovation are functional to the achievement of the ambitious green-house gases reduction targets,[23] they can hardly lead by their own to a novel normative project entailing a shift in the conception of production. This consideration might find support when considering the Communication's emphasis on innovation under the lenses of the so called 'Environmental Restoration Movement'.[24] This Movement, which roots can be traced in the early 20th century as a response to rapid industrialisation, proposes a conception on how humankind ought to live in relation to natural world which lies upon the main assumption that humans share the moral responsibility to restore harmed place to a pre-harm condition.[25] This assumption is justified by a wise and far-looking use of natural resources for the sake of

[22] For the economic relevance of the EU defence industry, as potential competitor of NATO, see D. FIOTT, *Defence industry, industrial cooperation and military mobility*, in *Report NATO and the EU: The essential partners*, NATO Defense College publisher 2019, p. 55.
[23] In this vein, F. VON LUCKE, *Green principled pragmatism*, cit. at n 2.
[24] On this Movement, see D. BALDWIN – J. DELUCE - C. PLETSCH (eds), *Beyond Preservation: Restoring and Inventing Landscape*, University of Minnesota Press: Minneapolis, MN, 1994. See also F. BESTHORN, *Restorative Justice and Environmental Restoration - Twin Pillars of a Just Global Environmental Policy: Hearing the Voice of the Victim*, in *Journal of Social and Societal Policy*, no. 3, 2004, p. 33.
[25] L. JACKSON ET AL., *Ecological Restoration: A Definition and Comments*, in *Restoration Ecology*, Vol. 3, no. 1995, p. 71.

granting future generations' prosperity. More in depth, Environmental Restoration shapes the relation between humans and natural resources based on few basic tenets. Firstly, environment has merely instrumental value for human purposes.[26] Secondly, humans dominate nature. It is true that humans are organic living entities, but they are considered different and superior to any other natural creature. As a corollary of these two assumptions, environmental issues are understood as merely technical issues, that is problems that humans can solve by means of technological progress and scientific expertise. It also follows - and this is the main normative point of this environmental approach - that humans have a moral imperative to restore and repair the natural environment.[27] However, restoration is conceived as to be functional to future human exploitation: restore now to be able to consume tomorrow. The original autonomous value of nature *per se* is denied.

Therefore, this Movement is underpinned by a relative conception of planet's limits, rather than an absolute one. While it is recognised that natural resources are limited, it is proposed that technological expertise can either restore them (as for instance a forest can be replanted) or find new alternatives if restoration is impossible (e.g., renewable energies when fossil ones are exhausted). Coherently, the Environmental Restoration Movement does not put into discussion the conception of economic development as a linear process, sharing a restrictive interpretation of sustainable development in which the focus is indeed on human development rather than on balancing this latter with environment's autonomous value.

In light of this understanding, one could conclude that the Communication's aim is to satisfy a growing need of energy and thus to ensure, through technology, a linear understanding of economic growth, natural resources' constraints notwithstanding. If this is correct, it follows that the Communication underpins a quite conservative conception of prosperity based upon a very anthropocentric standpoint,[28] for which nature merely enjoys functional value.

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[26] G. SESSION, *Deep Ecology for the 21st Century: Readings on the Philosophy and Practice of the New Environmentalism*, Shambhala: Boston MA, 1995.
[27] F. BESTHORN, *Restorative Justice and Environmental Restoration,* cit. at n 24, p. 38 *ff*.
[28] On Anthropocentrism see R. ECKERSLEY, *Environmentalism and Political Theory*, London: UCL Press, 1992, p. 51.

4. The Normative Ethos of the Communication: Toward a New Paradigm of Prosperity?

This reductive reading, however, does not seem to be conclusive. As Timmermans argued, the Green Deal does not merely mean greenwashing industries.[29] Although an organic analysis of the Green Deal goes beyond the scope of this paper,[30] the 'Industrial Strategy' certainly presents some deep normative ethos, in aiming to lead the global fight against climate change, coherently with the common but different responsibility approach.[31] Industry is indeed called to support the ecological transition as to allow Europe to be the first climate neutral continent by 2050, in compliance with the 2015 Paris Agreement. In doing so, the Communication highlights the EU industry's attitude in leading by example, being it in compliance with the «highest social, labour, and environmental standards».[32] Furthermore, the Commission states that the EU «will continue efforts to uphold, update and upgrade the world trading system»,[33] although «more established partners are choosing new paths».[34] Rhetoric aside, national economic considerations could not fully justify such emphasis on the social dimension of industry, which is urged to be the 'accelerator and enabler' of change and innovation.[35]

This ethos is particularly perceivable with reference to the circular economy sub-objective. Notably, circular model can be understood as 'the goods of today become the resources of tomorrow at yesterday's prices',[36] that is an economic model that refuses a linear conception of growth because of world's

[29] Frans Timmermans on the European Green Deal as a growth strategy at the Brussel Annual Meetings, Brussel 1.09.2020, at https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1551, p. 4

[30] For a general overview on the Green Deal, see L. KRAMER, P*lanning for Climate and the Environment: the EU Green Deal,* in *Journal for European Environmental & Planning Law,* no. 7, 2020, p. 267.

[31] C. STONE, *Common but Differentiated Responsibilities in International Law*, in *The American Journal of International Law*, no. 98(2)*,* 2004, p. 276.

[32] Communication §2.

[33] Communication §2.1.

[34] ID., *ibidem*. It is not difficult here to read a critic regarding the USA's withdrawn from the Paris Agreement decided by the D. Trump's administration.

[35] Communication §1.1. In the same paragraph, see also 'Europe's industrial strategy must reflect our values and social market traditions'. In § 2 'The European Pillar of Social Rights will continue to be our compass and to ensure the twin transitions are socially fair'.

[36] W. STAHEL, as quoted by I. FELDMAN ET AL, *The circular economy: regulatory and commercial law implications*, in Envtl L RepNews and Analysis, 46:12, 2016, p. 11009.

absolute limits.[37] A circular approach indeed focuses on the life-cycle of the product as to maintain it in the economy as long as possible.[38] As the European Commission stated, 'a circular economy preserves the value added to the products for as long as possible and virtually eliminates waste'.[39]

The circular economy model is well recognised in the EU legal order as the EU Package I and II demonstrate.[40] It is true that the text of the Communication (§3.4) is quite generic in defining how the Commission will implement this sub-objective. However, the inclusion of circular purposes in the 'Industrial Strategy' for reaching climate neutrality could constitute a novelty of great political relevance, since it would secure an efficient inter-linkage among industrial processes, various industrial sectors, and activities, as to facilitate a scale development of circular passages from resource extraction to waste treatments. In short, it would lead to structural changes in the industrial system. In this respect, the inclusion of this sub-objective in the Strategy, even if quite synthetic, should be read conjunctly with the Circular Economy Action Plan,[41] published on the same day of the Communication. The EU Commission defined circular economy as an economy «where the value of products, material and resources is maintained in the economy for as long as possible and the generation of waste is minimised».[42] Coherently, the Plan purports a regenerative growth

[37] See World Footprint – Do we fit on the planet? at https://www.footprintnetwork.org/.
[38] Lifecycle is a policy principle adopted by the EU institutions since early 2000s. See for instance the conceptualisation proposed by the EU Commission "Integrated Product Policy – Building on Environmental Life-cycle Thinking" 2003 COM 302. This principle aims at reducing products' impact on environment. In this respect, see T. DE ROMPH – J. CRAMER, *How to improve the EU legal framework in view of the circular economy*, in *Journal of Energy & Natural Resources Law*, 2020, p. 245.
[39] Questions and answers on the Commission Communication "Towards a Circular Economy" and the Waste Targets Review, Memo 14/450, 2/7/2014, Brussels.
[40] EU Commission 'Closing the Loop' and EU Commission 'A European Strategy for Plastics in Circular Economy (2018) COM 28. See also the earlier 'Manifesto for a resource-efficient Europe' (2012), at https://ec.europa.eu/environment/resource_efficiency/documents/erep_manifesto_and_policy_recommendations_31-03-2014.pdf. in which it is stated that «In a world with growing pressures on resources and the environment, the EU has no choice but to go for the transition to a resource-efficient and ultimately regenerative circular economy» (§1).
[41] A new Circular Economy Action Plan for a Cleaner and More Competitive Europe, at https://ec.europa.eu/environment/circular-economy/. For case studies regarding the Action Plan see the 'The EU's Circular Economy Action Plan – case study at Ellen MacArthur Foundation https://www.ellenmacarthurfoundation.org/case-studies/the-eus-circular-economy-action-plan.
[42] EU Commission 'Closing the Loop', cit., at n 38, p. 2.

model,[43] and it pleads for a sustainable product policy framework. Particularly, the Plan manifests the intention to go beyond producer self-regulation traditional approaches by imposing on producers and importers minimum constraints on how to produce goods as to meet circular economy's criteria.

While one could argue that the inclusion of circular economy model is justified by strategic considerations as well,[44] on the normative ground this is however relevant. Indeed, it represents a shift of paradigm from a linear conception of production to a radically new one, based on the closed-system idea. As such, it introduces in the 'Industrial Strategy', and more generally in the Green Deal, the revolutionary idea of prosperity without growth.[45] This may seem to be inconsistent with the statement that the Green Deal is a growth strategy.[46] However, it is arguable that a stark departure from current established conceptions would have been too radical and ill-placed in a general political document. Conceding merit to this interpretation, it is thus possible to suggest that alongside the twin transition the 'Industrial Strategy' seems to pursue a third more subtle and perhaps more radical transition, the one toward a new regenerative productive paradigm, entailing social and economic transformations. More precisely, the Commission, by acting as a principled actor,[47] seems to purport a shift from a pure anthropocentric understanding of production to one based on ecocentrism, in which human prosperity is conceived as strictly depending upon the respect of nature's inner value.[48] The message promoted by the Communication thus could be that 'Europe's industry (could)

[43] A model in which resources are at first taken from the environment but then they are kept in the system. That is waste becomes itself a resource to re re-used, i.e. re-cycled, multiple times. Therefore, a truly circular model of production in which the outputs become the inputs, as defined by T. DOMENECH, *Explainer: What is Circular Economy?*, 2014 at https://theconversation.com/explainer-what-is-a-circular-economy-29666.

[44] In § 3.4 the Communication outlines social advantages lined with circular economy. Also, geopolitical considerations play a role, as indeed circularity would reduce reliance on non-energy raw materials sourced from above, as indicated in § 4.

[45] In doing so, the Commission would embrace and support social systemic transformative goals determining the qualitative nature of growth. In this respect, see M. MAZZUCATO et al., *The economics of change: Policy and appraisal for missions, market shaping and public purpose*, 2018 at https://www.ucl.ac.uk/bartlett/public-purpose/publications/2018/jul/economics-change-policy-and-appraisal-missions-market-shaping-and-public.

[46] Communication §2.2.

[47] See note no. 3.

[48] On ecocentrism see R. ECKERSLEY, *Environmentalism and Political Theory*, cit. at n 28, p. 57; D. PEPPER, *Eco-socialism: From Deep Ecology to Social Justice*, New York: Routledge, 1993, p. 33.

lead the twin transition and drive our competitiveness'[49] only by embedding such conception of prosperity in the industrial policies. This latter aspect would constitute the real normative novelty of the Communication.

5. Behind the Tension: The Commission's Strategic Leadership

The 'Communication on the New Industrial Strategy' balances strong pragmatic considerations propelled by Member States (MSs) with normative aspirations campaigned by the Commission beyond domestic interests. The circular economy project, which implementation should bring to a transition toward a new growth paradigm and thus to a new concept of prosperity, is one of those normative objectives.

In this respect, it is appropriate to stress that such tension reflects the Commission's strategic behaviour in pursuing its normative ambitions while operating in fragmented and politically sensitive fields such as the industrial one. This field indeed is difficult to handle because of the asymmetrical preferences of MSs regarding the industrial sector, on the ground of both the internal deep polarisation of industrial policies and the external fierce competition with major global players. In such contest, pushing unilaterally toward audacious changes could result into a failure if Member States' concerns are not sufficiently met. A more cautious and nuanced approach is therefore more likely to lead to results, for instance by means of repackaging policies[50] as to facilitate holding parties accountable to already existing commitments by pushing for higher standards.[51] Under this perspective, the 'Strategy' label adopted by the Communication is not meaningless, as indeed it makes clear the Commission's specific *modus operandi* by purporting its objective without jeopardising MSs interests.[52]

The strategic approach does not mean that the Commission intends to refrain from undertaking its leadership by accepting a subsidiary role before

[49] Communication §1.
[50] As for example Communication's §3.3 'Supporting industry towards climate neutrality' seems to do, by proposing a reviewing of already existing regulations, such as the Trans-European Network Energy regulation.
[51] B. SKIAERSETH, *The European Commission's Shifting Climate Leadership*, in *Global Environmental Politics*, 17(2), MIT Press, 2017, p. 97.
[52] The Commission adopted a strategic approach also in 2014, in order to overcome Member States' asymmetries that risked hampering the deliberations for the new 2030 climate-and-energy framework. In this respect, see B. SKIAERSETH, *The European Commission's Shifting Climate Leadership*, cit. at n 51, p. 93 *ff.*

Member States. Rather, the Communication's constant reference to the European Industry and not to the industries of the European States reflects the Commission's attitude in presenting itself as the leader of a geopolitical unity, as opposed to other global industrial realities such as those of China and of the USA.[53] In this respect, the Communication makes clear that the Strategy will be «entrepreneurial in spirit and in action».[54] By that, the Commission revels the intention to carry out precisely the so-called entrepreneurial leadership,[55] that is to fulfil the task to identify the means and to guide others toward a common end.[56] In short, in leading stakeholders, in both the private and public spheres, by shaping their preferences and crafting their consensus. Using the Communication's wording «In the entrepreneurial spirit of this strategy, EU institutions, member States, regions, industry and all other relevant players should work together to (…) ensure our industry is a global frontrunner».[57] Furthermore, given that the circular economy is not yet a very well established concept, it is likely that the Commission will enhance its entrepreneurial spirit by also acting as an 'intellectual' leader,[58] that is by gathering the necessary expertise as to advance the transition. This explains the Communication's emphasis on promoting networks, cooperation, innovation, and reskilling. In this regard, the industrial Alliances[59] can be understood as powerful governance tools to channel consensus over the Commission's principled stances, as they indeed constitute a middle ground between economic interests, political considerations,[60] and

[53] The Communication refers numerous times to the 'geopolitical reality' in which industry is framed. See for instance Communication § 2.1. or § 4. About the geopolitical role of the Commission, see note n. 8.
[54] Communication § 1.
[55] P. M. BARNES, *The role of the Commission of the European Union: creating external coherence from internal diversity*' in R. WURZEL – J. CONNELLY (eds) *European Union as a Leader in International Climate Politics*, London, Routledge, 2010, p. 41. O. YOUNG, *Political leadership and Regime Formation: on the Development of Institutions in International Society*, in *International Organization*, no. 45 (3), 1991, p. 281.
[56] B. SKIAERSETH, 'The European Commission's Shifting Climate Leadership', cit. at n 51, p. 86.
[57] Communication § 2.2.
[58] O. YOUNG, *Political leadership and Regime Formation: on the Development of Institutions in International Society*, cit. at n 55.
[59] See Communication § 5. Regarding the first Alliance, The European Clean Hydrogen Alliance, see https://ec.europa.eu/growth/industry/policy/european-clean-hydrogen-alliance_en.
[60] As for instance, geopolitical resilience by securing raw-material sources.

normative goals.[61] It is thanks to its capability to steer policies and to achieve convergences, that is to «pool its strengths to do collectively what no one can do alone»,[62] that the Commission can refer to the EU as the enabler of this transition.

6. Conclusions

The implementation of the circular economy paradigm is particularly challenging since it requires a system-based response. This is due to the fact that the regenerative industrial system (make-remake-use-return) implies a level of cooperation among all stakeholders, consumers included, that the linear economic logic (take-make-use-dispose) does not require.[63] In this respect, while a discussion on the implementing tools falls outside the scope of this article, it is appropriate to stress that the Commission's should exercise its leadership to tackle two main challenges,[64] in order to embed the circular model across the system without hampering national interests.[65] These challenges are the reduction of internal polarisation between Member States and the orchestration of the ecosystem-wide transformation to the circular economy paradigm,[66] while at the same time improving EU firms' competitiveness at the global level.

As for the first challenge, consistently with the Communication's commitment «no one shall be left behind», the Commission should attempt to reduce divergences among Member States, and precisely between those States that have innovated more and those that mainly rely upon conventional carbon-based industrial systems. Efforts in this direction would reduce the gap between different national priorities and they would create the structural conditions for the

[61] Since Alliances would facilitate the achievement of the Green Deal ambitious targets. For instance, the Hydrogen Alliance promises to reduce mobility reliance on carbon-based energy sources.
[62] Communication § 2.3.
[63] On these productive models, see P. GHISELLINI - C. CIALANI - S. ULGIATI, *A review on circular economy: The expected transition to a balanced interplay of environmental and economic systems*, in *Journal of Cleaner Production*, 114 (2016), p. 11–32.
[64] For an analysis of public policies that Europe should implement in the industrial field, PIANTA ET AL., *The policy space for a novel industrial policy in Europe*, cit., at n 17.
[65] That is in a way consistent with the strategic behaviour discussed above.
[66] On this point, see V. PARIDA ET AL., *Orchestrating industrial ecosystem in circular economy: A two-stage transformation model for large manufacturing companies*, in *Journal of Business Research* 101 (2019), p. 715.

spread of new markets supporting circular economy.[67] In this regard, the Just Transition Fund is a valuable tool.[68] However, the Just Transition Fund operates through horizontal measures only, which are likely to benefit states or joint public-private partnerships with long-standing expertise in the field.[69] Therefore, to make the Fund more effective and coherent with its rationale to improve cohesion, Member States that lag behind should benefit from dedicated funding, under the condition of implementing circular economy models. In addition, competition rules should be lessened as to permit state aid support for private investments in innovation.[70] In doing so, the Commission would achieve uniformity of action in implementing the circular economy project by leveraging the single market potentialities.

As for the second issue, the whole global value chain system of which European based firms are component should embed the circular paradigm.[71] Particularly, closed-loop global value-chains should be arranged for circular project to have a global significant impact. In this regard, the Commission should operate on three aspects.[72] To begin with, laws should facilitate the implementation of the life-cycle principle across the whole value-chain. Moreover, already established public-private partnerships should be encouraged to cooperate as to involve closed-up supply chains in public procurement and regulatory direction of performance of services. Finally, measures should be created as to encourage costs and revenues to be fairly shared among the closed-loop value chain. Such closed-loop value chains are promising tools for providing EU firms with a competitive advantage over international partners, thanks to EU

[67] The Action Plan stresses the need to create specific markets for fostering circular economy. See for instance, Action Plan § 3.
[68] The internal cohesion represents one of the main challenges the Green Deal as to deal with. In this regard, see M. LANDESMANN – R. STOLLINGER, *The European Union's industrial Policy: What are the Main Challenges*, 2020 at https://wiiw.ac.at/the-european-union-s-industrial-policy-what-are-the-main-challenges-p-5211.html.
[69] As Rodrick puts clear, indeed, horizontal measures produce *de facto* inequalities «In practise most interventions, even those that are meant to be horizontal, necessarily favour some activities over others». In this way, D. RODRIK, *Industrial policy: don't ask why, ask how*, in *Middle East Development Journal* 1(1), 2009, p. 6.
[70] State should shoulder the risks of initial investments as to encourage private sectors in engaging in innovation and in entering in new markets.
[71] As affirmed in Communication § 2.2. «All industrial value chains, including energy-intensive sectors, will have a key role to play», to reach climate-neutrality.
[72] As proposed by R. FELDMAN in I. FELDMAN ET AL, *The circular economy: regulatory and commercial law implications*, cit. at n 36, p. 11021.

dedicated funding, shared expertise and the coordination granted by the single market. Also, these chains would be a mean to export the EU normative standards globally, coherently with the Commission's aim to make the EU a global leader in circular economy.[73]
In order to implement these two lines of actions, benchmarks and indicators should be adopted as to monitor compliance, progresses and to incentivize public and private actors' competition for better circular performances.[74]

Only time will reveal whether and to which extent the Commission will be able to achieve the foregoing ambitious normative goals, thereby confirming its attitude in leading the EU environmental policies.[75] The expectation is that in addressing the aforementioned tension between intergovernmental pragmatic considerations and supranational normative goals, the Commission will carry out a true entrepreneurial role,[76] being a dynamic engine behind social, economic, and structural changes. In this respect, as Timmermans argued,[77] the hope is that the dramatic impact of the COVID-19 pandemic will constitute an opportunity for, rather than an obstacle to, the implementation of the Green Deal.

[73] As also suggested by the Action Plan § 7 where it is stated that 'Free Trade Agreements reflect the enhanced objectives of the circular economy'.
[74] F. BONVIU, *The European Economy: from a linear to a circular Economy*, in *Romanian J Eur Aff* 14:4, 2014, p. 78.
[75] On the leading role of the Commission, see B. SKIAERSETH, *The European Commission's Shifting Climate Leadership*, cit. at n 51, p. 84.
[76] Here the reference is to the M. MAZZUCATO, *The Entrepreneurial State: debunking Public vs. Private Sector Myths*, London, Anthem Press, 2014.
[77] Frans Timmermans on the European Green Deal as a growth strategy at the Brussel Annual Meetings, at n. 29.

ABSTRACT

Stefano Porfido - *Pragmatic Considerations vs Normative Goals. The New EU Industrial Strategy*

This paper analyses the EU 'Communication on the New Industrial Strategy for Europe' adopted in March 2020 in the frame of the new EU Green Deal. The Green Deal is the European Union's hallmark, which paves the way for a long-term growth strategy that aims at making the EU the first neutral climate continent by 2050. In light of this, the paper explores the role that the EU industrial policies are expected to play in the next future as to be coherent with the ambitious goals pursued by the Green Deal. In this respect, this article argues that the 'Communication of the New Industrial Strategy' is primarily based upon economic and political considerations mostly rooted in Member States' attempts to invert the slowly but steady EU zone industrial decline in the face of global competitors, namely China and the USA. However, it is also asserted that the 'Communication' offers the momentum for the EU Commission to push for a shift toward a new sustainable paradigm of production consistent with a circular understanding of growth. Hence, this contribution argues that the 'Communication' is an attempt to balance state-based pragmatic interests with supranational normative aspirations. The paper thus frames this duality in the Commission's strategy to carry out a leadership role in guiding Member States toward a deep transformation of the EU industry for the achievement of the Green Deal's goals.

KEY WORDS: *EU Green Deal; New Industrial Strategy; sustainability; circular economy; EU Commission.*

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Two Parallel Discourses and a New Path for Policy-Making. The Biodiversity Strategy for 2030

TABLE OF CONTENTS: 1. *Introduction*. 2. *Perspective: Biodiversity Protection in the European Integration Process*. 2.1 *The Paris Summit. 2.2 The Single European Act.* 2.3 *From the Convention on Biological Diversity thereafter: towards a Strategic Approach.* 3. *Understanding the Ambivalent Commitment to Sustainable Development and Economic Growth in EU.* 3.1. *The International Origin of SD, a Multi-Dimensional Concept.* 3.2. *The EU's reception, the Ecological Modernization Route.* 4. *Biodiversity Strategy as a Policy and a Discourse*. 4.1. *Policy Contents and Instruments, an Incremental Response.* 4.2. *Two Parallel Discourses*. 5. *Conclusions.*

1. *Introduction*

The progressive broadening and deepening of European Union (EU) environmental policies run parallel with the European integration process. Along this process, nature has gradually modified its relevance and meaning: from abbreviated and incidental non-tariff barrier to headline of the latest regulatory project launched by the Commission, the European Green Deal (EGD).[1]

This article focuses on the component of the EGD expressively devoted to "bringing back the nature into our lives", namely the EU Biodiversity Strategy for 2030.[2] Given its still declaratory status pending implementation, the inquiry on the policy document would benefit of a parallel discourse analysis, in the attempt to grasp the political thinking behind its contents and to anticipate its future unfolding. The following intertwines legal and discourse analysis, by juxtaposing the Strategy to the evolution of EU environmental law and policy and to the dominant discourse developed therein.

The article is organized as follows. It opens by recalling the major steps in the evolution of the EU environmental law and policy: notably, it points to the passage from a fragmented set of initiatives to a strategic policy framework on

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[1] COM (2019) 640 final.

[2] EU Biodiversity Strategy for 2030. Bringing nature back into our lives COM (2020) 380 final.

biodiversity (§ 2). Following, the study moves on the discourse level to conceptualise the origin and implication of EU's commitment to sustainable development (SD), standing out in primary legal sources as well as secondary legislation and policies (§ 3). These two sections pave the way to a discussion of the Biodiversity Strategy for 2030, which is examined both for its contents and for the environmental thinking being conveyed (§ 4). The final pages present some general conclusions on the overall picture (§ 5).

2. *Perspective: Biodiversity Protection in the European Integration Process*

The history of environmental protection in the EU order runs parallel to that of the European integration process.[3] Along its unfolding, the role and status of nature expands and is enriched, both at legal and policy level. The following section tries to give a sense of both dimensions. The growing commitment of the European institutions to the safeguard of the natural environment is also read in dialogue with the evolving international agenda. For the purpose of our analysis, the focus is narrowed on the crucial role played by the adoption of the Convention of Biological Diversity (CBD) on the development of EU policy response for biodiversity protection: this moment gave a sort of strategic orientation to all the following programmes.

2.1. *The Paris Summit*

[3] See E. ORLANDO, *The evolution of EU legislation and policy in the environmental field: achievements and current challenges*, in C. BAKKER - F. FRANCIONI (eds.), *The EU, the US and global climate governance*, Routledge, London, 2014, pp. 61-81. The citations of the following law cases have been drawn from this contribution. For a brief overview, see also: H. SELIN - S.D. VANDEEER, *EU Environmental Policy Making and Implementation: Changing Processes and Mixed Outcomes*, Paper presented at the 14th Biennal Conference of European Union Studies Association, Boston, March 2015. For a broader study: E. REHBINDER -R. STEWART, *Environmental protection policy*, Vol. 2 in M. CAPPELLETTI et al. (eds.), *Integration through law: Europe and the American federal experience*, Walter de Gruyter, Berlin and New York, 1985; L. KRAMER, *EU Environmental Law (8th ed.)*, Sweet & Maxwell, London, 2016; L. KRAMER, *Casebook on EU Environmental Law*, Hart, Oxford - Portland, 2002; N. DE SADELEER, *EU environmental law and the internal market*, Oxford University Press, Oxford, 2014; G.V. CALSTER- L. REINS, *EU Environmental Law*, Edward Elgar, Cheltenham (UK) – Northampton (MA), 2017.

The commonly accepted starting point of this path is traced back to the Paris Summit, held in 1972[4] among the heads of state and government of the former nine European Member States. The Summit legitimised, although without the Treaty of Rome's revision, the intervention of the then Communities into new policy areas, adjacent and functional to the economic dimension. The session followed an event of international importance, the United Nations Conference on the Human Environment in Stockholm.[5] In line with the attention towards nature protection, that the UN Conference catalysed, the formal statement of the Summit did not leave environment out of its scope. Point 8 introduced the practice of setting periodical Environmental Action Programmes (EAPs) and, the same year, a first unit devoted to environmental subjects was established within the Directorate-General (DG) Industry.[6]

In Weiler's interpretation and explanation of the "transformation of Europe", the Paris Summit was a key event in the second phase of the evolution of the European legal order, a phase going from 1973 until mid-1980 and characterized by a remarkable mutation of jurisdiction and competences, including the erosion of the enumerated powers principle.[7] In the environmental policy area, we can observe what he refers to as the "expansion" of the Community's material jurisdiction.[8] The paradigm shift rested on the passage from a restrictive use of Article 235 of the EEC Treaty,[9] as a mere codification of

[4] Bulletin of the European Communities. October 1972, No 10. Luxembourg: Office for official publications of the European Communities. "Statement from the Paris Summit", p. 14-26. Available on: https://www.cvce.eu/obj/statement_from_the_paris_summit_19_to_21_october_1972-en-b1dd3d57-5f31-4796-85c3-cfd2210d6901.html. However, there are some isolated acts of secondary legislation with implications in the environmental sphere preceding this event, see P. SANDS, *European Community environmental law: the evolution of a regional regime of international environmental protection*, in *Yale LJ*, Vol. 100, 1990, p. 2512.

[5] UN General Assembly, United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994

[6] E. SCHÖN-QUINLIVAN, *The European Commission,* in A.J. JORDAN – C. ADELLE (eds.), *Environmental Policy in the European Union: Contexts, Actors and Policy Dynamics*, 3d edn., Earthscan, London and Sterling, 2012. A fully-fledged DG XI for environment is established in the '80s.

[7] J.H.H. WEILER, *The transformation of Europe*, in *Yale Law Journal*, 1991, pp. 2403-2483.

[8] P. SANDS, *European Community environmental law: the evolution of a regional regime of international environmental protection*, cit., p. 2513.

[9] According to art. 235, EEC, the Council is legitimated to act unanimously, even where the «Treaty has not provided the necessary powers, whether the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community». Art.235 of the EEC is today replaced by art.352 of TFEU.

the implied power doctrine - thus intended to give the Community an instrument in a field within which it already has competence[10]- to its quantitatively and qualitatively extensive usage in new policy fields.

At that time, the burgeoning of secondary legislations on environmental protection were, indeed, based on both such "elastic clause"[11] (Article 235 of the EEC Treaty) and on Article 100 of the EEC Treaty,[12] and were mostly focused on pollution rights. The justification for their adoption was that the divergences among member states' legal measures raised non-tariff barriers to the completion of the common market, hence they had to be harmonized. Environmental law entered the EU legal order in the form of social regulation, in order to regulate market failures.[13]

Anyway, not all norms fit this paradigm. Article 235 of the EEC Treaty was ill-suited for the scope of nature conservation. Indeed, the legal basis of the first directive in this genre - Birds Directive 79/409/EEC - has been questioned by many, as the measure blatantly transcended the Community's objective of economic mutual co-operation.[14] In its preamble, the Birds Directive sought an anchor in the more congruous lines of the Treaty of Rome: «the Community's objectives regarding the improvement of living conditions, a harmonious development of economic activities throughout the Community and a continuous and balanced expansion».[15] Equally questionable is the signature of the Convention on the Conservation of Migratory Species of Wild Animals (CMS) at Bonn the same year.

It is worth underscoring that such growing legislative action could not have been possible without, besides the Commission's "entrepreneurism",[16] the

[10] J. H. WEILER, *The transformation of Europe*, cit., p. 2443.
[11] ID., *ibidem*.
[12] Art. 100, EEC allowed the Council «by acting unanimously (…) to issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market». Art.100 EEC is replaced by art.115 TFEU.
[13] G. MAJONE, *The European Community between Social Policy and Social Regulation*, in *Journal of Common Market Studies*, 1993, Vol.31, pp. 153 ff.
[14] S.P. JOHNSON - G. CORCELLE, *The Environmental Policy of the European Communities*, Kluwer, London, 1995.
[15] Art. 2, EEC.
[16] Among numerous sources giving account of the Commission's "entrepreneurism", see A. LENSCHOW, *Environmental Policy: Contending Dynamics of Policy Change*, in H. WALLACE - M.A. POLLACK - C. ROEDERER - RYNNING - A. R. YOUNG (eds.), *Policy-making in the European Union*, Oxford University Press, Oxford, 2015, pp. 324-326.

European Parliament[17] and Court of Justice's alliance. The Court legitimised the Community's internal[18] and external[19] competence in this sphere. Moreover, it went further declaring the environmental protection as «one of the Community's essential objectives» and that «the freedom of trade is not to be viewed in absolute terms, but is subject to certain limits justified by the objectives of general interest pursued by the Community».[20]

2.2. *The Single European Act*

Another major milestone along this path has been the signature of the Single European Act (SEA) in 1986, which finally introduced Title VII on "Environment" in the Treaty of Rome. Articles 130 r-t not only set the explicit legal bases for the community's internal and external competence in the environmental field, but also consolidated some key principles: that of preventive action, that the polluter pays, and that environmental damages have to be rectified at source.

The SEA subscribed the interconnection between social, environmental and economic dimensions; environmental protection finally appeared within the primary law, the EU constitutional legal basis, although still functional to the completion of the single market. The year 1987 gave way to a very prolific and ambitious law-making in new substantive areas, extending the former engagement on pollution rights to a more horizontal level.[21] Much is owed to the flexible use made by the Commission of Article 100a of the EEC Treaty - devoted to the establishment and functioning of the internal market – which required a more easily obtainable qualified majority, compared to the unanimity asked by

[17] ID., *op. ult. cit.,* p. 328 «traditionally, the EP has been the "greenest" of the three main environmental policy-making bodies. Already in the early 1970s, the EP was instrumental in the emerging EU-level nature-protection policy – that is, a sub-field of environmental policy that was hard to link to the internal-market agenda and thus dependent on broad societal support. The 1979 Wild Birds Directive (79/409/EEC) is a prime example: it can be traced back to 1971 when the EP requested the Commission to take up this issue».
[18] ECJ 1980, Commission v. Italy, Case 92/79; ECJ 1982, Commission v. Belgium, Opinion in Cases 68/81 to 73/81.
[19] ECJ 1971, Commission v Council AERT, Case 22/70.
[20] ECJ 1985, Procureur de la République v. Association de défense des brùleurs d'huiles usages (ADBHU), Case 240/83.
[21] P. SANDS, *European Community environmental law: the evolution of a regional regime of international environmental protection*, cit*.,* pp. 2515-2517.

Article 130s. Nonetheless, this did not come always smoothly. This strategy sparked some institutional clashes between intergovernmental and supranational instances over the proper legal basis to employ.[22] The entrepreneurism of the Commission can be also measured on a number of infringement proceedings moved against member states, the other side of the coin being, however, the general lack of implementation that these efforts suffered.[23]

Despite the institutional tensions and the many deficiencies, this second stage in the evolution of environmental protection in the European order sustained the rise of a regulatory state[24] in the environmental sphere. Moreover, the three EAPs developed in the meantime generally manifest a gradual learning-process[25] in terms of a broadening and specializing policy agenda.

2.3. *From the Convention on Biological Diversity thereafter: towards a Strategic Approach*

Intuitively, the legal and political watershed in the evolution of EU environmental protection was the Earth Summit in 1992. Among other precious documents[26] and agreements,[27] the Earth Summit produced the Convention on Biological Diversity (CBD) that "named" biodiversity in the international arena and addressed it with a tailored attention. The passage it is also conceptual. The most authoritative political and normative voice, the UN, gave back to nature all its complexity, by recognising its tight interdependence, as source and foundation of human and earth's life and welfare. The agreement also stressed the social, political and economic dimensions in play when regulating biodiversity. The

[22] Among many, Case C-300/89 Commission of the European Communities v Council of the European Communities on the annulment of Directive 89/428 on waste from the titanium dioxide industry.
[23] E. ORLANDO, *The evolution of EU legislation and policy in the environmental field: achievements and current challenges*, cit., p. 65.
[24] G. MAJONE, *Regulating Europe*, Rountledge, London, 1996.
[25] C. HEY, *III. EU Environmental Policies: A short history of the policy strategies. EU Environmental Policy Handbook*, 2007, EU Commission -Working Paper.
[26] Rio Declaration on Environment and Development (A/CONF.151/26, vol. I), Agenda 21 (A/CONF.151/26, Vol. II), the Statement of principles for the Sustainable Management of Forests (A/CONF.151/26, Vol. III) adopted by the United Nations Conference on Environment and Development on 14 June 1992.
[27] The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69); UN General Assembly, United Nations Framework Convention on Climate Change, 20 January 1994, A/RES/48/189; United Nations Convention to Combat Desertification (UNCCD).

three main objectives laid down were: the conservation of biological diversity; the sustainable use of the components of biological diversity; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. Especially the third appeal resurfaced the commercial core of the subject debated, and the latent dispute opposing developed and developing countries over the regulation of biotechnologies and intellectual property.[28]

Europe had an important leading role in the negotiations,[29] as well as conversely the adoption of the CBD had been very influential in shaping European biodiversity policies. In this case, we can talk of a double-speed response to the ratification of the CBD.[30]

First, Europe integrated the CBD's principles in the 5th EAP (1993-2000).[31] The 5th EAP was expressly entitled to "sustainability".[32] Accordingly, much emphasis was placed on environmental policy integration (EPI), one of the sustainable development's key features, although it remained vague on how to achieve it in practice. It also evolved a sectoral[33] and themed[34] approach, and was aligned to the spirit of shared responsibility, by making appeal to all levels of society.[35] Its 3 main goals were: 1. maintenance or restoration of natural habitats and species of wild fauna and flora at a favourable conservation status; 2. the creation Natura 2000; 3. strict control of abuse and trade of wild species. The

[28] See BP-317E Background paper The Rio Earth Summit: Summary of the United Nations Conference on Environment and Development**,** Prepared by: Stephanie Meakin Science and Technology Division November 1992. The USA was the only attending party not to sign the Convention fearing that a regulation over biotechnologies could have undermined the competitiveness of its industries. See the country profile on: https://www.cbd.int/countries/?country=us. Such the contention about the topic, that the subsequent Cartagena and Nagoya protocols have greatly delayed their entry into force.

[29] S. BAKER, *The dynamics of European Union biodiversity policy: interactive, functional and institutional logics*, in *Environmental Politics*, Vol. 12, No. 3, 2003, pp. 27 ff.

[30] *Ibidem*.

[31] Commission on the first report of the implementation of the COM (1998) 42 final p. 69. Available on https://www.cbd.int/doc/world/eur/eur-nr-01-en.pdf.

[32] The Fifth EC Environmental Action Programme, "Towards Sustainability" the European Community Programme of policy and action in relation to the environment and sustainable development, Official Journal of the European Communities, No C 138/5.

[33] The focus on 5 sectors: industry, energy, transport, agriculture, and tourism.

[34] Climate change; acidification and air quality; protection of nature and biodiversity; management of water resources; the urban environment; coastal zones; and waste management. See 5th EAP p. 51.

[35] The actors: EC, Member States, Local Authorities, NGOs, farmers, UNEP (United Nation Environment Programme).

constitution of Natura 2000, by coupling the Birds and Habitats Directives,[36] is certainly still the cornerstone of nature conservation in Europe.[37] At the same time, the first report to the CoP of the CBD[38] also recalled the constitutional amendments complying with the international agreement. Among the most relevant elements, the Maastricht Treaty included the principle of precaution,[39] emphasised the EPI principle and introduced the double formula of sustainable growth[40] and sustainable development;[41] whereas the Amsterdam Treaty moved EPI up to Title I,[42] among the general principles, and centralised the position of SD as one of the Union's objectives.[43][44]

Second, the Union, pursuant to Article 6 of the CBD,[45] introduced a "strategic" approach. In line with the evolvements of the Cardiff process[46] within the European Council, the Union set forth the first Biodiversity Strategy in 1998.[47] The strategy was also accompanied by some administrative adjustments,

[36] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats.
[37] Natura 2000 is said to be «the largest coordinated network of protected areas in the world». It stretches over all 27 EU countries, both on land and sea, to protect valuable habitat and species under treat of extinction. It comprises strict nature reserves as well as area where human activities are allowed but are tried to be maintained sustainable. The programme is funded by Financial Instrument for Environment (LIFE) under LIFE Nature Budget. The Natura 2000 network is made up of Special Protection Areas (SPAs) classified under the Birds Directive, and Special Areas of Conservation (SACs) designated under the Habitats Directive.
[38] Note 31.
[39] Art.130s, TEU.
[40] Art.2 TEU.
[41] Art.130u TEU.
[42] Art.2 TEC and TEU.
[43] Art.6 TEC.
[44] Among a vast Italian literature, for a comprehensive overview of European principles of environmental protection see A. GRASSO - A. MARZANATI - A. RUSSO, *Ambiente, articolazioni di settore e normativa di riferimento*, in M.P CHITI - G. GRECO (eds.), *Trattato di diritto amministrativo europeo*, 2 edn., Giuffrè, Milano, 2007, Part II, Volume I, pp. 157-269; F. FONDERICO, *Ambiente*, in S. Cassese (ed.), *Dizionario di diritto pubblico*, Giuffrè, Milano, 2006, *ad vocem*; M. CAFAGNO, *Principi e strumenti di tutela dell'ambiente. Come sistema complesso, adattativo, comune,* in F. G. SCOCA - R. ROVERSI MONACO - G. MORBIDELLI (eds.), *Sistema di diritto amministrativo italiano*, Giappichelli, Torino, 2007; M. RENNA*, I principi in materia di tutela dell'ambiente,* in *Rivista Quadrimestrale di Diritto Ambiente*, No. 1-2, 2012, pp. 62-83.
[45] Art.6 of the CBD requires to implement a strategic response.
[46] Communication from the Commission to the European Council of 27 May 1998 on a partnership for integration: a strategy for integrating the environment into EU policies (Cardiff, June 1998) (COM (1998) 333).
[47] Communication from the Commission to the Council and the European Parliament on a European Community biodiversity strategy COM (1998) 42.

such as the appointment of "integration correspondents" and the inclusion of special environmental units within the Commission DGs.[48]

Since 1998, we observe a tendency to incrementalism, at least in biodiversity policies. The Union improved its action, by broadening and deepening the biodiversity policy agenda. The adoption of a series of Biodiversity Action Plans[49] was accompanied by a continuous and responsive engagement with the evolving international agenda. Some constitutional amendments strengthened the standing of environmental protection. The Lisbon Treaty made explicit reference to the climate change concern and further stressed the leading role of the EU in the promotion of sustainable development.

While a full account of the wide policy production falls out of the scope of our analysis, it is appropriate to point at its main patterns. There has been a clear orientation towards differentiation and flexibility, at the regulatory and implementation level, mainly triggered by the progressive enlargement of membership in the EU.[50] The use of subsidiarity and a growing recourse to New Environmental Policy Instruments (NEPIs) has been generalised. Nevertheless, the policy-making progress has not often been accompanied by an equal improvement in the implementation. The initial difficulties[51] encountered to monitor and to enforce the programmes at the member states level have remained unsolved. Another major obstacle has always been the insufficient integration of biodiversity protection within other sectoral policies.[52]

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[48] S. BAKER, *The dynamics of European Union biodiversity policy: interactive, functional and institutional logics*, cit., p. 33.

[49] Communication from the Commission to the Council and the European Parliament - Biodiversity Action Plans in the areas of Conservation of Natural Resources, Agriculture, Fisheries, and Development and Economic Co-operation COM/2001/0162 final.

[50] G. DE BURCA – J. SCOTT (eds.), *Constitutional Change in the EU. From Uniformity to Flexibility*, Hart, 2000.

[51] 1st National Report for the Convention on Biological Diversity (1998). Available on: https://www.cbd.int/doc/world/eur/eur-nr-01-en.pdf.

[52] See the 6th National Report for the Convention on Biological Diversity (2019) Section II. Implementation measures, their effectiveness, and associated obstacles and scientific and technical needs to achieve national targets pp. 13 ff. Available on https://chm.cbd.int/pdf/documents/nationalReport6/243509/1. Among the primary difficulties for the full implementation of the Birds and Habitat Directives - target1 of the Biodiversity Strategy for 2020 – there are the weak intervention on the member states level and the limited budget devolved.

3.Understanding the Ambivalent Commitment to Sustainable Development and Economic Growth in EU

Whereas the previous section intended to provide a perspective in the text, by retracing in broad lines the progressive settlement of environmental protection within the EU law and by pointing at the moments that had particularly orientated the state of art of biodiversity policies, this part moves on another level of analysis, that of the language in use in these documents.

Discourse analysis has often found its way into research agendas on environmental policy and politics. A major contribution made by this approach is that of restoring complexity and antagonism to the study of policy texts. Evolved within the social constructivist tradition of social science,[53] the basic assumption from which discourse analysis evolves is that «language profoundly shape one's view of the world and reality».[54] As for our context, the main implication of this premise is that discourses orient outcomes; they shape «what can and cannot be thought, delimit the range of policy options and thereby serve as precursors to policy outcomes».[55]

In this view, delving into the dominant discourses employed by EU in environmental law and policy, and confronting them to those seemingly entrenched in the EGD, and specifically in the latest Biodiversity Strategy would be beneficial to our analysis, as to detect whether something has changed and what might be its unfolding.

This section engages with the end point of our previous reconstruction, that is EU's leading commitment to sustainable development. The pledge is to read in juxtaposition to the historical objective of enhancing a competitive economy. Besides pervading policy programmes, countless declaratory statements and secondary legislations, the most telling assertion of such an ambivalent commitment can be found within the EU primary legal sources.

Art. 3(3) TEU states: «The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced

[53] M. HAJER -W.VERSTEEG, *A decade of discourse analysis of environmental politics: Achievements, challenges, perspectives*, in *Journal of environmental policy & planning*, Vol. 7, No. 3, 2005, pp. 175-184 refers to E. G. GUBA - Y. LINCOLN, *Fourth generation evaluation*, Sage, 1989.
[54] M. HAJER -W.VERSTEEG, *A decade of discourse analysis of environmental politics: Achievements, challenges, perspectives*, cit., p. 176.
[55] ID., *op. ult. cit.*, p. 178.

economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance». In another primary source, the Charter of Fundament Right (CFR), «the Union (…) seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment» (art. 37). Ultimately, art.11 TFEU reads «environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development».

The building of a strong and competitive economy has, since the outset, been the manifesto of the integration process. Yet, where does the concept of SD come from? And how to read its association to economic growth?

3.1. *The International Origin of SD, a Multi-Dimensional Concept*

The term, before entering the European lexicon, has been consecrated in the international arena by the Brundtland Commission report in 1987.[56] The document defined SD as a «development which meets the needs of the present without compromising the ability of future generations to meet their own needs». Not invented in that occasion,[57] but certainly popularized worldwide, this concept has ever since been very debated, in a way that it is hard to find a "common" understanding of its meaning in the literature. However, a great part of commentators might likely agree on the multi-dimensionality of such a concept, probably at the source of the general discord on its interpretation.

Economic growth forms a central part of it and is also the component that has seemingly been more emphasized by scholars. The accent on growth in the report has been accused of being ambiguous and contradictory[58] or of concealing

[56] UN-sponsored World Commission on Environment and Development (WCED) (A/42/427) named after Gro Harlem Brundtland, then Prime Minister of Norway, Chairman of the Commission. The text of the report is available on https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf.

[57] On the origins of the term prior to 1987, see P. MCMANUS, *Contested terrains: Politics, stories and discourses of sustainability*, Environmental Politics, Vol. 5, No. 1, 1996, pp. 48-73; O. LANGHELLE, *Why ecological modernization and sustainable development should not be conflated*, in *Journal of environmental policy and planning*, Vol. 2, No. 4, 2000, pp. 303-322.

[58] Among many H. E. DALY, *Toward some operational principles of sustainable development*, Ecological economics, Vol. 2, No. 1, pp. 1-6.

an underlying allegiance to an Ecological Modernization (EC) theorem.[59] Nonetheless, others[60] place the report in the groove of the "limits to growth" debate,[61] which had taken hold in the '70s and is still today very significant in the environmental movements milieu. Such compatibility is explained by elucidating the SD's multi-dimensionality and giving a prospective reading to the WCED's mandate.

The report states «(SD) contains within it two key concepts: i) the concept of "needs", in particular the essential needs of the world's poor, to which overriding priority should be given; ii) and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs».[62]

These two concepts can be rationalised as a "goal of development" and a "proviso of sustainability".[63]

The reliance on growth goes under the "goal of development", functionalised to the ultimate goal[64] of ensuring the satisfaction of people's needs. In this sense, the report incorporates intra-generational social justice in its pro-growth programme.[65] This positioning can be seen as a reaction to the conversationist-environmentalist orientation informing the previous World

[59] O. LANGHELLE, *Why ecological modernization and sustainable development should not be conflated*, cit., p. 1 refers to M. A. HAJER, *The politics of environmental discourse: Ecological modernization and the policy process*, Oxford University Press, 1995, p. 26; A. WEALE, *The new politics of pollution*, Manchester University Press, Manchester, 1992, p. 31.

[60] O. LANGHELLE, *Why ecological modernization and sustainable development should not be conflated*, cit., *passim*. on which the core argument of this contribution stands.

[61] See the seminal D.H. MEADOWS - D.L. MEADOWS - J.RANDERS - WW. BEHRENS, *The limits to growth*, Universe Book, New York, Vol. 102, No. 27, 1972; R. CARSON, *Silent Spring*, Houghton Mifflin, Boston, 1962.

[62] WCED, cit., p. 41.

[63] O. LANGHELLE, *Sustainable development: exploring the ethics of Our Common Future*, International Political Science Review, Vol. 20, No. 2, 1999, p. 133 refers to MALNES, *The environment and Duties to Future Generations*, Fridtjof Nansen Institute, 1990. For a conceptualisation of the principle of SD see also in the Italian literature, among many contributions: F. FRACCHIA, *Lo sviluppo sostenibile. La voce flebile dell'altro tra protezione dell'ambiente e tutela della specie umana***,** Editoriale scientifica, Napoli, 2010; F. FRACCHIA, *Il principio dello sviluppo sostenibile*, in G. ROSSI (ed.), *Diritto dell'ambiente*, 3d edn., Giappichelli, Torino, 2015, pp. 175-185; S. SALARDI, *Sustainable development: Definitions and models of legal regulation. Some legal-theoretical outlines on the role of law*, in *Rivista quadrimestrale di diritto dell'ambiente*, No. 1, 2011, pp. 77-100.

[64] WCED, cit., p. 8 «first and foremost our message is directed towards people, whose well being is the ultimate goal of all environment and development policies».

[65] O. LANGHELLE, *Sustainable development and social justice: expanding the Rawlsian framework of global justice*, in *Environmental Values*, Vol. 9, No.3, 2000, pp. 295-323.

Conservation Strategy (WCS),[66] which, once published, had raised a number of criticisms for having an alleged "anti-poverty" profile.[67] In a rather anthropocentric way, Our Common Future, instead, by prioritizing social justice and global solidarity, bridged developed and developing countries requests, for environmental protection and development, under the same agenda.

On the other hand, the "proviso of sustainability" calls for constraining growth within social and environmental limits, in order to preserve not so much the conservation of nature, as rather the "development" of present and future generations. It is requested to change the "quality of growth", in order «to make it less material- and energy-intensive and more equitable in its impact», by improving the distribution of income.[68] In the "proviso" is sown the inter-generational dimension of social justice and the appeal to respect natural boundaries.

The connection between growth and sustainability may be condensed in these lines: «(SD) can be consistent with economic growth, provided the content of growth reflects the broad principles of sustainability and non-exploitation of others. But growth by itself is not enough. High levels of productive activity and widespread poverty can coexist, and can endanger the environment».[69] Growth is recognised as an empty shell and the WCED makes sense of it through its appeal to social justice, the safeguard of planetary boundaries and global solidarity. "Goal" and "proviso" are to read interdependently.

Another teaching from discourse analysis school would tell us that «the meaning of the policy principle never solidifies, but is constantly the object of political contestation».[70] This applies to SD as well. Nonetheless, the Agenda 2030,[71] which is the latest authoritative document precisely devoted to sustainable development goals (SDGs), definitely furthers the direction set by Brundtland. The dimensions of social justice, global solidarity and ecological boundaries are broadened and deepened.

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[66] International Union for Conservation of Nature and Natural Resources, ed. World Conservation Strategy: Living Resource Conservation for Sustainable Development. IUCN–UNEP–WWF, 1980.
[67] O. LANGHELLE, *Sustainable development: exploring the ethics of Our Common Future*, cit., p. 132.
[68] WCED, cit., under Part I.2.III.1.2. *Changing the quality of Growth*, p. 48.
[69] WCED, cit., p. 41.
[70] M. HAJER - W. VERSTEEG, *A decade of discourse analysis of environmental politics: Achievements, challenges, perspectives,* cit., p. 177.
[71] UN General Assembly, *Transforming our world : the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

3.2. *The EU's reception, the Ecological Modernization Route*

The first reception of SD in the EU can be found in the Declaration on the Environment issued by the then EC heads of state and government in December 1988, «sustainable development must be one of the over-riding objectives of all Community policies».[72] Yet, in the following Rome Summit, the newly coined "sustainable growth" made its first entrance.[73] The Maastricht Treaty ambiguously made use of both formulas, referring "SD" to the external cooperative action in developing countries,[74] whereas "sustainable growth" to the internal politics.[75] Beside the uncertainties of what could have appeared as a double standard,[76] later overcome in the Amsterdam Treaty, the main difficulty in understanding EU's operationalisation of the Brundtland legacy, rests on the meaning of its historical loyalty to the economic growth. What does the European "growth" entail?

As premised, growth does not per se contradict SD, if respectful of environmental boundaries and committed to social justice. However, much of the elements informing EU politics seemingly departs from the "proviso" submitted by the WCED. There is an almost shared consensus to relate them to the Ecological Modernization (EM) theorem.[77]

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[72] D. WILKINSON, *Maastricht and the Environment: the Implications for the EC's Environment policy of the Treaty on European Union*, in *Journal of Environmental Law*, Vol. 4, No.2, 1992, p. 223.

[73] S. BAKER, *The evolution of European Union environmental policy From growth to sustainable development?*, in S. BAKER - M. KOUSIS - S. YOUNG - D. RICHARDSON (eds.), *The politics of sustainable development: theory, policy and practice within the European Union*, Routledge, London, 1997, p. 90.

[74] Art.130u, TEU.

[75] Art.2, TEU.

[76] S. BAKER, *The evolution of European Union environmental policy From growth to sustainable development?*, cit., p. 91 the author referring to B. VERHOEVE - G. BENNETT - D. WILKINSON, *Maastricht and the Environment*, Institute for European Environmental Affairs, 1992 warns that we cannot attach a mere arbitrariness to the terminology employed. She reminds «the sensitive bargaining among member states that accompanied the Treaty negotiations and the unsuccessful pressure to revert to the original term "sustainable development"».

[77] For an insight on this debate, have a look at the rich bibliography mentioned by A. MACHIN, *Changing the story? The discourse of ecological modernisation in the European Union*, Environmental Politics, Vol. *28,* No.2, 2019, pp. 208-227 and S. BAKER, *Sustainable development as symbolic commitment: Declaratory politics and the seductive appeal of ecological modernisation in the European Union*, in *Environmental politics*, Vol. *16*, No. 2, 2007, pp. 297-317.

The emergence of the EM theory can be reconnected to the studies of some of its most renown founding fathers, Jänicke and Huber.[78] The theorem has developed over the years with very diverse nuances and among numerous scholarships from different backgrounds, yet it is generally recognized, at least for its origins, as a western-centric paradigm. For the purpose of our analysis, we will not delve into the varieties of shapes and connotations evolved so far, yet we will account for its main tenets.

The core idea underlying EM is the alleged synergy bridging environmental protection to economic growth. This paradigm turns the ecological emergency into an opportunity to advance the economy, by relying on the innovations that industrial and technological sectors may develop in order to "decouple" growth from resource use. Besides the primary role occupied by science and technology, a great emphasis is also placed on market dynamics and economic agents as «carriers of ecological restructuring».[79] Hence, the EM hands over a more flexible and decentralised governance model, promoting the usage of new environmental policy instruments (NEPIs), namely market-based and voluntary tools. The technological "fix" proposed herein is reassuring, as it permits to further the same socio-economic patterns with a sort of managerial twist. The trajectory of modernity is preserved while the "common but differentiated responsibilities"[80] pass silent.

The distinction between SD and EM may be blurred by the common appeal to growth. Yet, a line of demarcation can be traced, and it rests upon that multi-dimensionality of SD referred above: social justice, planetary boundaries and global solidarity do not enter the EM paradigm.

Not surprisingly, as it dispels any inherent antagonism to the environmental *problématique* by means of a win-win rationale, the EM «increasingly dominates within political rhetoric and frames policy-making at various levels of governance».[81] In a way that it has consolidated as a "common

[78] A.P. MOL - D.A. SONNENFELD, *Ecological Modernization around the World: Debates and Critical Perspectives*, Rouledge, London, 2000; O. LANGHELLE, *Why ecological modernization and sustainable development should not be conflated*, cit., p. 305.
[79] A.P. MOL - D.A. SONNENFELD, *Ecological Modernization around the World: Debates and Critical Perspectives*, cit., p. 6.
[80] Principle of international environmental law formalized at the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro.
[81] A. MACHIN, *Changing the story? The discourse of ecological modernisation in the European Union*, cit., p. 209.

sense".[82] EU has been among those heralding this message. One evidence of the "institutionalization"[83] of EM may be found in the establishment of the Emission Trading Scheme (ETS) as a cornerstone of the EU climate policy. Not least, the *raison d'être* of the original European project, absorbed of ordoliberal rationale,[84] cannot but to ask for the prioritization of a competitive economy over the social and environmental dimensions. As Scharpf brought up, quite some time ago now, the very "success" of European economic and monetary integration has constrained member states' interventions in several policy areas - he refers especially to «taxation of mobile capital and businesses, macroeconomic employment policy, industrial relations and social policy»[85] – and, with that, slowly eroded the core of their welfare state. The constrains imposed upon members states' regulatory capacity in those policy areas have not, indeed, been counterbalanced by strengthening the EU's one. Such a governance deficit has engendered what he called "problem-solving gaps",[86] which have undermined the very social legitimacy[87] of the national and European legal and political orders. It is also worth noting that the growing system of EU social policies cannot be called to invalidate Scharpf's argumentation. Social policies have developed in EU in an unconventional way: whereas «social policy had generally been seen as spontaneous "protective reaction" against market expansion, as an outcome of politics against market»,[88] in EU it has been «tightly connected to market-building (…), has been an integral part of the market-building itself».[89]

Not only the historical disengagement of the social from the economic constitution of EU, but also, as we saw in the previous § 2, the evolutional path of EU environmental legislation in the form of social regulation reflect the

[82] ID., *ibidem.*
[83] ID., *ibidem* refers to M. A. HAJER, *Coalitions, practices, and meaning in environmental politics: From acid rain to BSE*, in *Discourse theory in European politics*, Palgrave Macmillan, London, 2005, pp. 297-315.
[84] C. JOERGES- F. RODL, *"Social Market Economy" as Europe's Social Model?*, EUI Working Paper Law No. 2004/8.
[85] F.W. SCHARPF, *The Joint-Decision Trap Revisited*, Journal of Common Market Studies, Vol. 44, No. 4, 2006, pp. 845-864.
[86] ID., *ibidem*.
[87] ID., *ibidem*; ID., *Economic integration, democracy and the welfare state*, in *Journal of European public policy*, Vol. 4, No.1, 1997, pp. 18-36.
[88] S. LEIBFRIED, *Left to the Judges and the Markets*?, in H. WALLACE - M.A. POLLACK - C. ROEDERER - RYNNING - A.R. YOUNG (eds.), *Policy-making in the European Union*, Oxford University Press, Oxford, 2015, p. 289 which refers to K. POLANYI, *The great transformation,* Beacon press, 1944.
[89] ID., *ibidem*.

entrenchment of EM within the EU polity. Nonetheless, as concerns our main research focus, biodiversity protection has always been ill-suited to the social regulation model. In truth, social regulations aim at integrating public objectives within the market, redesigning it from a purely economic-driven space to a socio-economic one, yet without challenging its foundational rationale. The aspect of biodiversity protection policy related to nature conservation, instead, carves a space for the environment "out of the market" instead of within it. However, it has been precisely the language of biodiversity policies, in our view, to manage the assembling of both the economic and nature conservation spheres. Looking at previous policy programmes, we find the Commission very scrupulously emphasizing the economic functionality underlying its proposals. The most evident expression of it may be the headline of the strategy to 2020, "our life insurance, our natural capital".[90] Nature has not-so-naturally turned into "capital" and, on the same line, within the text the Commission warns that «biodiversity loss itself is costly for society as a whole, particularly for economic actors in sectors that depend directly on ecosystem services».[91]

That's when EM gets through the back door so as to preside even over the subjects less compatible to its rationale.

Considering the foregoing, one may question why the EU has continued to make declaratory commitments to SD. There has aptly been proposed a "symbolic" reading of such a behaviour: the appeal to SD has served the political cause of construing and presenting a certain "identity".[92] For the constituencies, SD has acted «as a legitimising, mobilising value for the European integration process»;[93] the social and ecological dimensions composing SD have the charisma to touch upon a collective ethos of shared values, hence connecting people to the integration cause.[94] Beyond the borders, SD also functioned as a

[90] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions 'Our life insurance, our natural capital: an EU biodiversity strategy to 2020' (COM (2011)0244).
[91] ID., *op. ult. cit.*, p. 3.
[92] S. BAKER, *Sustainable development as symbolic commitment: Declaratory politics and the seductive appeal of ecological modernisation in the European Union*, in *Environmental politics*, Vol.16, No. 2, 2007, pp. 297-317.
[93] ID., *op. ult. cit,* p. 311.
[94] J.H.H. WEILER, *Ideals and idolatry in the European construct*, in McSweeney B. (ed.), *Moral Issues in International Affairs*, Palgrave Macmillan, London, 1998, pp. 55-88.

bridge, it «enabled the EU to align itself with international best practice and to forge links, particularly with the Third World groupings in the United Nations».[95]

4. *Biodiversity Strategy as a Policy and a Discourse*

Published in the middle of a global pandemic and the worst economic recession since the World War II,[96] the Biodiversity Strategy for 2030 programme has to be welcomed for confirming the EU Commission's commitment to environmental safeguard, in spite of the growing concerns for the economic recovery. In its first lines, the Strategy stresses how the gravity of the COVID-19 crisis has actually raised awareness about the interconnectedness between "our own health and the health of ecosystems" and thus the need not to exceed the planetary boundaries. In line with this, the Commission has upheld support to the One Health approach,[97] based on such interdependency between human, animal and nature health, and placed the Strategy within the EU's economic recovery plan.

Such straightforward positioning could not have been given for granted. A strand of studies had postulated the dismantling and disintegration of the EU environmental policy during the former presidency, as the economic and financial recovery was prioritized to the environmental agenda.[98] Some scholars characterized as "hypocritical" the attitude of the former Commission towards environmental policies in the post-economic crisis time. Through an empirical analysis, they show the decoupling of the Commission's ambitious talk from the actual decisions and actions taken in the same direction. The institution could, in this way, sustain the reputational façade of being an "environmental

[95] S. BAKER, *Sustainable development as symbolic commitment: Declaratory politics and the seductive appeal of ecological modernisation in the European Union*, cit., p. 312.
[96] The World Bank press release, June 8, 2020. Available online on: https://www.worldbank.org/en/news/press-release/2020/06/08/covid-19-to-plunge-global-economy-into-worst-recession-since-world-war-ii.
[97] On the World Health Organization webpage see: https://www.who.int/news-room/q-a-detail/one-health.
[98] For a symposium article A. LENSCHOW - C. BURNS - A. ZITO, *Dismantling, disintegration or continuing stealthy integration in European Union environmental policy?,* Public Administration, Vol. 98, No. 2, 2020, pp. 340-348. The authors, however, conclude for a resistance to an outright dismantling.

entrepreneur".[99] Although for the most skeptical the declaratory emphasis in the Strategy might not exclude a similar outcome, we should not forget to contextualise the document within the renewed European and international landscape. In the light of the enhanced public awareness of the climate emergency and its increasing urgency, the ever-growing societal mobilisation, the flourishing of Green Deals across the world - prompted, in part, by the favourable framework of the Paris Agreement[100] - that this is not just a "talk" but a structural cross-sectoral regulatory project seems to us the most convincing option. The quasi-messianic language of the EGD, recalling that of the Shuman Declaration,[101] allegedly supports our position.

Nonetheless, the Biodiversity Strategy for 2030 is still a mere declaratory commitment, waiting to be operationalised, thus only time will test our assumptions.

In the following, we will try to approach the text on two levels of analysis. On the one hand, juxtaposing its contents to the state of art of the biodiversity policy strategies, introduced through an historical perspective in §2, on the other, from a discourse perspective relying on the appraisal of §3.

4.1. *Policy Contents and Instruments, an Incremental Response*

The very design of a horizontal "strategy" to address biodiversity protection, not least required by the CBD, has been proven the most suitable policy layout. Biodiversity, as expression of the multi-level interdependency of the ecosystem life, cannot but be dealt with in its whole. The Biodiversity Strategy for 2030 embraces such a complexity, by laying down a very wide-ranging programme.

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[99] C. KNILL - Y. STEINEBACH - X. FERNÁNDEZ-I-MARÍN, *Hypocrisy as a crisis response? Assessing changes in talk, decisions, and actions of the European Commission in EU environmental policy*, in *Public administration*, Vol. 98, No. 2, 2020, pp. 363-377.

[100] G. ÇAPAR, *What have the Green New Deals to do with the Paris Agreement? An Experimental Governance*, in this Symposium.

[101] J.H.H. WEILER, *In the face of crisis: Input legitimacy, output legitimacy and the political messianism of European integration,* in *Journal of European integration*, Vol. 34, No.7, 2012, pp. 825-841.

Compared to the previous Strategy to 2020, the format is different. Whereas the previous programme is structured in six targets,[102] the new Strategy seems to be clustered around two main objectives: widening a coherent network of protected areas and setting a nature restoration plan. Both macro-objectives are presented as key nature-based solutions to climate change mitigation and adaptation.

Under their umbrella is an ambitious catalogue of commitments and actions to be carried out jointly by the Commission and member states in a short timeframe. Whereas the conservation objective simply strengthens the regulatory framework already in place - that of Natura 2000 - and raises its targets, the restoration plan appears more challenging both for its goals and for the regulatory instruments to be set up. Accordingly, the Annex counts 20 key actions, stretching over multiple policy areas, in order to recover land, freshwater and marine ecosystems and to address the five main drivers of biodiversity loss: the changes in land and sea use; overexploitation; pollution; climate change; and invasive alien species.

The European Environmental Bureau (EEB)[103] as well as some NGOs are generally satisfied with the ambition placed therein,[104] yet manifest few doubts as regards the cross-sectoral integration of these targets. The compatibility of the Common Agricultural Policy (CAP) to these commitments,[105] and the

[102] Under the headlines: conserving and restoring nature; maintaining and enhance ecosystems and their services; ensuring sustainability of agriculture, forestry and fisheries; combating invasive alien species; addressing the global biodiversity crisis.
[103] EEB Assessment of the EU Biodiversity Strategy for 2030, available on: https://eeb.org/publications/54/nature/101581/eeb-assessment-of-the-biodiversity-strategy.pdf.
[104] ClientEarth Press release: Lawyers react to new EU strategies: ambition welcome but policy clashes must be resolved, 20 May 2020, on: https://www.clientearth.org/latest/press-office/press/lawyers-react-to-new-eu-strategies-ambition-welcome-but-policy-clashes-must-be-resolved/.
[105] Open letter to the President of the European Commission, the Presidency of the Council of the European Union, and the Conference of Presidents of the European Parliament calling for full alignment of the reformed Common Agricultural Policy with the European Green Deal, Brussels, 30th September 2020, by a number of environmental NGOs, see on: https://www.documents.clientearth.org/wp-content/uploads/library/2020-09-30-open-letter-for-full-alignment-between-the-reformed-common-agricultural-policy-and-the-european-green-deal-coll-en.pdf.

questionable adequacy of the Strategy as to protecting marine ecosystems and fisheries resources are the two main thorny points.[106]

An important section of the Strategy also covers EU's external action, reaffirming its historical "actorness" to set the global agenda.[107] A great emphasis is given on ensuring the compliance of the forthcoming post-2020 global framework for biodiversity - to be set in the 15th CoP to the CBD – with the goals of the 2030 Agenda for Sustainable Development[108] and on advancing the International Ocean Governance agenda.[109] The necessary strengthening of measures against illegal wildlife trade and the mobilization of financial resources for developing countries are not left aside.

The EEB, nonetheless, warns that EU's international pledges «will be much more credible if the ambition is backed by concrete actions within the EU and by taking steps to significantly reduce the global footprint of the EU». The Bureau complains about «the reintroduction of harmful subsidies in the next European Maritime and Fisheries Fund (EMFF) and harmful subsidies through the CAP» and argues that «the strategy has very little substance on reducing and changing consumption».[110]

Therefore, despite the engagement with the global agenda, on a declaratory level, is clearly enriched - compared to the previous biodiversity strategies - these discrepancies run against its credibility.

As above premised, the most challenging issues, when it comes to biodiversity policies, are often implementation and enforcement of the regulatory measures. Neither the 2020 biodiversity strategy objectives nor the global Aichi Biodiversity Targets, adopted under the CBD,[111] have been fully met by the

[106] ClientEarth and others NGOs, Back to the source: saving Europe's biodiversity starts in the ocean, November 2020 on https://www.clientearth.org/media/taqh0xq1/back-to-the-source_saving-europe-s-biodiversity-starts-in-the-ocean.pdf.
[107] J. VOGLER, *The European Union as an actor in international environmental politics*, in *Environmental Politics*, Vol. 8, No.3, 1999, pp. 24-48.
[108] UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015 (A/RES/70/1).
[109] Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions International Ocean Governance: an Agenda for the Future of our Oceans, JOIN (2016)49 final.
[110] Note 103.
[111] Convention on Biological Diversity. COP 10 Decision X/2: Strategic Plan for Biodiversity 2011–2020. See on http://www.cbd.int/decision/cop/?id=12268.

EU.[112] Comprehensively, the fact that the contents of latest Strategy are in line with the UN 2030 Agenda for Sustainable development, the Paris Agreement,[113] and also goes beyond the 20 Aichi Targets, cannot be enough. In this sense, the most encouraging innovation is the increased attention devoted to the "enabling framework", namely the instruments and channels to deliver the programme.

First, the Commission calls civil society to act as a compliance watchdog.[114] It intends to amend the Aarhus Regulation,[115] in order to improve the access to justice in environmental matters for individuals and NGOs.[116] Along the aim of social mobilisation comes the initiative directed to invest in research and education, in order to integrate environmental awareness into school, higher education programmes as well as professional training.[117] Third, the Commission turns to businesses, invoking a partnership to ensure that environmental and social interests are embedded into corporate strategies.[118] Finally, some economic instruments are lined up. On the one hand, it is planned to unlock and to broaden public investments and to attract private capitals by developing a sustainable finance taxonomy, namely a tool to guide investors towards green solutions. On the other, tax and pricing techniques are promoted so as to reflect the environmental/biodiversity costs in the production of goods and services, hence in order to influence consumers and producers' choices.[119] Much in line with a well-established trend, in the striving to prompt a behavioural change, the command-and-control regulatory approach is complemented by a great emphasis

[112] Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) of 31 May 2019; European Parliament, Draft Report on the EU Biodiversity Strategy for 2030: Bringing nature back into our lives (2020/0000(INI)) Committee on the Environment, Public Health and Food Safety Rapporteur: César Luena.
[113] Conference of the Parties, Adoption of the Paris Agreement, Dec. 12, 2015. U.N. Doc. FCCC/CP/2015/L.9/Rev/1.
[114] COM (2020) 380 final, p. 16.
[115] 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, OJ L 264, 25.9.2006, pp. 13-19.
[116] European Commission, Proposal for a Regulation of the European Parliament and of the Council on amending Regulation (EC) No 1367/2006, COM (2020) 642 final.
[117] COM (2020) 380 final, pp. 18-19.
[118] COM (2020) 380 final, p. 16.
[119] COM (2020) 380 final, p.17.

on voluntary and market forces, falling under the category of the new environmental policy instruments (NEPIs).[120]

All in all, the Biodiversity Strategy for 2030 reflects and reasserts the incrementalism and learning-process that have advanced the evolution of the EU environmental policy. It is a further step forward, building on past experiences, while at the same time enriching and detailing the contents of the previous strategies, and making full use of all the available policy instruments developed so far. No radical changes can be evidenced in its contents.

4.2. *Two Parallel Discourses*

The undertaking of assessing a manifesto of declaratory commitments, as a policy strategy in part being, entails a number of difficulties. They all converge to the trial of navigating the ambiguity of the language of politics; a language aimed at reaching and bridging a vast and variegated range of addressees frequently bearing conflictual interests. Hence, these documents are likely to employ simultaneously vocabularies alluding to different political narratives. A latent tension between discordant storylines exists herein as well.

The Biodiversity Strategy for 2030 condenses elements alluding to a change of paradigm in the understanding of the relationship between nature and the socio-economic dimension as well as others directly linked to the evergreen EM theorem.

The appeal of building partnerships with businesses, the call to tax and pricing tools, and the allusion to "win-win solutions for energy generation"[121] may align the Strategy to this scheme. The test case yet seems to be in the introduction of the Communication. The very fact that the Commission justifies its plan – "the need for urgent action" - by stressing the GDP value of biodiversity, its cost/benefit ratio, and the economic multiplier effect of natural capital investments, reveals a rooted common sense: that our economic model is the measure of ecological and social interests. Finally, reading the Strategy within the whole EGD makes these considerations louder, since the echoes of the EM are there much more frequent.

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[120] A. JORDAN - R. WURZEL - A. ZITO, *How 'new' environmental policy instruments (NEPIs) spread in the European Union: An analysis of the role of the EU in shaping environmental governance*, Paper presented at the Second ECPR Conference, Marburg, September 18-21, 2003.
[121] COM (2020) 380 final, p.10.

Yet, the strong commitment with the Agenda 2030 for Sustainable Development presumably moves towards another direction. In the toolkit accompanying the Strategy, the Commission relies directly on the Stockholm Resilience Centre's reading of the 2030 Agenda to picture the biosphere as underpinning the society as well as the economic system.[122] The straightforward pledge to design an economic recovery in the respect of planetary boundaries as well as the connection stipulated between our health and the health of the ecosystem are similarly powerful. This parallel storyline hints to a sort of "Ecological Primacy" principle, as we decided to call it. The Ecological Primacy, in other words, resumes one of the dimensions of SD, its plea to live within the ecosystem limits.

What do these two parallel narratives mean within the EU's constitutional framework?

Whereas a reading of the Strategy consistent with the EM paradigm will not change the current direction of the European integration project, Ecological Primacy might deeply question it.

Reconstructing the socio-economic system in function of environmental protection, and not the other way around, would likely have disruptive implications. It would require a reversal from the prevalently negative to a progressively positive integration, namely made of wide cross-sectoral market-correcting interventions. Yet, there are structural difficulties in pursuing this type of "political legislation" in Europe, since it would require high convergence among members states' interests.[123] Given the socio-economic fragmentation characterizing the EU polity, only the strengthening of solidarity among Member States could pool them towards a common political direction and allow this new social order to realise.

Hence, the potential of this new principle may be very radical. Yet, we stay vaguely at the crossroad between the path-dependent EM's road and the new route opened by the Ecological Primacy.

5. *Conclusions*

[122] See on https://ec.europa.eu/info/sites/info/files/biodiversity_en.pdf p.3.
[123] F.W. SCHARPF, *The Joint-Decision Trap Revisited*, cit., *passim*.

This section can finally line up the considerations drawn from our parallel policy and discourse analyses.

The contents of the Biodiversity Strategy for 2030 reveal a document by and large in line with the traditional EU policy trajectory, that of incrementalism. Seen in perspective, as it is done in §2, environmental protection law and policy have certainly walked a long way up to now. Nature from a non-tariff barrier upgraded to a significant component within the integration process. Institutional alliances have progressively advanced Union's ambitions, although at times with difficulties. Nonetheless, the rationale underlying this long journey has habitually subjected nature to the establishment and adjustment of the internal market. Despite the consistent symbolic commitments to SD, the EM theorem has prevailed. Therefore, there have been no very disruptive changes along this way.

EM and policy incrementalism are two faces of the same coin: they "constrain" the policy imagery, and with that, its actual production. In this light, it is better explained why our analysis had to proceed on both a policy and a discourse level. Through this dual lens, even the reference to Ecological Primacy is better understood for all its potential: this new discourse may shake the traditional policy trajectory of incrementalism and prompt some radical transformations.

The indeterminacy given by the presence in the Strategy of two parallel rationales would create space for different political agendas in the future. There is a chance for the way opened by the Commission's Ecological Primacy discourse to be furthered, hence to resume the ecological dimension of the SD principle in the EU's polity. We look forward to seeing how this scenario will evolve. A last question yet remains on the background. It regards the SD's complementary dimension of social justice, which this article could not engage with as centred on the Biodiversity Strategy study. Does it find any place in the latest EGD? A future contribution might elaborate on this.

ABSTRACT

Michela Biscosi - *Two Parallel Discourses and a New Path for Policy-Making. The Biodiversity Strategy for 2030*

The undertaking of assessing a manifesto of declaratory commitments, as a policy strategy in part being, entails several difficulties. They all converge to the trial of navigating the ambiguity of the language of politics; a language aimed at reaching and bridging a vast and variegated range of addressees frequently bearing conflictual interests. Hence, these documents are likely to employ simultaneously vocabularies alluding to different political narratives. A latent tension between discordant storylines exists in the Biodiversity Strategy for 2030 as well. The document condenses elements directly linked to the evergreen Ecological Modernization (EM) theorem as well as others hinting at a change of paradigm for the understanding of the relationship between nature and the socio-economic dimension. We called this new standard "Ecological Primacy", as it seemingly resumes one of the core dimensions of sustainable development, namely its plea to live within the ecosystem limits. Through a dual policy and discourse analysis, starting with a survey of the historical evolution of the EU environmental law and policy and a reflection upon their ambivalent commitment to sustainable development and competitive growth, this contribution reconstructs the coexistence of these two parallel narratives. By juxtaposing the reading of the latest Strategy to the European integration process, the study ultimately questions the potential significance of this document on the future of the European constitutional framework.

KEY WORDS: *EU Biodiversity Strategy for 2030; sustainable development; Ecological Modernization; Ecological Primacy; discourse analysis.*

FILIPPO VENTURI*

The Farm to Fork Strategy. A Comprehensive but Cautious Approach to "Multidimensional" Food Sustainability

TABLE OF CONTENTS: 1. *Introduction.* - 2. *From one Macro-Objective to several Sub-Objectives: an Integrated and Progressive Approach to a "Multidimensional" Food Sustainability.* - 3. *Regulatory Instruments: The Reformist Legal Approach of the Commission and the Need for a Collective Effort.* - 4. *Continuity and Change: the F2F Strategy in the Evolution of Agriculture and Food Law.* - 5. *The F2F Strategy as a Social Regulation Agenda. 6. The F2F Strategy's Possible Shortcomings.* - 7. *Concluding remarks.*

1. *Introduction*

In May 2020, during the first wave of the pandemic emergency, the European Commission has presented a new "Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system"[1]. Such Strategy is part of the Green Deal project launched in December 2019 as one of the first and defining initiatives of the newly appointed von der Leyen Commission[2]. Within the context of the Green Deal, the Strategy aims at addressing «the challenges of sustainable food systems and recognises the inextricable links between healthy people, healthy societies and a healthy planet».

This article takes seriously the ambitions of the Farm to Fork Strategy (from now on, the F2F Strategy) and discusses the following questions: which are its objectives and instruments? How does it relate to previous evolutions of EU agriculture and food law? What is its overall rationale? And which are the institutional and substantive causes of its (possible) flaws?

In order to answer such questions, the article will first describe the objectives of the F2F strategy (§ 2) and the regulatory instruments proposed to achieve these objectives (§ 3); then, it will discuss the pattern of continuity and

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[1] COM (2020) 381 final.

[2] COM (2019) 640 final. For an analysis (also) of the acts following the Green Deal, see G. SEVERINI-U. BARELLI, *Gli atti fondamentali dell'Unione europea su "transizione ecologica" e "ripresa e resilienza": prime osservazioni*, in *Riv. giur. ambiente online*, 20, April 2021.

change between the F2F strategy and EU agriculture and food law (§ 4) and will highlight its fundamental rationale (§ 5); finally, it will provide a critical discussion of some possible flaws of the F2F strategy (§ 6).

2. *From one Macro-Objective to several Sub-Objectives: an Integrated and Progressive Approach to a "Multidimensional" Food Sustainability*

The F2F Strategy is mainly a regulatory agenda, *i.e.* a list of objectives[3] characterized by a comprehensive and integrated approach[4]. Indeed, first, it identifies one ambitious macro-objective and then, in a progressively more specific way, several sub-objectives. These sub-objectives ultimately represent the actual changes of the different stages of the food supply chain (and of its context) that are necessary to achieve that comprehensive macro-objective.

The Strategy's macro-objective is the «transition to sustainable food systems». The concept of food sustainability is nevertheless left undefined by the Commission[5]. However, a careful reading of the entire text of the Communication reveals that it has a "multidimensional"[6] meaning. Indeed, the Commission builds its understanding of food sustainability on three fundamental (and potentially conflicting[7]) social values: i) food security[8], ii) food safety (and health)[9], and iii) environmental protection. According to the Commission, pursuing food sustainability requires trying to achieve these three

[3] H. SCHEBESTA-J. L. CHANDEL, *Game-changing potential of the EU's Farm to Fork Strategy*, in *Nature Food*, 2020, p. 586.

[4] The nexus between agriculture, food, nature and climate (also in the field of public policies and also in the context of the F2F Strategy) is well described by M. ALABRESE, *Politiche climatiche, politiche agricole e il bisogno di coordinamento*, in *Riv. dir. agr.,* 2020, 3, pp. 636 ff.

[5] H. SCHEBESTA-J. L. CHANDEL, *op. cit*., p. 586 critically say that «the concept remains rather ill-defined in the F2F Strategy, appearing as a panacea without clear conceptual boundaries». According to them, the ambiguity of the concept creates the risk of "policy incoherencies".

[6] This adjective is used by H. SCHEBESTA-J. L. CHANDEL, *op. cit.*, p. 586.

[7] Again ID., *ibidem.*

[8] For a well-known definition of food security see FAO, Rome Declaration on World Food Security and World Food Summit Plan of Action, 13-17 November 1996, Rome. In this document, it is stated that «food security, at the individual, household, national, regional and global levels [is achieved] when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life».

[9] The concept of food safety is instead related to the quality of food. For a narrow definition of this notion, see article 14 of the Regulation n. 178/2002: «1. Food shall not be placed on the market if it is unsafe. 2. Food shall be deemed to be unsafe if it is considered to be: (a) injurious to health; (b) unfit for human consumption».

social values in all the stages of the food process: as it explicitly points out, there are strong «interrelations between our health, ecosystems, supply chains, consumption patterns and planetary boundaries»[10].

This ambitious macro-objective is then progressively articulated in several sub-objectives, having a wider or more narrow scope. In other terms, the Strategy moves from the macro-objective through "intermediate" sub-objectives to specific sub-objectives. In this way, the Commission tries to articulate gradually and comprehensively the paths that should be followed to achieve a "multidimensional" food sustainability. Only after having listed the specific sub-objectives, it can identify the corresponding concrete regulatory actions that should be taken to realize its ambitious macro-objective.

As anticipated, the many specific sub-objectives[11] are placed by the Commission in four main policy areas, which, in turn, represent the four "intermediate" sub-objectives of the Strategy[12]. These are: i) sustainable food production, ii) sustainable food processing and distribution, iii) sustainable food consumption, and iv) food loss and waste prevention[13].

These four "intermediate" objectives clarify the approach of the Commission to the challenge of a "multidimensional" food sustainability: it is an integrated and comprehensive approach that steers the entire food process, from the producer ("farm") to the consumer ("fork") by way of the food

[10] These words recall the concept of "food integrity", on which G. STEIER, *Food Integrity and the Food System From a Switchboard Perspective*, in *RQDA*, 2019, 1, p. 92.

[11] There are 21 specific sub-objectives. However, the distinction between regulatory objectives and regulatory instruments is not always clear in the text of the F2F Strategy. Therefore, this estimate has room for error. However, quantitative accuracy is not fundamental in this legal analysis.

[12] As correctly observed by A. MASSOT MARTI, *Research for Agri Committee, The Farm to Fork Strategy implications for agriculture and the CAP*, European Parliament Policy Department for Structural and Cohesion Policies, Brussels, May 2020, p. 10.

[13] There is also another peculiar field of legal action identified by the European Commission: that of global and international initiatives. The Commission wants the EU to be the leader of the «global transition to sustainable agri-food systems», mainly through «international cooperation and trade policy». However, this part of the F2F Strategy will not be analysed because it would broaden too much the scope of this paper: indeed, it could not be well understood without a thorough study of the global food and environmental legal regimes with which the Strategy should interact.

processing actors (industry)[14], towards the values of food security, food safety and environmental protection.

The analysis of the specific sub-objectives confirms the integrated approach of the F2F Strategy. It may be useful to give few examples from each policy area. In the area of sustainable food production, the Commission is committed to promoting a circular bio-based economy, reducing the use of hazardous pesticides (by 50% by 2030) and fertilizers (by 20% by 2030) and supporting the algae industry. In the area of sustainable food processing and distribution, the Commission states instead that sustainable production methods and circular business models in food processing and retail should be encouraged. In the area of sustainable food consumption, the Commission wants to realize the transition to a more plant-based diet with less red and processed meat (to tackle obesity and other "ordinary" diseases). Lastly, in the area of food loss and waste prevention, the Commission wants to propose legally binding targets to reduce food waste. In fact, there is also another sub-objective that is presented as "autonomous" and that is worth mentioning for its importance, *i.e.* the development of a contingency plan for ensuring food supply and food security in times of crisis.

These few examples reveal the strategic rationale of the Commission. To achieve a "multidimensional" food sustainability, a huge transformation is needed, a transformation that should affect all the actors involved in the food supply chain. For this reason, the macro-objective of the Strategy is articulated in specific sub-objectives concerning food production, food processing and food consumption (which can determine food loss and waste): farms need to change, industries need to change, consumers need to change. Ultimately, these sub-objectives specify in which ways the different stages of the food supply chain should change to achieve a "multidimensional" food sustainability.

This integrated and comprehensive approach is due to the Commission's ambitious "multidimensional" understanding of food sustainability. Indeed, if food sustainability had meant (as it does, for example, in the Report of June 2020 by the High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security) only the guarantee of

[14] This holistic approach was anticipated (on the control side) by the Regulation n. 625/2017. See F. ALBISINNI, *Regulation (EU) 2017/625: Official Controls, Life, Responsibilities, and Globalization*, in *European Food and Feed Law Review*, 2019, pp. 118 ff.

"intergenerational" food security[15], then the F2F Strategy would have been much simpler and shorter. However, because the Commission is inspired by the values of food safety, food security and environmental protection at the same time, then the Strategy needs to set several specific objectives concerning the entire food supply chain.

The few specific sub-objectives recalled, however, are also useful to stress another important point. Indeed, some of them (*e.g.* the promotion of the algae industry) seem expressions of the idea that the Strategy should also «offer economic gains» to European citizens. In fact, the Commission goes even beyond (a "multidimensional" understanding of) food sustainability when it explicitly points out that the «shift to a sustainable food system can bring environmental, health and social benefits, offer economic gains and ensure that the recovery from the crisis puts us onto a sustainable path». The idea is that the transition «to a sustainable food system» should be "just", thus taking a social justice perspective, and should represent «a huge economic opportunity», especially in the aftermath of the COVID-19 pandemic and the subsequent economic downturn. By saying that, the Commission seems to design the F2F Strategy as an initiative aimed not only at achieving environment- and food-related results but also at fostering the economic, social and political recovery of the European integration process. However, even from the few examples given one can say that, while the economic growth paradigm is somehow implicit in the underlying rationale of the F2F Strategy, the social justice spirit is instead underdeveloped and, ultimately, rhetorical. But we will come back later to this consideration.

As argued, by listing the specific sub-objectives, the Commission approaches the identification of the corresponding concrete regulatory actions required to realize the transition. In fact, in the Strategy, there is also a part called "Enabling the transition". It contains other specific sub-objectives that are instrumental to the achievement of the goals of other policy areas[16]. These "instrumental" sub-objectives could be placed in a fifth residual policy area,

[15] High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security, 15th Report, Food security and nutrition. Building a global narrative towards 2030, June 2020.

[16] Actually, one could also consider them regulatory instruments. However, the legislative initiatives through which they will be realized are not always clarified in the main text of the Communication. Therefore, it is better to consider them as "instrumental" sub-objectives.

that of protection of R&I (research and innovation) on and knowledge sharing about sustainable food systems. In this part of the Strategy, the Commission proposes, for example, to increase funds for R&I on food and environmental issues, to take (more) actions against food fraud along the food supply chain, to enhance the common European agriculture data space with specific attention to sustainability, and so on. These "instrumental" sub-objectives thus identify the changes of "context" necessary to the realization of the specific sub-objectives concerning the transition of the food system. In this perspective, they confirm the complexity of the F2F Strategy, which adopts an integrated and comprehensive approach that considers not only "internal" aspects of the food supply chain, but also factors (such as R&I, data sharing, frauds) that are "external" to (but impacting on) it.

3. *Regulatory Instruments: The Reformist Legal Approach of the Commission and the Need for a Collective Effort*

As said before, the F2F strategy is mainly a list of regulatory objectives. However, it is not only that. Indeed, the Commission also points to several regulatory instruments that could be used to achieve (some of)[17] these objectives. These regulatory actions are presented in the Annex to the Communication[18], which provides a list of 27 regulatory measures, divided into the four main policy areas of the Strategy and accompanied by the indication of the year in which they will be probably implemented (between 2021 and 2024). In fact, there are also two cross-cutting initiatives that are worth mentioning for their importance: the «proposal for a legislative framework for sustainable food systems» and the development of a «contingency plan for ensuring food supply and food security in times of crisis».

It is interesting to point to two aspects of the Annex's regulatory actions: how they relate to the existing EU regulatory framework and their "autonomy" from or "dependence" on other social and institutional actors. The overall impression is that the Commission shows a reformist legal attitude and that it is aware of the need for a collective implementing effort, which should also involve Member States, businesses and citizens.

[17] As H. SCHEBESTA-J. L. CHANDEL, *op. cit.*, p. 587 point out, «many of the strategy's promises are not translated into action points».
[18] Draft Action Plan of the Farm to Fork Strategy, Annex to COM/2020/381.

Indeed, from the first point of view, the types of regulatory actions that the Commission proposes to realize the objectives of the F2F Strategy are three: i) the revision of the existing regulatory framework (regulation, directives, etc.), ii) the proposal of new regulatory instruments, iii) the use of the Common Agricultural Policy (from now on, CAP) and, in particular, the direction and control of draft CAP Strategic Plans of Member States[19].

The first type of initiatives is more frequent and, in a certain sense, specific: indeed, one may from now foresee their content by considering the existing legal rules that will be reformed (even if a certain vagueness is inevitable). For example, knowing the specific sub-objectives of the Strategy (reduction of the use of chemical pesticides by 50% by 2030), one can already predict in which way the Sustainable Use of Pesticides Directive will be reviewed. The second type of measures, slightly less frequent, tends to be more generic: for example, the (fundamental) initiative to create a legislative framework for sustainable food systems is so generic that one cannot foresee its contents[20], but the same could be said also for other innovative regulatory measures (*e.g.* the «legislative initiatives to enhance cooperation of primary producers to support their position in the food chain»). The third type of action is instead recalled only once, but it has great importance for all the objectives of the Strategy because it represents the way in which the Commission will try to steer Member States' agricultural policies through the targeted use of a third of the EU's total budget and the coordination of the functioning of national administrations[21].

As anticipated, a balanced reformist approach emerges: the Commission wants to exploit the existing legal framework, refining it and not demolishing it. Indeed, also the innovative regulatory actions have a limited sectorial scope (except for the «proposal for a legislative framework for sustainable food systems», which may have a broader impact). In this perspective, there is no doubt that a lot will change (hopefully for the better), but there does not seem to be any intention to overthrow the existing regulatory paradigm. The impression

[19] For a further analysis of the F2F Strategy's Annex and its relationships with the CAP, see A. MASSOT MARTI, *op. cit.,* pp. 18-20.
[20] As noted by H. SCHEBESTA-J. L. CHANDEL, *op. cit.,* p. 587.
[21] See S. CASSESE (ed.), *La nuova costituzione economica*, VI ed., Bari, Laterza, 2021, p. 99 and A. MASSOT MARTI, *op. cit.,* p. 13.

is that the F2F Strategy is an evolution (rather than a revolution) of the existing EU law.

From the second point of view (concerning the "autonomy" or "dependence" of the actions proposed by the Commission from other social and institutional actors), it should be stressed that a large majority of these regulatory instruments is likely to be hard law, while a slight minority of them is likely to be soft law (in particular, in the area of sustainable food processing and distribution) or of national governments coordination (in particular, in the CAP area)[22]. However, the importance of soft law initiatives should not be underestimated. Indeed, if the transition to "multidimensional" food sustainability must affect the entire food supply chain, then the EU's powers and competencies are not enough: a comprehensive transformation such as the one described by the Commission also requires the active involvement of Member States and citizens. This is made clear by what will be said later about the fundamental role played in the Strategy by the CAP, but another example could be the initiative to «develop an EU code and monitoring framework for responsible business and marketing conduct in the food supply chain»: self-responsibility of virtuous economic actors should be steered towards food sustainability, even beyond hard law rules.

But, even more interestingly, also most of the hard law initiatives described in the Annex are not "concrete" and, so to say, "self-executive": take, for example, «the revision of the relevant implementing Regulations under the Plant Protection Products framework to facilitate placing on the market of plant protection products containing biological active substances» or the «legislative initiatives to enhance cooperation of primary producers to support their position in the food chain and non-legislative initiatives to improve transparency» or, to make only another example, the «proposal for EU-level targets for food waste reduction». These measures (and many others like them) will only create a general legislative framework that will enable other institutional, economic and social actors to realize the transition. Indeed, under the principles of competence, subsidiarity and proportionality, the Commission is only able to create the legal conditions for citizens, businesses and, above all, national governments to create sustainable food systems. The Commission is well aware

[22] Obviously, given the generic and synthetic nature of Annex, these are only predictions: it is up to the future choices of European institutions to determine the actual composition (in terms of hard law or soft law) of the food and agricultural legal framework.

of that when it says, in the conclusions of the Strategy, that this transition «requires a collective approach involving public authorities at all levels of governance (including cities, rural and coastal communities), private sector actors across the food value chain, non-governmental organisations, social partners, academics and citizens». This is the reason why sometimes one may have the impression that the regulatory instruments proposed in the Annex only scratch the surface of the great ambitions of the F2F Strategy[23]. The truth is that the EU cannot, alone, realize its challenging objectives. It can only create the general legislative framework (quantitative limits on the use of certain products, bans on the use of certain products, quantitative targets, labelling rules, economic incentives, etc.) within which other actors (in particular, Member States) should take concrete administrative or economic actions capable of realizing the transition.

To sum up, the Annex's regulatory actions reveal two fundamental implicit features of the F2F Strategy. The first one is its reformist attitude towards the existing EU regulatory framework. The second one is the fundamental role that it attributes to other actors besides European institutions, such as citizens, businesses and, mostly, Member States.

4. *Continuity and Change: the F2F Strategy in the Evolution of Agriculture and Food Law*

Once recalled the regulatory objectives and instruments of the F2F Strategy, we can now situate it in the historical evolution of EU agriculture and food law.

In this perspective, the Strategy can be considered a gradual evolution of the existing agriculture and food legislation through some real novelties and some rediscovered values. As for the novelties, the main innovation is represented by the autonomous dignity gained, in this field, by environmental protection. As for the rediscoveries, there is a new (wider) understanding of the concepts of food safety and food security[24]. The prominence of these three

[23] Impression shared also by H. SCHEBESTA-J. L. CHANDEL, *op. cit*., pp. 586-587.

[24] The increased political sensitivity on (and the connection between) the issues of food security, food safety and sustainable agriculture is stressed by A. JANNARELLI, *Il diritto agrario del nuovo millennio tra food safety, food security e sustainable agriculture*, in *Riv. dir. agr.*, 2018, 4, pp. 511 ff. At p. 548 he says that «the main novelty compared to recent past is that the same issues

social values (which together form the "multidimensional" food sustainability) makes the economic impact of the Strategy's policy proposals less important than it has traditionally been in the EU's history.

Indeed, perhaps unsurprisingly, the F2F Strategy is first of all coherent with the relevant Treaty provisions. While laying down the conditions for renovating the food system, the Strategy does not go beyond the objectives of the CAP as established by Article 39 TFEU and *integrated* with the needs of environmental protection under Article 11 TFEU. Similarly, the regulatory instruments of the Strategy, which reflect this balance, are aligned with the measures listed in Articles 40 and 41 TFEU.

Also from the point of view of primary legislation, the F2F strategy represents a way to continue the transition of the CAP and of European food law towards a more ambitious project of "multidimensional" food sustainability.

To cut a long (and complex) story short, the CAP original main concern was market support (to foster productivity and, consequently, to ensure food security after the IIWW). Then, since 1992, it became producer support (in the form of direct payments to farmers to ensure their income and avoid production surpluses). In the meantime, in the near field of food law, the EU started to give increasing importance to "food safety", originally conceived as the prohibition of «unsafe food», *i.e.* food that is «injurious to health» or «unfit for human consumption» (Regulation n. 178/2002). Therefore, one can say that, in recent times, food-related policies started focusing also on consumers[25].

During the last years, however, there has been a further eco-friendly evolution of the CAP. In the 2018 Regulation proposal for the CAP reform[26], its general objectives are defined by article 5 in this way: «(a) to foster a smart, resilient and diversified agricultural sector ensuring food security; (b) to bolster environmental care and climate action and to contribute to the environmental- and climate-related objectives of the Union; (c) to strengthen the socio-

concerning food safety and food security need to be addressed in the perspective of the so-called "sustainable development", in which "productive agriculture" itself should be placed» (originally in Italian).

[25] *Amplius*, on the evolution of CAP, see S. CASSESE (ed.), *op. cit*., pp. 100-103. On the history of European food law, B. M. J. VAN DER MEULEN, *The Structure of European Food Law*, in *Laws* 2013, pp. 73-78. See also G. BUIA, *Agricoltura multifunzionale e produzione integrata: profili giuridici*, in *RQDA*, 2019, p. 46 ff.

[26] COM (2018) 392 final.

economic fabric of rural areas». Even more interestingly, within the nine CAP specific objectives enlisted in article 6 of the Regulation proposal, six seem to anticipate quite accurately the contents of the F2F Strategy: «(a) support viable farm income and resilience across the Union to enhance food security; […] (d) contribute to climate change mitigation and adaptation, as well as sustainable energy; (e) foster sustainable development and efficient management of natural resources such as water, soil and air; (f) contribute to the protection of biodiversity, enhance ecosystem services and preserve habitats and landscapes; […] (h) promote employment, growth, social inclusion and local development in rural areas, including bio-economy and sustainable forestry; (i) improve the response of EU agriculture to societal demands on food and health, including safe, nutritious and sustainable food, food waste, as well as animal welfare»[27]. Therefore, even if the European Green Deal is a cornerstone of the political action of the von der Leyen Commission, also the Juncker Commission started to orient European food policies towards climate change mitigation, preservation of biodiversity, promotion of bio-economy and, more generally, environmental protection[28]. Thus, the Strategy did not come out of the blue, being instead the final (political) product of a mature political will.

As anticipated, the F2F Strategy seems coherent with this overall evolution of EU agriculture and food law and represents a further step of this process, characterized by four "new" features.

Firstly, after its decline in 1992, the importance of food security is emphasized again[29] (because of the growing population but also because of the "shock" of the COVID-19 pandemic[30]), but its understanding is now enriched by the attention given to the value of "food variety"[31]. The Commission

[27] More information on the contents of the proposal can be found in SWD (2020) 93 final, p. 3-8. On p. 8-16, this document also clarifies that the links between the CAP reform and the F2F Strategy are more than those recalled in this essay and concern also operative aspects.
[28] However, as A. MASSOT MARTI, *op. cit*., pp. 17-19 observes, the reform of the CAP will be affected by the new «socio-economic, environmental and institutional» background post-2020.
[29] See also F. ALBISINNI, *La definizione di attività agricola nella nuova PAC, tra incentivazione e centralizzazione regolatoria,* in *Riv. it. dir. pubbl. comunit*.,2014, p. 967 ff.
[30] On the impact of the COVID-19 pandemic on the food system, see L. PAOLONI, *La sostenibilità "etica" della filiera agroalimentare*, in *Riv. dir. alim*., 2020, 4, pp. 7 ff. See also P. CAVARZERAN, *COVID-19 e agricoltura. La gestione europea della crisi nel contesto di transizione della PAC*, in *Riv. dir. agr.,* 4, 2020, pp. 925 ff.
[31] For the importance of the concept of "food diversity" and for the renewed importance of the value of "food security" in EU agricultural policies, C. NAPOLITANO, *Food security: percorsi per la sostenibilità alimentare*, in *RQDA*, 2020, 2, pp. 83-84. See also M. MONTEDURO, *Diritto*

ambitiously speaks of the need to ensure a «sufficient and varied supply of safe, nutritious, affordable and sustainable food».

Secondly, the concept of food safety is widened because it considers now not only directly "injurious" (toxic) food (like Regulation n. 178/2002) but also "unhealthy" food, which causes "ordinary" pathologies (such as obesity, cardiovascular diseases and cancers). The aim is to guarantee to European citizens «healthy and sustainable diets will benefit their health and quality of life, and reduce health-related costs».

Thirdly, environmental protection gains autonomous dignity (even if from an anthropocentric point of view) in the agriculture, fishery and food sector[32] and it is pursued notwithstanding other concerns. The entire F2F Strategy is an expression of this new approach in which environmental protection is an objective *per se*, but a clear and specific example of it is the part of the Strategy on carbon sequestration: this proposal has indeed no other aim than the environmental one[33].

Fourthly, and lastly, compared to food security, food safety and environmental protection (that together form the "multidimensional" food sustainability), the economic impact of the transition is not a major concern of the F2F Strategy and it is easily dismissed by saying that «the transition to sustainability presents a first mover opportunity for all actors in the EU food chain». Rather, purely economic measures of the CAP (such as direct payments) are made instrumental to the achievement of environmental objectives (so-called eco-schemes). In other terms, market and producer support are relevant for the Strategy as long as they contribute to the realization of the transition to food sustainability. However, the "marginality" of the economic consequences of the Strategy is only formal and apparent: indeed, as we will see in the next paragraph, the economic growth perspective is somehow implicit in the

dell'ambiente e diversità alimentare, in *RQDA*, 2015, 1, pp. 116 ff. For the concept of "agrobiodiversity", M. BRUNORI, *Which pathways for agrobiodiversity in the new CAP reform?*, in *Riv. dir. agroalimentare*, 2020, 2, pp. 277 ff.

[32] On the recent "greening" of the CAP and, more generally, on the environmental impact of agricultural activities, see G. A. PRIMERANO, *Il carattere multifunzionale dell'agricoltura tra attività economica e tutela dell'ambiente*, in *Dir. Amm*., 2019, p. 837 ff.

[33] Even if it should be realized also through economic incentives. Indeed, there is no need to clarify that, even if the farmers who realize carbon sequestration practices are economically rewarded, the aim of this policy proposal remains exclusively environmental.

underlying rationale of the proposals of the Commission[34], which believes that the realization of a "multidimensional" food sustainability will also determine the creation of «new green business models», more competitive and modern.

In conclusion, from a legal point of view, the F2F Strategy does not break the existing regulatory framework of EU agriculture and food law. Rather, it is a gradual evolution of the existing legislation, an evolution in which social values (food security, food safety and environmental protection) acquire wider significance and greater importance. From the perspective of "multidimensional" food sustainability, the assessment of the purely economic impact of the transition becomes somehow silent and implicit (but still present, as will be clarified in the next paragraph).

5. *The F2F Strategy as a Social Regulation Agenda*

What has just been said suggests that the F2F Strategy is not about economic integration[35] or economic regulation. It is, instead, a project of social regulation. This is the real "substantive" meaning of the "multidimensional" food sustainability objective pursued by the Commission.

To clarify this statement, it is first of all necessary to explain the meaning of the expressions "economic regulation" and "social regulation". Following Giandomenico Majone, we can consider economic regulation as the regulation directed to improve «the efficiency of the economy by correcting specific forms of market failure such as monopoly, imperfect information, and negative externalities»[36]. On the contrary, to understand the meaning of "social regulation", we can recall the work of Alfred Müller-Armack on "social market

[34] According to A. MASSOT MARTI, *op. cit.*, p. 5, «the European Green deal goes well beyond just climate policy. It includes an EU's new sustainable growth model emphasising that decarbonisation, sustainability, protection of natural resources, public health, and economic competitiveness must go hand-in-hand». It is not by chance that "economic growth" is mentioned by the Commission at the beginning of the part of the Strategy called "Promoting the global transition": even if it is not an objective of the Strategy, it is still the traditional policy paradigm, implicit also in the Strategy.

[35] It is the well-known history of the creation of the EU customs union and monetary union, on which S. CASSESE (ed.), *op. cit.*, pp. 67-137. See also C. JOERGES-F. RÖDL, "*Social Market Economy" as Europe's Social Model?*, EUI Working Paper, n. 2004/8, pp. 3-9.

[36] G. MAJONE, *The rise of the regulatory state in Europe*, in *West European Politics*, 1994, p. 79. For some failures of the food market, L. COSTATO, *Il "Dio mercato" e l'agricoltura*, in *Riv. dir. agr.*, 2018, 1, pp. 88 ff.

economy"[37]: in this paradigm, the regulation pursues social objectives, but these are in any case «subordinated to the functionality of market mechanisms». The concept of social regulation may be better understood through a comparison with the different concept of welfare social policy: while in the latter the State creates alternatives to the market through tax-financed public services directed to free citizens from some of their basic needs (such as healthcare, education, etc.), in the former regulatory actions that «threaten to distort market competition and its core, the price mechanism, are excluded from the socio-political agenda»[38].

Following these definitions, the F2F Strategy can be considered a social regulation agenda. As argued before, the F2F Strategy has a reformist legal approach in which the social values of food security, food safety and environmental protection compose the macro-objective of food sustainability: however, the Commission believes that this macro-objective could and should be realized by the (common) market. Indeed, the transition to a "multidimensional" food sustainability needs to be (also) economically sustainable. In other words, the Strategy should not distort (or replace) the food market, but rather exploit its hidden "green" potentialities. Therefore, while the objectives of the Strategy are predominantly social, its subjects (those who are called to make the transition happen) are private individuals and businesses, steered and coordinated by European (and national) public institutions.

As already argued, however, the market is not an objective of the Strategy for itself. On the contrary, agriculture, fishery and food markets seem to be redesigned as «social economic spaces» and are considered instrumental to the achievement of social purposes. Their negative externalities on the environment (and on the health of present and future generations) are therefore corrected through different measures (quantitative limits on the use of certain products, bans on the use of certain products, quantitative targets, labelling

[37] A. MÜLLER-ARMACK, *Wirtschaftslenkung und Marktwirtschaft*, 1946 reprinted in *Wirtschaftsordnung und Wirtschaftspolitik. Studien und Konzepte zur sozialen Marktwirtschaft und zur europäischen Integration*, Freiburg, 1966, pp. 19-170. This study is recalled by C. JOERGES-F. RÖDL, *op. cit.*, pp. 12 ff.

[38] These quotes are taken by C. JOERGES-F. RÖDL, *op. cit.*, p. 16. The Authors do not define the concept of welfare social policy. However, it can be derived *a contrario* by Müller-Armack's definition of "social market economy", which is conceived as opposed to «the socialist or at least interventionist (mixed economy)» project.

rules, corporate governance systems, etc.)[39]. The Commission states indeed that the transition to a sustainable food system «is also a huge economic opportunity»: however, economic growth is not an objective of the Strategy *per se* but rather a positive consequence of its implementation. A consequence that the Commission considers inevitable because it conceives the Strategy as an avant-garde and anticipatory project in a world that changes (better, that must change) in the direction of environmental sustainability. Therefore, the F2F Strategy is not an economic regulation project.

But the Commission does not either want to create a real alternative to the market: the paradigm is always the (now sustainable) economic growth paradigm. Indeed, as food sovereignty[40] scholars pointed out in their "collective response" to the F2F Strategy[41], the Commission failed to take up in its Communication the recommendation of a group of independent experts according to whom «food must be viewed more as a common good rather than as a consumer good»[42]. Considering this, the Strategy cannot be considered a welfare social policy proposal. Instead, it is a perfect example of social regulation: the economic dynamics of the market are steered towards the creation of a sustainable food system (which is a socially valuable objective). Even economic public incentives, such as the so-called eco-schemes or the guarantees of the InvestEU Fund, do not aim at replacing the market. They only aim at boosting "sustainable practices" and, in this way, promoting the "transition" to environmental sustainability of the common market itself, which remains the core of the European unitary project. Indeed, the Commission explicitly says that «the framework [for a sustainable food system] will allow operators to benefit from sustainable practices and progressively raise sustainability standards so as to become the norm for all food products placed on the EU market». Ultimately, the fundamental economic rationale is always Alfred Müller-Armack's "social market economy".

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[39] Also, D. BEVILACQUA, *Il Green New Deal e la regolazione pubblica*, in *Riv. giur. ambiente online*, 19, March 2021.

[40] For the concept of food sovereignty, see A. RINELLA, *Food sovereignty*, in *RQDA*, 2015, 1, pp. 16 ff. For a critical analysis, G. ZAGREBELSKY, *Sovranità alimentare: un concetto costituzionale,* in *Riv. dir. agroalimentare*, 2017, 3, pp. 435 ff.

[41] Food sovereignty scholars (G. ALBERDI et al.), *A collective response from food sovereignty scholars on the EU's Farm to Fork Strategy*, May 2020.

[42] Group of Chief Scientific Advisors, Scientific opinion n. 8, *Towards a Sustainable Food System*, Brussels, March 2020, p. 7.

This is made clear also by the paragraph regarding the need to ensure food security in times of crisis, in which the Commission does not consider food as a "common good". Instead, it only proposes to use the "agricultural crisis reserve", which is however a simple form of «additional support for the agricultural sector in the case of major crises affecting the agricultural production or distribution» obtained from «a reduction to direct payments» to farmers[43]. This is the old idea of producer support, applied to (modern) times of crisis. Surely, it is not a form of welfare social policy in which food is produced and distributed for free by public institutions. The Commission believes that, also for future unpredictable crises, the solution will come from the common market (with some public incentives).

To sum up, the F2F Strategy is an advanced form of regulation that proposes an integrated and comprehensive approach that steers the entire food process, from the producer ("farm") to the consumer ("fork") by way of the food processing actors (industry)[44], towards an idea of food sustainability based on three social fundamental values: food security, food safety and environmental protection. Therefore, the Strategy is a social regulation agenda: indeed, food sustainability is a social macro-objective and the idea of the Commission is that the common market could achieve it on its own after having been correctly shaped and steered by public policies. Consequently, economic growth is not an objective of the Strategy for itself, but it is considered as a certain positive consequence of the transition because, according to the Commission, the Strategy «presents a first mover opportunity for all actors in the EU food chain». In other terms, even if the Strategy is not an economic regulation project, the economic growth paradigm is somehow implicit in its "social market economy" philosophy. Furthermore, being consistent with this philosophy, the Commission does not want to use the F2F Strategy to propose a welfare social policy agenda. Indeed, it believes that the food supply chain, even in times of crisis, cannot be entirely public: according to the Commission, it is necessarily private and, for this reason, it is up to farms and food companies (and citizens) to become environmentally sustainable, with some help from public institutions. Therefore, also from a more "substantive" point of view, the

[43] Article 25 of the Regulation n. 1306/2013.
[44] As H. SCHEBESTA-J. L. CHANDEL, *op. cit*., p. 586 notice, «it is the first time in the history of EU food law that the union has addressed food sustainability in a comprehensive manner, from primary production to the consumer».

cautious reformist approach of the Strategy is confirmed: to realize the huge transition to a sustainable food system, the Commission intends to follow known (legal and substantive) regulatory paths.

6. *The F2F Strategy's Possible Shortcomings*

In the previous pages, we have reconstructed the relationship between the F2F Strategy and the existing EU agriculture and food law. We should now develop such analysis by considering the possible flaws of the approach taken by the Commission in the Strategy.

Among the shortcomings so far detected by commentators and social actors, three of them are relevant to our analysis.

To begin with, it is argued that the F2F Strategy gives a too important role to CAP[45] (of whose budget, nearly a third should be devoted to climate change mitigation and environmental protection actions[46]). Indeed, the CAP has a "dark side": it strongly relies on the action of Member States' national governments[47]. After its reform, national Strategic Plans will be even more important[48]. Therefore, the success of the Strategy will strongly depend on the capacity of the Commission to steer the Member States towards the idea of food sustainability[49]. The Commission shows to be aware of that when it recognizes that «the [CAP] strategic plans will need to reflect an increased level of ambition to contribute to reaching these targets»[50]. However, commentators

[45] See also A. MASSOT MARTI, *op. cit.*, p. 19-20. For a critical overview of the CAP's reforms, F. ALBISINNI, *La nuova PAC e le competenze degli Stati Membri tra riforme annunciate e scelte praticate*, in *Riv. dir. agr.,* 2020, 1, pp. 43 ff.
[46] SWD (2020) 93 final, p. 7.
[47] On this, in the perspective of the nexus between food security, food safety and environmental protection, A. JANNARELLI, *Agricoltura sostenibile e nuova PAC: problemi e prospettive*, *in Riv. dir. agr.,* 2020, 1, pp. 23 ff.
[48] SWD (2020) 93 final, p. 3, where it is said: «the future CAP is proposed to be implemented through national CAP Strategic Plans, a programming tool that will define, for each Member State, the key parameters for the implementation of all CAP instruments (direct payments, rural development and sectorial interventions). The proposal provides for objectives and a set of broad types of interventions laid down at EU level, establishing what Member States can do with the resources allocated to them: each Member State will be free to select and further design the specific measures it considers the most effective in meeting its own specific needs. A common set of indicators is proposed at the EU level to allow monitoring of policy implementation and an evaluation of policy impact based on common indicators».
[49] SWD (2020) 93 final, p. 20.
[50] SWD (2020) 93 final, p. 9.

have already shared «their worries about the lack of ambition among Member State governments, as well as the relabelling of CAP instruments as climate expenditure without having substantive climate impacts»[51].

A second possible flaw, underlined by food sovereignty scholars, is represented by the fact that the Strategy gives an «active role for the financial sector, rather than public policies». According to them, this «can lead to further promotion of farm concentration and accelerate the disappearance of small-scale farmers that are the core of agroecology and a sustainable food systems approach»[52]. Therefore, they argue that the Strategy relies too much on private capital.

The third criticism was raised by the European Federation of Food Agriculture and Tourism Trade Unions (EFFAT), which suggested that more attention needs to be given to economic and social negative impacts (job losses, new skills required, etc.) of the Strategy[53]: indeed, «food processing, agriculture and hospitality are not included among the sectors covered by the Just Transition Fund as proposed». According to the EFFAT, «social policies must be fully integrated into the new vision» of the Strategy[54].

To sum up, from a wide legal point of view, we can identify three main possible shortcomings of the F2F Strategy detected by commentators and social actors: i) too much reliance on Member States, ii) too much reliance on private capital and market dynamics, iii) too little attention on social negative impacts of the transition.

Time will tell whether these criticisms are correct. In the meanwhile, we can stress the fact that each of the three flaws derives from the limits of the cautious and reformist approach of the Strategy.

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[51] H. SCHEBESTA-J. L. CHANDEL, *op. cit*., p. 587. See also p. 588, where they say that «successful coordination with the Member States is therefore a prerequisite without which there is a real risk of a watering down of the Strategy's ambitions in the Member State implementation phase». The same criticism is shared by H. MOSCHITZ et al., *How can the EU Farm to Fork strategy deliver on its organic promises? Some critical reflections*, in *EuroChoices,* 2021, 20(1), pp. 30-31.

[52] Food sovereignty scholars (G. ALBERDI et al.), *op. cit.*, p. 2.

[53] A similar worry is shared by H. SCHEBESTA-J. L. CHANDEL, *op. cit*., p. 588.

[54] European Federation of Food Agriculture and Tourism Trade Unions, *For a successful EU Farm to Fork Strategy*, 2020, p. 2 and p. 4. A similar criticism is expressed by H. MOSCHITZ et al., *op. cit.,* pp. 33-34. They observe that «the key role of innovation is clearly identified in the F2F strategy, but the focus is almost exclusively on nature-based, technological and space- based solutions, largely neglecting social processes»: therefore, according to them, more attention should be given to the education and training of the people involved in the transition (farmers, consumers, etc.)».

Let us start with the third criticism. It is quite clear that Trade Unions point to the lack of a real social policy in the Strategy: they underline the need of embedding into it a stronger social justice action. However, as argued before, the Commission does not want, in this Communication, to open a new path of the EU substantive action, *i.e.* the path of welfare social policies. Indeed, the element of the "just transition" is quite rhetorical and superficial in the text of the Strategy: the idea of the Commission is that the «shift to a sustainable food system can bring […] social benefits», without the need of a specific public intervention to support the ones damaged by the transition (other than the traditional producer support payments of the CAP). But the EFFAT underlines precisely that it is unlikely that the social "wounds" of the transition will be spontaneously healed by the market. Nevertheless, it is true that the European Green Deal also includes a Just Transition Mechanism, in which an important role is played by a Just Transition Fund financed through the EU budget. But, at the moment, it seems that this instrument will be used only to give a support that should be always «linked to promoting a transition towards low-carbon and climate-resilient activities», providing to citizens vulnerable to the transition «access to re-skilling programmes, jobs in new economic sectors, or energy-efficient housing»[55]. This is an expression of the traditional "social market economy" approach: public funds are used to steer private individuals towards jobs and activities that are (environmentally and socially) sustainable. The idea is that the market, with a little public support, should become able to achieve the goal of food sustainability and to repair social damages on its own. This is, as said before, the overall rationale of the F2F Strategy. Obviously, one cannot exclude that, in the future, the Commission will decide to use part of the Just Transition Fund to realize also some real welfare social policies *beyond* the market (such as providing a basic income to citizens who have lost their jobs because of the transition): but, at the moment, this is not probable nor foreseeable.

The criticism of food sovereignty scholars is similar. Indeed, they believe that the Strategy's strong reliance on private investments may boost processes, such as "farm concentration", that they think are negative (also) for the environment. For this reason, they advocate for a major role of public

[55] COM (2019) 640 final, p. 16. See also the website of the European Commission, page: The European Green Deal Investment Plan and Just Transition Mechanism explained.

investments, asking for a stronger social policy capable of maintaining and promoting certain modes of production, such as «small-scale producers and peasant agriculture». This may imply only a difference of understandings about the better ways to realize food sustainability: indeed, food sovereignty scholars support the paradigm of agroecology[56], while the Commission always relies on the paradigm of (green) economic growth. While leaving open the question of which option would be preferable, however, the criticism of food sovereignty scholars reveals that the Commission aims at realizing the only form of food sustainability that the market, with a little public support, can achieve on its own. Therefore, social and environmental objectives are subordinate to the logic of the market. This confirms once again that the core of the European Green Deal, as of the whole European unitary project, is the common market: its dynamics, even in a social regulation programme, cannot be distorted too much. Consequently, the Commission imagines a form of food sustainability inside the logic of the capitalist market, with all its (positive and) negative consequences. This is exactly the reason why food sovereignty scholars affirm that «the (green) economic growth paradigm […] reified by the European Green Deal, perpetuates unsustainable lock-ins and entrenched inequalities»[57]. In the end, their "collective response" reinforces the opinion expressed before: the F2F Strategy is a cautious (and not ground-breaking) reform of the current food production and distribution processes. Thus, it is a perfect example of social regulation.

EFFAT and food sovereignty scholars' criticisms both emphasize the need for a stronger social (environmental) commitment of the EU, even if from different perspectives (social security for the EFFAT and environmental protection for food sovereignty scholars). On the contrary, the first possible flaw recalled above does not concern this aspect, but the institutional architecture of the EU. In fact, it seems to advocate for greater autonomy of the action of EU institutions at a supranational level. Excessive reliance on national governments could indeed undermine the ambitions of the F2F Strategy and increase differences and asymmetries among Member States. However, one has to consider that the implementation of the CAP (or of similar policies of diffuse

[56] For a definition of the complex concept of agroecology, see E. LENI, *What Legal Foundations for Agroecology? Exploring Insights from the Thai Sufficiency Economy Philosophy*, in *RQDA*, 2019, 2, pp. 1 ff.
[57] Food sovereignty scholars (G. ALBERDI et al.), *op. cit.*, p. 1.

public control and intervention) requires huge administrative resources that the Commission does not have now. The proposed CAP reform seems to explicitly accept this, being characterized by a legal shift «from rules and compliance towards results and performance»[58] and recognizing National Strategic Plans as the main instrument to the realization of economic and environmental objectives. Thus, EU institutions are fully aware of their operative limits. In the current institutional context, the Commission knows that it can only act as a coordinator of the actions of national governments. The Strategy exactly shows that, for now, European public institutions can only fix common standards, binding limits, quantitative targets, create common legal frameworks and coordinate policies: but the relevant administrative implementing actions (such as direct payments, local projects, etc.) can only be done by national administrations (even if, sometimes, in the form of joint implementation). The dependence on the action of Member States is a hallmark of the European integration project and the Strategy confirms such consolidated feature, although its challenging ambitions make the limits of this architecture even tighter and clearer.

7. *Concluding remarks*

This essay has analysed the structure and the rationale of the F2F Strategy.

In the first descriptive paragraphs, we have stressed that it has one ambitious macro-objective, *i.e.* the creation of a sustainable food system, which has a "multidimensional" meaning based on three social values: food security, food safety and environmental protection. This macro-objective is then articulated in several sub-objectives, some "intermediate" and some specific: the main text of the F2F Strategy is indeed a regulatory agenda that adopts a progressive, comprehensive and integrated approach to food sustainability. But it also has an Annex that includes a list of regulatory actions, which reveal the cautious reformist approach of the Commission and the importance of a collective implementing effort of all the institutional, economic and social actors of the EU (in particular, Member States).

[58] This is the exact wording used on the website of the European Commission, page: Future of the common agricultural policy.

After that, we have stressed the coherence between the F2F Strategy and the existing EU agriculture and food law. Indeed, the F2F Strategy is an integrated application of Articles 11, 39, 40 and 41 TFUE and a continuation of the evolution process of food and agricultural primary law through some real novelties (such as the autonomous attention given to environmental protection) and through a new understanding of some "rediscovered" concepts (food safety and food security).

Then, we have tried to identify the "substantive" rationale of the F2F Strategy by considering the different models of economic regulation, social regulation and welfare social policy. We have seen that the Strategy is a social regulation project. Indeed, at its core, there is the idea that the common market should be shaped and steered to achieve the "multidimensional" food sustainability (which is a social objective). Economic growth is considered as a certain consequence of this approach, but it is not an objective of the Strategy for itself. Moreover, the Commission does not want to create alternatives to the market: food is not conceived as a "common good".

In the last paragraph, some possible flaws of the F2F Strategy have been discussed. We have said that they derive from the limits of the cautious and reformist approach of the Commission. Indeed, some criticisms point to the lack of a strong social justice action: however, the Commission does not want the Strategy to open a new (foundational) path of welfare social policy in the EU and, consequently, it is up to the market (appropriately steered by public institutions) to absorb any negative social impacts of the transition. Moreover, other criticisms underline, from an institutional point of view, the excessive reliance of the Strategy on the implementation actions of Member State: however, in the European institutional architecture, direct and diffuse administrative action has always been responsibility of national governments and, according to the Commission, the F2F Strategy is not the occasion to change this fundamental feature of the EU.

To conclude, the F2F Strategy is a challenging reformist project that represents an evolution (rather than a revolution) of the existing EU agriculture and food law: it is, in other terms, an attempt to satisfy the urgent needs of environmental protection *within* the existing institutional, political and economic architecture of the EU. This does not imply a negative judgment on the F2F Strategy. The point is that the analysis has shown a relationship of continuity, not of rupture, between the F2F Strategy and the existing EU

regulatory framework. But this does not mean that the F2F Strategy is not ambitious enough: indeed, its success will depend on the bravery that the Commission and the Member States (and all other EU social and economic actors) will show in implementing it through legal, administrative and economic measures[59]. The F2F Strategy, like the entire European Green Deal, is indeed only the political starting point for our collective effort to address the most important and urgent challenge of modern times, that of saving our "common home"[60].

[59] The same opinion is shared by H. SCHEBESTA-J. L. CHANDEL, *op. cit*., p. 586.
[60] The expression "common home" is used by the Holy Father Francis in the Encyclical letter *Laudato si' on care for our common home*, 24th May 2015.

ABSTRACT

Filippo Venturi - *The Farm to Fork Strategy. A Comprehensive but Cautious Approach to "Multidimensional" Food Sustainability*

This paper focuses on the "Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system", adopted by the European Commission in May 2020. Firstly, it provides a conceptual analysis of the objectives of the F2F Strategy: the "multidimensionality" of the macro-objective of food sustainability is underlined. Secondly, the paper examines the regulatory instruments proposed by the European Commission to realize this ambitious agenda: in particular, it underlines the fact that the F2F Strategy adopts a cautious reformist approach based on the cooperation of all the institutional and economic actors involved in the food system. After this descriptive analysis, the paper situates the F2F Strategy in the (recent) history of EU agriculture and food law and frames it as a gradual evolution of the existing legislation through four "new" features: the regained importance of the concept of food security, the enlargement of the concept of food safety, the autonomy of environmental protection in agricultural and food law, and the (only apparent) irrelevance of the economic impact of the transition. The latter point is then critically and specifically analysed: the conclusion is that the F2F Strategy represents a "social regulation" agenda in which the EU tries to realize a multi-layered social objective (food sustainability) through the steering of (common) market. In other words, the underlying "substantive" rationale of the F2F Strategy is the traditional economic growth paradigm, now "greened". Lastly, three possible flaws of the F2F Strategy's cautious and reformist approach are discussed: the lack of a strong social justice action, the excessive economic reliance on private capital and the excessive institutional reliance on the implementation actions of Member States.

KEY-WORDS: *Farm to Fork Strategy; European Green Deal; EU agriculture and food law; common agricultural policy; sustainable food system; food safety; food security; environmental protection; social regulation; social market economy.*

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What Room for the 1998 Aarhus Convention in the European Green Deal? An Analysis of the Possible Reluctance of the Court of Justice

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1. *Introduction*

In the Communication setting out the European Green Deal, the European Union (EU) Commission affirmed that «[s]ince it will bring substantial change, active public participation and confidence in the transition is paramount if policies are to work and be accepted. A new pact is needed to bring together citizens in all their diversity, with national, regional, local authorities, civil society and industry working closely with the EU's institutions and consultative bodies»[1]. The role explicitly granted to citizens in the elaboration and implementation of EU environmental policies and laws significantly ties the delivery of the Green Deal to the enforcement in the EU legal order of the Aarhus Convention, the 1998 landmark environmental mixed agreement that enables citizens and environmental Non-Governmental Organizations (NGOs) to participate in decision-making procedures and have access to information and justice in environmental matters[2].

This article aims at discussing the Commission's efforts to exploit the functional connection between the Green Deal and the Aarhus Convention. It asks whether the Commission's attempts to improve EU and its Member States' implementation of the Aarhus Convention are sufficient to the purpose of the

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[1] COM (2019) 640 final, p. 1.

[2] For an in-depth analysis of the procedural rights in the field of environmental law enshrined in the Aarhus Convention, please see R. LANCEIRO, *The Review of Compliance with the Aarhus Convention of the European Union*, in *Global Administrative Law and EU Administrative Law Relationships, Legal Issues and Comparison*, edited by E. CHITI, B.G. MATTARELLA (eds.), Springer-Verlag Berlin Heidelberg, 2011, pp. 359-383.

European Green Deal, in particular in light of the «overly rigid»[3] jurisprudence of the Court of Justice of the European Union (CJEU). The article is organized as follows. The second Section assesses how the CJEU has managed the opening of the EU legal order towards environmental protection through the 1998 Aarhus Convention. To this end, three emblematic case-laws will be analysed. In particular, the fact that the CJEU persistently refuses to confer direct effect to certain provisions of the 1998 Aarhus Convention seems to demonstrate the Court's attempt to protect EU environmental law, and the potential legislation stemming from the Green Deal, from the Convention's influence. In light of the reported failure of EU institutions, including the Court of Justice, to fully comply with the Aarhus Convention's requirements on access to justice in environmental matters, the third Section analyses the efforts of the Commission to restore EU institutions' compliance in the field, by amending Regulation (EC) No 1367/2006 (so-called Aarhus Regulation)[4]. In its conclusions, this paper points out three reasons why the Commission, via the Green Deal, should encourage a wider openness towards the Aarhus Convention.

2. *The Court's effort to protect EU environmental law from the influence of the Aarhus Convention*

To start with, it is important to stress that, according to Article 4.2 of the Treaty on the Functioning of the European Union (TFEU), environmental policy is a shared competence, where the Member States, by virtue of the principle of subsidiarity, shall exercise their competence only to the extent that the Union has not already exercised, or has decided to cease exercising, its own competence. The possibility given by the Treaties to the EU and the Member States to implement environmental objectives is also affirmed in Article 191.4 TFEU, according to which both, within their respective spheres of competence, shall cooperate with third countries and competent international organisations to promote environmental protection. In the case of an international environmental

[3] B. PIRKER, *Access to Justice in Environmental Matters and the Aarhus Convention's Effects in the EU Legal Order: No Room for Nuanced Self-executing Effect?*, in *Review of European Community & International Environmental Law*, 25 (1) 2016, p. 1.
[4] 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.

treaty, cooperation between EU, its Member States and third parties should be concluded in the form of a mixed agreement,[5] i.e. treaties touching on exclusive competences respectively to the EU and to the Member States.

The Aarhus Convention is a perfect example of a mixed agreement in the field of environmental protection. Other international environmental treaties that bind both the EU and its Member States are, to mention but a few, the UN Framework Convention on Climate Change (UNFCCC)[6], which provides the fundamental international framework to address climate change issues, the 1997 Kyoto Protocol[7], with the aim to reduce greenhouse gas emissions through mitigation and reduction mechanisms, and the Paris Agreement[8], adopted in December 2015, which substitutes the Kyoto Protocol.

As confirmed under Article 216.2 TFEU, EU's international agreements bind EU institutions and its Member States. This gives rise to what Katja Ziegler calls «a triangular relationship» [9] between EU law, international law and the Member States, where EU's approach to international law influences Member States' approaches to international law, which in turn impact on EU's approach to international law. The substantive interaction between these three distinctive but closely connected legal orders results in their miscellaneous «cross-fertilization»[10], promoting legal coherence and uniform application. In other words, from Article 216.2 TFEU stems, firstly, the obligation both for EU institutions and the Member States to adopt, when required, pieces of legislation to give effect to those international provisions that need to be implemented[11]. Secondly, from their entry into force, EU international agreements become «an

[5] For a thorough analysis on the particular features of a mixed agreement, please see J.H. JANS, *Who is the referee? Access to justice in a globalised legal order: A case analysis of ECJ judgment C-240/09 Lesoochranárske zoskupenie*, in *Review of European Administrative Law*, Vol. 4, Nr. 1, 87-99, 8 March 2011.
[6] UN Framework Convention on Climate Change, 1992, FCCC/INFORMAL/84 GE.05-62220 (E) 200705.
[7] Kyoto Protocol to the United Nations Framework Convention on Climate Change, FCCC/CP/1997/7, 1997.
[8] Paris Agreement, Conference of the Parties Twenty-first session Paris, 30 November to 11 December 2015, FCCC/CP/2015/L.9/Rev.1.
[9] K. ZIEGLER, *The Relationship between EU Law and International Law*, University of Leicester School of Law Research Paper No. 15-04, 2015, p. 4.
[10] ID., *op. ult. cit.,* p. 6.
[11] F. MARTINES, *Direct Effect of International Agreements of the European Union*, in *The European Journal of International Law*, Vol. 25 no. 1, 2014, p. 132.

integral part of the European legal order»[12], and are included within the hierarchy of EU law. As Francesca Martines explained, the principles governing the relationship between the international and the EU legal orders lie in the rank that international law assumes within the hierarchy of EU sources, as well as in the chosen method of incorporation of international law into the EU legal order[13]. As to the former, the Court traditionally established the supremacy of international law over EU secondary legislation, positioning it between secondary and primary sources, unless it constituted a norm of *ius cogens*. As to the latter, the *Haegeman* doctrine[14] privileged the technique of automatic treaty incorporation within EU law, according to which there is no *ex ante* evaluation of the international law norm to be incorporated, rather the assessment of its exhaustiveness is operated *ex post* by the CJEU, which not only guarantees the uniform application of the incorporated provision, but also exercises its exclusive jurisdiction to interpret and to determine the effects of the international law norm contained in the agreement. Hence, the CJEU plays a paramount role in deciding whether an international provision may, or may not, be directly effective in the EU legal order. This is all the more relevant in the field of the environment, considering that climate change is a worldwide phenomenon requiring global political and legal solutions, and that environmental law necessarily entails elements of interaction among different levels and systems of law, which strengthen the breadth and efficacy of environmental provisions. Therefore, adopting a strict approach towards the incorporation of international provisions into EU law in the field of the environment may invalidate the efforts of this multi-layered legal context.

In her influential work on the relationship between international law and EU law, Ziegler concludes that the approach traditionally endorsed by the CJEU has changed since *Kadi I* in 2008, turning it into an «outcome-oriented», «selective» and «instrumental»[15] use of international law. In both *Kadi I*[16] and

[12] CJEU, Case 181/73, R. & V. Haegeman v. Belgian State, 1974.
[13] F. MARTINES, *op. cit.,* pp. 132 ss.
[14] CJEU, *Haegeman*, cit.
[15] K. ZIEGLER, *op. cit.,* p. 16.
[16] CJEU, Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation, 2008.

Kadi II[17] cases, the Court challenged the validity of Regulation n. 881/2002/EC[18] transposing UN Security Council Resolutions imposing sanctions (asset freezing and travel ban) on individuals included in a list of persons suspected of terrorism, giving a rather narrow interpretation of direct effect than it used to. In *Kadi I*, in fact, the CJEU interpreted restrictively Article 351 TFEU[19], holding that «the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the Treaties»[20]. Therefore, the Court concluded that an international obligation that is in conflict with the core EU principles of liberty, democracy, and human rights cannot be part of the EU legal order, and ruled the annulment of Regulation n. 881/2002/EC in so far as it concerned the appellant[21]. As widely acknowledged, *Kadi I* has been seen as «a perfect representation of the jurisprudential boldness of the CJEU»[22], where the Court was not afraid to step up to defend the primacy of the EU legal order, an approach that the CJEU confirmed in the following *Kadi II* decision[23]. In this occasion, the Court, in Ziegler's view[24], showed to be more prone to open the door to international law when its provisions serve to confirm the autonomy and

[17] CJEU, Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P, Commission, Council, United Kingdom v. Yassin Abdullah Kadi, 2013.
[18] EC Council Regulation n. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the AlQaida network, 2002 O.J. (L139) 9 (EC).
[19] Article 351 TFEU: «The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States».
[20] CJEU, *Kadi*, cit., para 285.
[21] K. LENAERTS, *The Kadi Saga and the Rule of Law within the EU*, in *SMU Law Review* Vol. 67, Issue 4, 2014, p. 707, p. 710.
[22] G. MARTINICO, *Building supranational identity: Legal reasoning and outcome in Kadi I and Opinion 2/13 of the Court of Justice*, in *Italian Journal of Public Law*, Vol. 8, Issue 2, 2016, p. 242. See also, N. WALKER, *Opening or Closure? The Constitutional Intimations of the ECJ*, in L. AZOULAI, M. POIARES MADURO (eds.), *The past and the future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, 2010.
[23] G. MARTINICO, *op. cit*., p. 247.
[24] K. ZIEGLER, *op. cit.,* p. 17.

the primacy of the EU legal order, while becoming more reluctant to do so when international law may limit the power of the EU.

In light of the foregoing, understanding whether the Court provides the Aarhus Convention or part of its provisions with direct effect is of primary importance, since, if this is the case, they can be used to review internal implementing legislation in the field of the environment and they can also be invoked by individual addresses. In this regard, Article 9.2 of the Convention states that the contracting parties should «ensure that members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure» to challenge environmental decisions. It leaves therefore a certain margin of discretion in defining those members of the public who have that right. Article 9.3 provides that these criteria shall be laid down in national law, while also containing the obligation for contracting parties to give the public wide access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene environmental provisions established therein.

As we can read in the preamble of Directive 2003/4/EC[25] on public access to environmental information, the Aarhus Convention was signed by the European Community on 25 June 1998 and was later approved on 17 February 2005 by Decision 2005/370/EC[26] in order to provide for consistent Community provisions aligned with the Convention. Several pieces of secondary legislation have been adopted since then to comply with the three pillars of the Convention. For instance, Directive 2011/92/EU[27] on the assessment of the effects of certain public and private projects on the environment, Directive 2004/35/CE[28] on environmental liability with regard to the prevention and remedying of

[25] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.
[26] Council Decision 2005/370/EC of 17 Feb. 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters.
[27] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance.
[28] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

environmental damage or Directive 2003/35/EC[29] providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment. For the purposes of this paper, specific attention is devoted to Regulation n. 1367/2006/EC, whose Article 10.1 restricts the scope of Article 9.3 of the Convention by establishing a system of internal review to EU institutions and bodies limited to environmental NGOs. In order to evaluate the selective or, on the contrary, the flexible approach undertaken by the CJEU on access to justice in environmental matters, the next paragraphs will examine three cases concerning preliminary rulings referred by national courts on Article 9.3 of the Aarhus Convention.

2.1 *The Lesoochranárske case*

In the *Lesoochranárske* case[30], the applicant (*Lesoochranárske zoskupenie VLK*), a Slovakian environmental NGO[31], requested the Slovakian Ministry of the Environment to participate in the administrative proceedings concerning a derogation from the system of protection of brown bears[32] proposed by pro-hunting groups. In support of its notification, the applicant claimed that the Aarhus Convention, and particular Article 9.3 thereof, had direct effect in EU law. The Slovakian Ministry rejected the NGO's request on the basis that the Convention, pursuant to the abovementioned Article 9.3, had to be implemented in national law in the first place before it could be invoked. On appeal, the Slovakian Supreme Court referred the question of whether Article 9.3 had direct effect to the CJEU[33].

[29] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.
[30] CJEU, Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011.
[31] On the obstacles environmental NGOs have to deal with to have access to justice in the framework of the Aarhus Regulation, please see DG Environment – Milieu Consulting Sprl, Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters, Final report, September 2019, 07.0203/2018/786407/SER/ENV.E.4.
[32] Such standards of protection had been conferred by the so-called Habitats Directive. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, O.J. 1992, L 206/7.
[33] The issue of jurisdiction on the Aarhus Convention, being it a mixed agreement, is not discussed in this occasion. For an in-depth analysis on the matter, please see J.H. JANS, cit., and M.

The Court held[34] that Article 9.3 of the Aarhus Convention does not contain any clear and precise obligation capable of directly regulating the legal position of individuals, given that that provision is subject to the adoption of a subsequent measure to be adopted at the national level. In the absence of EU rules governing the matter, the Court nevertheless recognized that in order to ensure effective environmental protection, Member States should lay down detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. The Court also stressed that such detailed procedural rules must be no less favourable than those governing similar domestic actions (in light of the principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (by virtue of the principle of effectiveness).

The legal reasoning of the Court thus led to the conclusion that, in order to ensure effective judicial protection in the field of EU environmental law, national courts have a duty to interpret their national law in a way which, «to the fullest extent possible»[35], is consistent with the objectives laid down in Article 9.3 of the Aarhus Convention, so as to enable an environmental protection organisation, such as the applicant, to challenge before a court a decision contrary to EU environmental law.

This judgement has been widely discussed and two main positions may be identified. For some commentators[36], the Court seems to have developed a perfectly functioning framework of direct effect but almost never uses it, with just few exceptions, preferring to delegate to national courts the obligation to broaden access to justice pursuant to the principle of effectiveness. Other commentators[37] looked more at the bright side, focusing on the crucial relevance

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ELIANTONIO, *Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011*, *nyr, and Case C-115/09, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg (intervening party: Trianel Kohlekraftwerk Lünen GmbH & Co. KG) Judgment of the Court of Justice (Fourth Chamber) of 12 May 2011*, in *Common Market Law Review* 49, 2012, pp. 767–792. See also, a G. LIGUGNANA, *Poteri giustiziali dell'amministrazione europea e decisioni in materia ambientale*, in *Federalismi*, 8 March 2017.

[34] CJEU, Case C-240/09, para. 45.

[35] ID., para. 50-51.

[36] A. ROGER, *A lost opportunity for improving access to justice in environmental matters: the CJEU on the invocability of the Aarhus Convention*, in EU Law Analysis, 15 February 2015.

[37] M. ELIANTONIO, cit., p. 784 and ff.

that the CJEU gave to national courts as Union courts in the effectively enforcement of EU law.

On this behalf, the Aarhus Convention Compliance Committee (ACCC), the compliance mechanism put in place under the Aarhus Convention, interpreted this judgment as an example of the Court's non-compliance with Article 9.3 and 9.4. In particular, it expressed its regret that «despite its finding with respect to the national courts, the CJEU does not consider itself bound by this principle [ensuring effective judicial protection, N/A»[38], and continued by affirming that if the Court had bound itself in the same way as the national courts, the EU might have improved its compliance with the abovementioned provisions.

2.2 *The Stichting Natuur en Milieu and the Vereniging Milieudefensie cases*

In *T-396/09*[39] and *T-338/08*[40], two Dutch environmental NGOs (*Stichting Natuur en Milieu* and *Vereniging Milieudefensie*) asked the General Court, the lower court of the CJEU, to annul the decision taken by the Commission in which it rejected their request for internal review of its own decision[41]. The denial of the Commission to their request was justified by the fact that, according to the Commission, Article 2.1(g) of the Aarhus Regulation applied only in respect of a measure of individual scope[42] under environmental law. The applicants brought the issue before the General Court, claiming that Article 10.1 of the Aarhus

[38] Aarhus Convention Compliance Committee, Findings and Recommendations of the Compliance Committee concerning compliance by the European Union with the Aarhus Convention, adopted on 17 March 2017 (ACCC/C/2008/32(EU)), para. 83.
[39] CJEU, Case T-396/09, *Vereniging Milieudefensie & Stichting Stop Luchtverontreiniging Utrecht v European Commission*, (General Court), 14 June 2012.
[40] CJEU, Case T-338/08, *Stichting Natuur en Milieu, Pesticide Action Network Europe v Commission* (General Court), 14 June 2012.
[41] Directive 2008/50/EC.
[42] The Court examined the notion of individual scope in CJEU, T-12/17, *Mellifera eV, Vereinigung für wesensgemäße Bienenhaltung v European Commission*, 27 September 2018. For a comment, please see M. PAGANO, *The "Mellifera" case and access to environmental justice under the Aarhus Regulation: new findings, old story*, in *EU Law Analysis*, http://eulawanalysis.blogspot.com/2018/10/the-mellifera-case-and-access-to.html. See also, C. PITEA, *Il caso Mellifera dinanzi alla Corte di giustizia e l'accesso alla giustizia nell'Unione europea: prime considerazioni in una prospettiva internazionalistica*, in Rivista giuridica dell'ambiente, 4/2020; E. PALADINI, *La difficile attuazione della Convenzione di Århus: accesso alla giustizia in materia ambientale e adattamento al diritto internazionale nella sentenza Stichting Natuur en Milieu*, in Eurojus, 16 February 2015.

Regulation was unlawful since it limited the concept of "acts" in Article 9.3 of the Convention to measures of individual scope, although acts on environmental matters are typically of public interest and of general scope.

The General Court held that Article 9.3 had to be interpreted in light of the Convention's objectives. Consequently, it observed that an internal review procedure which covered only measures of individual scope would be indeed very limited[43]. As a result, the General Court annulled both Commission's decisions.

However, upon appeal[44], the CJEU set aside the General Court's decisions and went far from the opinion delivered by the Advocate General Jääskinen[45] on the matter, who adopted a more nuanced approach towards Article 9.3 of the Aarhus Convention. In particular, the Advocate General admitted that «[i]t increasingly often appears difficult for the Court to guarantee observance of the international obligations incumbent on the European Union whilst also preserving the autonomy of EU law, quite particularly in international law relating to the environment. Environmental law is, in fact, one example of an area in which the law is being drawn up and applied in an increasing number of locations, which necessarily entails instances of the interaction, internationalisation and even globalisation of that law. This multi-layered legal context requires, in my view, the adoption of a nuanced approach»[46].Therefore, he interpreted the norm as a mixed provision, which contains parts with a self-executing core that satisfy the criteria of being sufficiently clear, precise, and of not requiring the adoption of subsequent measures[47]. On the contrary, the Court neither agreed nor disagreed with the General Court's reasoning and insisted on the path already traced, simply refusing to provide Article 9.3 with direct effect[48].

[43] CJEU, Case T-396/09 (General Court), para. 65. The Aarhus Convention Compliance Committee shared the General Court's opinion on the matter. Please see, DG Environment – Milieu Consulting Sprl, September 2019; I. HADJIYIANNI, *Access to Justice in Environmental Matters in the EU Legal Order – Too little too late?*, in *European Law Blog*, 4 November 2020.
[44] CJEU, Joined Cases C-404/12 P and C-405/12 P *Council of the European Union, European Commission v Stichting Natuur en Milieu, Pesticide Action Network Europe* (Grand Chamber) of 13 January 2015 and CJEU, Joined Cases C-401/12 P to C-403/12 P *Council of the European Union, European Parliament, European Commission v Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging Utrecht* Grand Chamber of 13 January 2015.
[45] Opinion of Mr Advocate General Jääskinen delivered on 8 May 2014.
[46] ID., para. 71.
[47] B. PIRKER, *op. cit.,* p. 89.
[48] Joined Cases C-401/12 P to C-403/12 P, para. 54.

Therefore, it reversed the legal reasoning of the General Court and confirmed that internal review is limited to individual acts. In this way, the ACCC noted that the CJEU «left itself unable to mitigate the flaws correctly identified by the General Court. So, it remains the case that article 9, paragraph 3, of the Convention is not adequately implemented by Article 10(1) of the Aarhus Regulation»[49]. Accordingly, the judgment «does not bring the Party concerned into compliance with article 9, paragraph 3, and, consequently, article 9, paragraph 4, of the Convention»[50]. In dismissing both cases due to its overly rigid jurisprudence[51], the Court, according to some commentators[52] and the ACCC, missed the chance to reconcile the conflicting views of the EU Aarhus Regulation with that of the Convention.

3. *The Commission's effort to improve access to justice in environmental matters*

As highlighted, the ACCC issued two reports on the EU implementation of the Aarhus Convention, respectively in 2011[53] and 2017. In both cases, as also reiterated by an external study published in October 2019 by the Commission[54], it found that the EU failed to fully comply with its obligations under the Convention's requirements on access to justice in environmental matters, especially with regard to Article 9.3 and 9.4 of the Aarhus Convention[55]. In particular, the Committee pointed out that neither the Aarhus Regulation nor the jurisprudence of the CJEU granted adequate access to justice in environmental matters to citizens and NGOs, especially in relation to EU acts and omissions in

[49] Aarhus Convention Compliance Committee, 17 March 2017, para. 56.
[50] ID., para. 57.
[51] B. PIRKER, *op. cit.,* p. 1.
[52] A. ROGER, *op. cit.*
[53] Aarhus Convention Compliance Committee, Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part 1) concerning compliance by the European Union, adopted on 14 April 2011
[54] Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters, Final Report, September 2019.
[55] For an in-depth analysis of the findings of the Compliance Committee, please see B. PIRKER, *Implementation of the Aarhus Convention by the EU – An Inconvenient Truth from the Compliance Committee,* in *European Law Blog*, 24 April 2017, https://europeanlawblog.eu/2017/04/24/implementation-of-the-aarhus-convention-by-the-eu-an-inconvenient-truth-from-the-compliance-committee/.

the field of the environment[56]. In its January 2020 resolution on the European Green Deal, the European Parliament aligned itself with the Committee's findings, recalling how essential it is to guarantee public participation and access to justice to comply with fundamental rights as well as to promote the implementation of the Green Deal, calling on the Commission to ensure EU observance of its international obligations[57].

For its part, in response to these assessed critics, the European Commission contextually published a proposal to amend the Aarhus Regulation, mainly to improve environmental NGOs' possibilities to challenge EU acts and omissions, and a Communication on improving access to justice in environmental matters in the EU and the Member States, where it recognizes that «[t]he involvement and commitment of the Member Stats, of the public and of all stakeholders is crucial to the success of the European Green Deal. […] The public is and should remain a driving force of the green transition and should have the means to get more actively involved in developing and implementing new policies»[58]. The Commission acknowledged, therefore, the importance of an efficient and fully functioning system to access justice both at the EU level, via the CJEU, and at the national level, via national courts, to help deliver the Green Deal transition.

In particular, the Commission proposed to amend the definition of administrative acts endorsed by the Aarhus Regulation so to include not only those acts of individual scope that directly or individually address natural or legal persons, but also those acts of general scope, coherently with the nature of the majority of environmental acts adopted by EU institutions. This might solve the issue of the Court's restricted interpretation on the matter highlighted in the *Stichting Natuur en Milieu* and *Vereniging Milieudefensie* cases analysed in the previous paragraph. Moreover, it would make it possible for NGOs to request an administrative review of any EU non-legislative act, which has legally binding

[56] Some scholars found more gaps than those spotlighted by the Committee. For instance, Bogojević noted that the Aarhus Regulation is not only restrictive «in defining who is entitled to review and what can be reviewed but, the impact of such a review is also narrow in scope». S. BOGOJEVIĆ, *Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity*, in *Yearbook of European Law*, Volume 34, Issue 1, 2015, Pages 5–25. Following this line of reasoning, Hadjiyianni added that «[t]he proposed amendments address only the 'what', while the 'who' and the 'impact' remain the same». I. HADJIYIANNI, *op. cit.*

[57] European Parliament, Resolution of 15 January 2020 on the European Green Deal, 2019/2956 (RSP).

[58] European Commission, COM (2020) 643 final, para.1 and 2.

and external effects. In this regard, the refusal of the Commission to give effect to the Committee's observations on the need to extend internal review also to administrative acts without legally binding and external effects in order to comply with the wording of the Aarhus Convention represents a point of concern. The proposal, in fact, roughly dismissed the argument, by considering that «only acts that are intended to produce legal effects are capable of 'contravening' environmental law, as indicated in Article 9(3) of the Convention»[59].

Secondly, the Commission proposed to extend the administrative review procedure under Article 2.1(g) not only to environmental acts, or acts adopted under environmental law, but also to all those administrative acts that contravene EU environmental law, regardless of their policy objectives. This amendment would lead to two main benefits: a) it would help aligning the references to environmental law with the scope of the Aarhus Convention as well as the relevant jurisprudence, such as in the *Stichting Natuur en Milieu* and the *Vereniging Milieudefensie* cases; b) it complies with Article 11 TFEU, establishing that environmental protection requirements must be integrated into the definition and implementation of all Union's policies and activities.

Finally, it is proposed to extend the time frames for requests by environmental NGOs (from 6 to 8 weeks) and replies by the Commission (from 12 to 16 weeks), in order to improve the quality of the administrative review process. Most recently, the report drafted by the Committee on the Environment, Public Health and Food Safety to provide amendments to the Commission proposal was adopted by the Parliament in plenary, enabling the inter-institutional negotiations with the Council[60].

Although relevant, it has been noted[61] that the Commission's proposal still does not fully cover the gaps spotlighted by the Committee. Among other points[62], members of the public beyond entitled environmental NGOs are still excluded from administrative review, something that may affect those parties of

[59] COM (2020) 642 final, p. 8.
[60] European Parliament, legislative observatory, Procedure file on Environment: access to information and justice, public participation, application of the Aarhus Convention, 2020/0289 (COD), 20 May 2021
[61] I. HADJIYIANNI, *op. cit*.
[62] For a thorough analysis, please see CLIENTEARTH, *Amending the Aarhus Regulation: an internal review mechanism that delivers the EU Green Deal*, 2020, available at https://www.clientearth.org/latest/documents/position-paper-amending-the-aarhus-regulation-an-internal-review-mechanism-that-delivers-the-eu-green-deal/.

the public not organized in formal organizations. The Commission justified this omission on multiple grounds. First, the Convention requires for either administrative or judicial review, not necessarily both. Therefore, while NGOs with an environmental mandate are entitled to access administrative review, individuals can still a) bring national implementing measures before a national court and request the domestic judges to present a preliminary ruling in front of the CJEU by virtue of Article 267 TFEU; b) challenge before the General Court acts directly and individually addressed to them as well as regulatory acts of direct concern which do not entail implementing measures, pursuant to Article 263.4 TFEU. Moreover, the Convention provides for privileged access to justice as compared to individuals given their structured and higher professional position and, according to the Commission, this provision would not be respected if individuals were granted access to both judicial and administrative review, something that the Convention does not require.

Although it is certainly true that Article 9.3 does not literally expect the EU and its Member States to allow for both administrative and judicial review, still it does not prevent to do so. Additionally, it is widely known that State parties may provide for higher standards of rights' protection than those set therein. Unsurprisingly, in fact, Article 3.5 of the Aarhus Convention coherently states that «[t]he provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention». It is also important to stress that the fact that individuals have the possibility to ask the national court to send a preliminary reference to the CJEU does not mean that the domestic judges automatically do so. What is more, a procedure as such might take years and, as already pointed out by the Committee, the preliminary reference procedure does not provide a suitable alternative to the internal review mechanism.

Remarkably, these loopholes have been confirmed once again by the Committee in early February 2021, whose advice on the legislative proposal was expressly requested by the Commission[63]. The Committee, in fact, while welcoming the significant positive developments advanced in the proposal, still finds some areas of concern. It reiterates, *inter alia*, that the EU should ensure

[63]Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3, 12 February 2021.

access to review procedures not only to NGOs, but also to other members of the public. Contrary to the Commission's proposal and the Court's line of reasoning in *Stichting Natuur en Milieu* and the *Vereniging Milieudefensie* cases, the Committee reaffirms the need to immediately open the review of a national implementing measure at the EU level. Most importantly, it restates that there is no legal basis in the Aarhus Convention to limit the scope of review to acts with "binding" legal effects. It therefore recommends to remove that reference from the definition of an administrative act.

4. *Concluding remarks*

This article has discussed whether the Commission's efforts to improve the implementation and enforcement of the Aarhus Convention by the EU and its Member States are sufficient to the purpose of the European Green Deal, in particular in light of the Court's selective opening of the EU legal order towards the Aarhus Convention. It has pointed to some emblematic elements of non-compliance that the ACCC found respectively in the jurisprudence of the Court and in the legislations adopted by the EU institutions.

Section 2 meant to assess whether the alleged «parochial»[64] and «outcome-oriented» approach of the Court to protect EU law from possible interferences from international law could be observed also in the context of the 1998 Aarhus Convention. In the cases under review, the CJEU repeatedly denied that the Aarhus Convention, in particular Article 9.3, was sufficiently precise and unconditional to be capable of being directly applicable in the EU and its Member States legal orders, respectively quashing the view of some scholars, the ruling of the General Court, and the opinion of the Advocate General Jääskinen. Moreover, the narrow interpretation of direct effect appears not fully in line with the requirement the Court set itself in *Hermès*, where it held that if the EU is party to an international treaty, including a mixed agreement, EU secondary legislation shall be interpreted «as far as possible»[65] in view of the international obligations of the EU.

[64] G.DE BÚRCA, *The European Court of Justice and the International Legal Order After Kadi*, in 51 *Harvard International Law Journal*, 1, 2010.
[65] CJEU, Case C-53/96 Hermès International v FHT Marketing Choice BV, 1998, para 28.

It seems therefore that the CJEU is attempting to protect EU law also in the field of the environment, and supposably the legislation that will stem from the European Green Deal, from the possible influence of the Aarhus Convention. In spite of the fact that the Court's need to defend the values and core principles of the EU legal order, being an expression of its legal identity, is understandable, it is crucial to stress that, as straightforwardly affirmed by the Advocate General Jääskinen, «at the current stage of development of EU law, the theory of direct effect, which has been regarded as an 'infant disease' of EU law, is no longer intended to protect its autonomy internationally»[66]. If the Court aims to keep the rights recognized by EU treaties practical and effective, rather rendering them impossible and illusory, the Court should provide a coherent, yet dynamic and evolutive interpretation of the rights stemming from EU environmental law and from EU's international environmental obligations, which is in light of present-day conditions[67].

Section 3 examined the Commission's attempts to overcome the divide between the Convention and the EU restrictive secondary legislation. However, as highlighted, several significant deficiencies have been ignored or not fully solved, such as the persistent exclusion of members of the public other than NGOs from review procedures, as well as the need to immediately open the review of a national implementing measure at the EU level, and most importantly, the inconsistency to limit the review procedures only to acts with binding legal effects. It seems therefore that further improvements are needed for the EU to perfectly align itself with the Convention's requirements. Moreover, the broader amendments suggested by the Compliance Committee would integrate the actions envisaged by the Green Deal concerning public involvement.

Although it is undoubtedly true that all institutions should engage with EU civil society to deliver the Green Deal, the ambition of a neutral-climate EU cannot possibly be achieved without the constant and comprehensive involvement of all EU citizens, as single individuals and as collectively engaged in public and private organizations, in all phases of the Green Deal, from its inception to its implementation and monitoring. As the Commission acknowledged, «[t]he public is and should remain a driving force of the transition

[66] Opinion of Mr Advocate General Jääskinen, para. 72.
[67] The so-called «living-instrument doctrine». European Court of Human Rights, Tyrer v. The United Kingdom, 5856/72, 15 March 1978, para. 31.

and should have the means to get actively involved in developing and implementing new policies»[68]. For instance, the European Climate Pact, envisaged in the Communication setting out the Green Deal and subsequently in a dedicated Communication[69], endorses a proactive participation of the public in climate actions, which however only focuses on information sharing, inspiration, and public understanding, leaving aside public engagement through consultation in policy-making processes and through administrative and judicial review. In this perspective, the Aarhus Convention can positively influence the potential legislations stemming from the Green Deal inasmuch as it has the potential to better coordinate the different instruments of the Green Deal, turning public engagement into a more structured and transversal element.

It can be concluded that the Commission, via the Green Deal, should encourage a wider openness towards the Aarhus Convention for three reasons. First, for the EU and its Member States to comply with their international obligations in the field of the environment, in general, and in environmental justice matters, in particular. Second, to clearly communicate to the Court of Justice the intention of the EU to become more open to the influence of international environmental law that, together with EU provisions, provide for stronger and more coherent responses to the threats posed by a global phenomenon such as climate change. Indeed, worldwide challenges require a global, coordinated response between the international and EU legal orders. This might, in turn, stimulate a new direction in the jurisprudence of the CJEU that would ensure compliance with the third and fourth paragraph of Article 9 of the Convention, as wished by the Compliance Committee. Lastly, all EU institutions and the Member States should ensure the widest and seamless implementation of the Convention's goals, for it to be, in the words of Advocate General Jääskinen, the truly expression of the human right to the environment in its most solemn form.

ABSTRACT

[68] COM (2020) 642 final, p. 1.
[69] COM (2020) 788 final, 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, 9 December 2020, Brussels.

Chiara Scissa - *What room for the 1998 Aarhus Convention in the European Green Deal? An analysis of the possible reluctance of the Court of Justice*

Both the Court of Justice' case-law and part of EU institutions' secondary legislation have been found in violation of the 1998 Aarhus Convention's requirements on access to justice in environmental matters. For the European Green Deal to succeed both for the EU and its citizens not only should the Commission grant wide and consistent public engagement in the promotion and implementation of environmental policies and legislations, but it should also ensure adequate enforcement of EU environmental law. The aim of this contribution is, therefore, to explore some emblematic elements of non-compliance stemming from, respectively, the Court's «overly rigid» jurisprudence and from EU implementation of the Aarhus Convention to assess whether the Commission's efforts to improve EU and its Member States' implementation of the Convention are sufficient to the purpose of the European Green Deal.

KEY WORDS: *European Green Deal; Aarhus Convention; Access to justice; Environmental law; Direct effect; Court of Justice.*

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Constitutional Implications: The European Green Deal in the Light of Political Constitutionalism

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1. *The Unclear Relationship Between the EGD and the Basic Principles of EU Environmental Protection*

In 1971, the European Commission gave a holistic definition of "environment", meant as all the elements which, interacting in a complex fashion, shape the world in which we live and move and have our being[1]. The scope and elasticity of such definition contribute to explain how environmental protection developed from a sectoral policy into a horizontal aspect of the EU law by taking roots within the principles of integration and sustainable development[2].

In the environmental law scholarship, several stages of such a historical development have been identified, each of which characterized by a distinct governance regime: first, the 1972 "environmental regime"; then, the 1982 "internal market regime", combined with the "integration regime" initiated in 1992; at last, the "sustainable development regime" which dates back to 1998[3]. More specifically, such an identification of the four regimes is based on the empirical observation

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[1] First Communication of the Commission about the Community's policy on the environment, SEC (71) 2616 final, Brussels 22.7.1971.

[2] G. WINTER, *Perspectives For Environmental Law - Entering The Fourth Phase*, in *Environ. Law*, 1989, pp. 38–47.

[3] I. VON HOMEYER, *The evolution of EU environmental governance*, in J. SCOTT (ed.), *Environmental Protection: European Law and Governance*, Oxford University Press, Oxford, 2009, pp. 1-26.

concerning the rising number of legislative acts adopted from the foundation of the Environment and Consumer Protection Service (ECPS—the predecessor of the Commission's Directorate General (DG) for Environment)[4] until now.

As for the basic principles, within the system of European Treaties, the high level of environmental protection has transited from an EU objective enshrined in Article 3 of the Treaty on European Union (TEU), as well as a fundamental principle of the EU environmental law, to the slanting concept of the EU legal order interpreted under the light of the combined provisions of Article 3 TEU, Article 191(2) of the Treaty of the Functioning of the European Union (TFEU) and Article 37 of the Charter of Fundamental Rights. Environmental protection has turned into a new legal avenue for the EU legal order's environmental reorientation:[5] as Advocate General Sharpston observed, «following the entry into force of the Treaty of Lisbon (...) the "principle of a high level of environmental protection and improvement of the quality of the environment" set out in Article 3(3) TEU and Article 37 of the Charter has become a guiding objective of EU law»[6].

The Court of Justice of the European Union (CJEU) has also played a significant role in the recognition and consolidation of environmental protection as a permanent and influential element of EU law. Indeed, without any explicit legal basis – and in a context of a Treaty mainly oriented to eliminating of trade barriers – the CJEU declared «environmental protection to be one of the essential objectives of the Community (...). Contrary to the recognition of fundamental rights as a general principle of Community law, the Court did not deem it necessary to justify the introduction of such an essential objective (…) by reference to any external source or support (such as national constitutional traditions or international law)».[7] More recently, the Court ruled that the EU legislation on environmental protection put into

[4] A. JORDAN*, Editorial introduction: the construction of a multi-level environmental governance system*, in *Environment and Planning C: Government and Policy*, 1999, p. 4.
[5] A. SIKORA, *Constitutionalisation*, cit., p. 60 ss.
[6] See Opinion of AG Sharpston in Case C-557/15 *Commission v Malta*, EU:C:2017:613, point 44; and in Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, EU:C:2017:760, point 68.
[7] F. JACOBS, *The Role Of The European Court of Justice in The Protection On Environment*, in *Environ. Law*, 2006, pp. 185-205.

concrete terms the EU's obligations concerning environmental protection and protection of public health, which stem, inter alia, from Article 3(3) TEU and Article 191(1) and (2) TFEU[8].

In the historical evolution of EU environmental protection, the relevance of environmental principles in the meaning of Article 191(2) TFEU should be underlined. Those principles perform a pivotal role in overcoming those multidimensional and scientifically complex environmental problems by stressing the legal commitment to environmental protection and sustainability[9]. The just mentioned principles are those of integration, protection, precaution, prevention, rectification at source and the polluter-pays principle which must be followed when adopting EU secondary law. More specifically, the principle of integration states that environmental protection requirements must be integrated into other EU policies; the principles of protection and precaution state that shall be pursued a high level of environmental protection even in those cases where the dangers to the environment are uncertain; at last, the prevention criterion suggests of acting in advance to avoid damage to the environment. In addition to such principles, the importance of solidarity should also be emphasized: considered in a wide sense, solidarity constitutes a sort of quintessence of what is both the raison d'être and the objective of the European project[10] and is operationalized in some legislations such as the so called "Effort Sharing Regulation"[11].

While obviously building on such a consolidated context, the European Green Deal fails to firmly anchor its geopolitical objective in the abovementioned concepts of sustainable development, high level of environmental protection, and solidarity. The European Green Deal does not refer to any of the classical environmental principles. The Commission's Communication on the EGD seems to

[8] Judgement in Case C-723/17 *Craeynest and Others*, EU:C:2019:533, para 33; judgement in Case C-129/16, *Túrkevei Tejtermelo˝Kft*., EU:C:2017:547, para 33.
[9] N. de SADELEER, *Environmental Principles*, Oxford University Press, Oxford, 2008.
[10] Opinion of AG Bot in joined Cases C-643/15 and C-647/15, *Slovakia and Hungary v Council*, EU:C:2017:618, point 17.
[11] Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013, (OJ L 156, 19.6.2018, p. 26–42).

recall only the sustainability concept, but giving relevance exclusively to its economic potential. Likewise, the EGD Communication introduces a new policy principle – «green oath: do no harm»[12] – somewhat ambiguous and far too programmatic to grab any substantial potential contribution within the constitutional dimension of environmental protection in the EU legal order. More specifically, the scope of the "green oath" seems to be more comprehensible under the perspective of the EU funding, with particular attention on the recent taxonomy regulation[13]; likewise, according to the European Council conclusions of July 2021, «EU expenditure should be consistent with Paris Agreement objectives and the "do no harm" principle of the European Green Deal»[14].

Admittedly, one might argue that the EGD has a limited legal relevance, as it has been intended by the Commission essentially as a «roadmap, a strategy (…) and a framework of regulation and legislation setting clear overarching targets»[15]. Under the light of such an approach, the Commission has fostered a policy perspective by using mainly soft-law tools. This is one of the legal techniques available to the Commission, which may publish acts such as guidelines, notices or communications in order to ensure transparency, equal treatment and legal certainty[16] by offering policy evaluations, commentaries, explanations of programs or outlines on future policies.[17] In the light of this, it could be argued that the EGD represents more a contribution to the existing Global Legal Complex on Climate change than a transformation of the EU substantive constitution.

However, the relevance of soft law measures should not be under-evaluated. In the EU legal order, soft law measures may produce certain legal effects under the duty of sincere cooperation enshrined in Article 4(3) TEU which are to be taken into

[12] COM (2019) 640 final, point 2.2.5.
[13] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088.
[14] https://www.consilium.europa.eu/media/45109/210720-euco-final-conclusions-en.pdf.
[15] COM (2019) 640 final.
[16] Judgments in joined Cases C-75/05 P and C-80/05 P, *Germany and Others v Kronofrance*, EU:C:2008:482, paras 60 and 61 and C-387/97, *Commission v Greece*, EU:C:2000:356, para 87.
[17] Cailles, Ruffert, Art. 288 (ex-Art. 249 EGV) [Rechtsakte des Unionsrechts] Ruffert in Calliess/Ruffert | AEUV Art. 288 Rn. 1-108 | 5. Auflage 2016, beckonline.de.

due account by the Member States' authorities[18]. Although such a duty of cooperation cannot be understood as making those rules binding, on penalty of eluding the legislative procedure set out in the FEU Treaty,[19] soft law measures can produce, particularly in the field of environmental protection, some legal effects and a practical impact to the extent that they fruitfully interact with binding legal sources such as the classical sources of EU environmental law[20].

Ultimately, even though the European Green Deal represents the "Europe's man on the moon moment"[21], it seems like it has failed to addressing and exploring its constitutional entrenchment within environmental protection. In other terms, as things currently appear to stand, the European Green Deal risks remaining a mere program, literally a roadmap of new legislative and political initiatives outlining ambitious climate targets without however clarifying their relationships with the basic principles of environmental protection under the existing Treaty framework[22].

2. *Reframing the European Constitutional Discourse?*

In spite of its unclear relationship with the Treaty framework, we may wonder whether the EGD can anyhow promote and feed a constitutional discourse detached from the analysis of positive laws, constitutional texts, institutional arrangements. Indeed, the EGD, with its powerful will to make great steps toward the future, may be interpreted as the symptom of the persistency of problems and disputes entrenched in the past, namely the issue of how the European community is constituted:[23] the EGD seems to recall that, regardless the failure of the Lisbon

[18] Judgment in Case C-322/88, *Grimaldi*, EU:C:1989:646, paras 18 and 19; and Opinion of AG Kokott in Case C-226/11, *Expedia*, EU:C:2012:544, point 38.
[19] Opinion of AG Wahl in case C-526/14 *Kotnik*, EU:C:2016:102, point 38.
[20] A. EPINEY, *EU environmental law: sources, instruments, enforcement*. in *Maastrich*, in *Eur. Comp. Law*, 2013, pp. 403–422.
[21] Ursula von der Leyen, "Press Remarks by President von der Leyen on the Occasion of the Adoption of the European Green Deal Communication," European Commission, press release, December 10, 2019, https://ec.europa.eu/commission/presscorner/detail/en/speech_19_6749.
[22] P. ALLOT, *The Crisis of European Constitutionalism: Reflections on the Revolution in Europe*, in *CML Rev.*, 1997, p. 489.
[23] M.A. WILKINSON, *Political Constitutionalism and the European Union*, in *The Modern Law Review*, 2013, p. 192.

Treaty's constitutional project[24], the constitutional question remains open and urgent because equally open and urgent is the need for responses concerning how the European community is constituted, what Europeans have in common and are willing to decide terms of shape and substance of their legal, political and social system. In other words, it is a matter of what sort of polity the European Union is becoming[25].

In order to verify whether the EGD can eventually contribute to the European constitutional discourse, it is appropriate to briefly outline and overcome the two main approaches that attempt to answer the question concerning what kind of constitution is emerging and should emerge in Europe. While the nation-state paradigm strictly inspires the first theory, the second approach presupposes a set of universal moral-legal values or basic principles. Once outpointed their limitations, the political constitutional approach will be introduced as a third way capable to better understand the current process of constitutionalization in Europe.

3. *Foundational v Freestanding: Two Perspectives and Their Limitations*

The first approach is the one called "foundational" and lies on the assumption that the constitutional discourse can be held only within a community capable of exercising collective self-rules. In essence, it refers to the nation-state as the exclusive authority allowed to exercise its authority in the name of "we, the people"[26]. The application of such foundationalist mindset to the European constitution consists in a clear-cut denial of its plausibility because there is any "we, the people" of Europe. So, in light of this, European Union is considered a derivative body, i.e. an international organism - in place of a supranational entity- and an administrative organism, rather than constitutional.[27]

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[24] The European Council announced the abandonment of the constitutional 'concept' in the summer of 2007, see the German Presidency Conclusions: European Council, Brussels, 21–22 June 2007.
[25] J. BOHMAN, *Reflexive Constitution-Making and Transnational Governance* in E. ERIKSEN (ed.), *Making the European Polity: Reflexive Integration in the EU*, Routledge, London, 2005.
[26] S. CHAMBERS, *Democracy, Popular Sovereignty and Constitutional Legitimacy*, in *Constellations*, 2004, p. 153.
[27] P. LINDSETH, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford University Press, Oxford, 2010.

The second approach is the one called "freestanding". It theorizes that the constitutional authority must be founded on the will of the people as a collective entity engaging in a set of universal moral-legal values of basic principles deemed essential to humanity. Essentially, a phenomenon of cosmopolitan constitutionalism emerges, one in which - contrasting the sharp dichotomy between domestic constitutional state and the international legal order supported by the foundationalism approach - it is privileged the quality of the relationship between rulers and ruled. In other words, such an approach conceives a distinct cosmopolitan framework for the construction of a coherently principled, yet pluralist world of public law[28].

It is also argued that such an interpretation would reconcile cases decided by the CJEU such as *Kadi*[29] and *Costa v ENEL* with judgments of the constitutional or supreme courts in the Member States, such as the Maastricht and Lisbon decisions[30]. Indeed, since constitutionalism is intended just like a freestanding set of legal-moral norms, it would be possible to overcome all those incommensurable situations that deem just one legal source as the supreme law. However, the *Kadi* case itself proves the freestanding approach wrong. The words of the Advocate General Maduro are clear: the Treaty «is not merely an agreement between states but an agreement between the peoples of Europe» creating a municipal legal order of transnational dimensions, of which it forms the basic constitutional charter[31] under which the process of the constitutionalization in the EU is revealed. In other words, from the *Kadi* judgment it emerges that the matter it is not merely about identifying freestanding individual rights and upholding a transnational rule of law, however it rather concerns the defense of a certain polity legitimacy. Ultimately, the *Kadi* case seems to strongly assert a particular constitutional identity with significant polity-building implications in place of representing a light freestanding claim of principled

[28] M. KUMM, *How Does European Union Law Fit into the World of Public Law*, in *Political Theory of the European Union*, Oxford, 2010, p. 135.
[29] See Joined Cases C-402/05 P and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council of the European Union and Commission of the European Communities* [2008] ECR I- 6351 (*Kadi*).
[30] B. BRYDE, *The ECJ's Fundamental Rights Jurisprudence – A Milestone in Transnational* Constitutionalism, in M.P. MADURO-L. AZOULAI (eds.), *The Past and the Future of EU Law*, Oxford University Press, Oxford, 2010.
[31] Opinion of Advocate General Poiares Maduro in *Kadi ibid*, delivered 16 January 2008 at [21].

openness around a cosmopolitan order of law beyond the state[32]. Similarly, the *Kadi* case also proves the inadequacy of Foundational Constitutionalism which cannot be reduced to a political *will*[33]. In substance, the contemporary age is going to be increasingly connected to the (written) texts or (unwritten) principles of the constitution itself[34], rather than based on the stark alternative between a political or cultural foundation: these are not stationary and separable phenomena because the constitution architecture is made up of the interactions between politics and law, power and authority, materialism and idealism, fact and norm. In short, in place of any political *will* or moral *right*, constitutionalism evolves in a dialectic that involves the so-called *political right*[35].

4. *An Alternative Understanding: Political Constitutionalism and the European Green Deal*

After ascertaining the limitations inherent within the two traditional approaches, we may now turn to a different approach, one capable of referring to the dynamic relationship between rulers and ruled, and between the ruled themselves in their public capacity as citizens, also taking into consideration all of those contingent and haphazard series of relatively idealistic political struggles that frame the constitution over time[36].

Such a perspective takes the name of "Political Constitutionalism"[37], here intended as a prospective aimed at seeking to detect the historical-political 'laws' behind governmental development, or «all those rules, principles, practices and

[32] M.A. WILKINSON, *Political,* cit., 206.
[33] This understanding of political constitutionalism builds upon Martin Loughlin's notion of public law as political jurisprudence or *droit politique*: M. LOUGHLIN, *Foundations of Public Law*, Oxford University Press, Oxford, 2010.
[34] M.A. WILKINSON, *Political,* cit., p. 207.
[35] M. LOUGHLIN, *Foundations,* cit.
[36] For a different, radical take on the idea of constituent power which refuses its absorption by the constituted power, see A. NEGRI, *Insurgencies: Constituent Power and the Modern State*, University of Minnesota Press, Minneapolis, 1999.
[37] M.A. WILKINSON, *Political,* cit., p. 206.

maxims that establish, sustain and regulate the activity of governing the state».[38] Indeed, polity formation keeps representing a ceaseless, uneven and disputed process particularly within the integration and constitutionalization of Europe. Against such a background, the political constitutionalism approach replaces the concept of *State* or *the People* with the concept of the "public sphere", as to better accounts that constitutional developments derive from the interactions between rulers and ruled[39] that cannot be understood in any other way than primarily through historical and political terms[40]. Ultimately, the foundational and freestanding theories fail to display constitutionalization in Europe as a dynamic, proactive and "constituting" phenomenon. Rather, they present a sort of passive "juridification"[41] of an otherwise inactive authority structure. Consequently, the challenges lie in the field of ideas, practices and principles that have held the EU as a constitutional project of polity-building and attempted to shape the people(s) of Europe in a certain way.[42]

In other terms, it is possible to develop a constitutional discourse from the starting and basic assumption that no substantive constitution exists in a political or social vacuum. In this latter sense, the approach of political constitutionalism can represent a useful tool to treat the dynamic that reproduces and produces the European people thanks to the public sphere's mediation pursued by political and juridical forces. Indeed, political constitutionalism stresses the various juridical, political and social tensions in play. In so doing, it contributes to the understanding and the articulation of the various problems and complexities coping with the construction of Europe and the European constitution. Ultimately, the matter is not only who wields power in the society and for whom[43], but also, and above all, which political goods the EU is responsible for.

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[38]M. LOUGHLIN, *The Nature of Public Law*, in C. MAC AMHLAIGH- C. MICHELON- N. WALKER (eds.), *After Public Law. Oxford constitutional theory*, Oxford University Press, Oxford, 2013, pp. 11-24.

[39] L. FULLER, *The Morality of Law*, in J. T. LEVY (ed.), *The Oxford Handbook of Classics in Contemporary Political Theory*, Oxford University Press, Oxford, 1969, p. 210.

[40] A. G. GRIFFITH, *The Political Constitution*, in *The Modern Law Review*, 1979, p. 42 ss.

[41] M.A. WILKINSON, *Political,* cit., p. 208.

[42] G. FRANKENBERG, *Tocqueville's Question: The Role of a Constitution in the Process of Integration*, in *Ratio Juris*, 2000, pp. 1-30.

[43] R. GEUSS, *Philosophy and Real Politics*, Princeton University Press, Princeton2008, p. 25: or as the

When situated within this context, the EGD appears as a process capable of contributing to the identification of the legal goods for which the EU is responsible. The political momentum behind the low-carbon economy transition is strong not only because the clear majority of Europeans feel a sense of urgency concerning this matter, but also, and above all, because the EGD has the ambition to overcome Member States' clashing interests, the lobbies' concerns about international competitiveness, the still opened fracture between Eastern and Western Europe and Northern and Southern Europe. The EGD might represent the Trojan Horse which outweighs the traditional methods of decision-making relying on the politicians' willingness to compromise and seek consensus; on protracted and meticulous negotiations; turning political issues into technocratic topics. In other words, such an initiative might not only be oriented to tackle the climate challenge, but might also have the effect of portraying a framework in which is possible to give common (and communitarian) responses to transnational problems.

Therefore, the EGD not only embodies a political roadmap on climate change, but it fits into a specific constitutional framework committed to responding to specific and crucial questions: which are the political goods for the sake of European Union is established? What sort of community is the European Union becoming? The European Green Deal calls the European leaders to deal with a task that is not just about the specific policy measures needed to mitigate climate change, but also how to negotiate them within an EU political system designed for a different political-constitutional age.

Author puts it *who does what to whom for whose benefit*?; P. ANDERSON, *The New Old World*, Verso, London, 2009, 510, the Author quotes Alan Milward's approach to the question of Europe: «In whose interests will the brutal power of the state continue to exist? Who will run it? And for whom? It is the answers to these questions which will determine the future of the European Union».

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ABSTRACT

Roberta De Paolis – *Constitutional Implications: The European Green Deal in the Light of Political Constitutionalism*

This paper aims to discuss some of the possible constitutional implications of the European Green Deal (EGD). In particular, it will first ask whether the geopolitical actions envisaged by the EGD can be anchored to the basic principles of environmental protection under the current Treaty framework (§ 1); secondly, it will examine whether the EGD can eventually contribute to the European discourse on the constitution that is emerging and should emerge in Europe (§§ 2-4). It argues that the EGD has not yet established a clear connection with the existing principles of EU environmental protection, while it is potentially capable of feeding and enriching the ongoing constitutional discourse on the EU polity, in particular in the perspective of "Political Constitutionalism".

KEY WORDS: *Green Deal; Constitutionalism; Europe; Principles.*

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GIAMMARIA GOTTI[*]

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

TABLE OF CONTENTS: 1. *Introduction.* – 2. *«The involvement and commitment of the public»: different ways to engage people in the regulatory process*. – 3. *The functions of the involvement of the public*. – 3.1 *The bottom-up involvement: creating a "sounding board"*. – 3.2 *Participation in the development and implementation of the policies: legitimising the process*. – 3.3 *Access to administrative and judicial review: empowering individuals as «watchdogs in the democratic space»*. – 4. *Towards a novel conception of public involvement?* – 5. *Final remarks*.

1. *Introduction*

In September 2020, the Commission adopted the Stepping Up Europe's 2030 climate ambition Communication[1], 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 Deal[3] 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 Law[7] and the communications on the European Climate Pact[8] and on the Conference on the future of Europe[9]; the above mentioned «Stepping Up» Communication; the legislative proposal[10] and the Communication[11] 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 perfomed 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 arragenement». 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 assessements 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]

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[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'appartenence 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 democracy[23]: democratic institutions are unable to face «le souci du long terme», namely tackling long-term issues such as those related to climate change[24]. 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 Sovereignity 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 Ethichs*, 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 puovoir 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 determination 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 France[28], 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 international».

[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 alternatives[31] 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 expertise[36] and *ii*) it enables to create «more

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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 Standars*, 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 «legitimisation 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]

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[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. ALEMANNO, *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.

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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* case[46]), 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 another[47] 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 conditions[49] – 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:

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[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» rights[54] 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"

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[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 noticed[59] - «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 Aahrus 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]

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[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 parties[62]) and which role could be played by new technologies (e.g. blockchain technology[63]). 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 platforms[64]), 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 Brasilian'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 Brasilian 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 Commision'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. BÁNDI (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, Cambrige, 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 scrutinity 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 Plan[72], 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 particulary 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 streghten 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.*

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GÜRKAN ÇAPAR*

What Have the Green New Deals to Do With the Paris Agreement? An Experimental Governance Approach to the Climate Change Regime

TABLE OF CONTENTS: 1. *Introduction: a plethora of green new deals.* – 2. *Three modes of global governance: integrated international regimes, regime complexes and global experimentalist governance.* 2.1. *From Rio to Copenhagen: climate change multilateralism squeezed in unilateralism and transnationalism.* 2.2. *The modus operandi of the Copenhagen Accord: an example of regime complex?* 2.3. *The Paris Agreement: an example of experimental governance?* 3. *Three examples of experimental governance in climate change regime.* 3.1. *Unilateralism as a default sanction: the interplay between the EU and the ICAO.* 3.2. *Climate change litigations.* 3.3. *Enabling the global green new deals.* 4. *Conclusions*.

1. *Introduction: a plethora of green new deals*

After years of inertia, a number of countries have begun taking new steps to address the climate change challenge. The EU has launched its Green New Deal (GND) on December 2019, just before the burst of COVID-19 outbreak. Joe Biden, new president of the US, has made clear, in his speech after the election, that environment will be one of the most prominent issues on which he will lean during his presidency. Similarly, China, despite the lack of a comprehensive GND, has assured that it will fulfill by 2060 the climate neutrality obligation imposed by the Paris Agreement[1]. Even in Canada, a country having withdrawn from its second term obligations under the Kyoto Protocol in 2011, the GND has begun to be discussed following the democrats GND proposals in the US[2]. Recently, South Korea also followed this trend by giving GND a prominent place in its post-COVID-19 stimulus

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[1] China's Great Green Reset: Carbon neutrality by 2060. (2020). Retrieved 31 December 2020, from https://news.cgtn.com/news/2020-09-24/China-s-Great-Green-Reset-Carbon-neutrality-by-2060-U2EvAoswHS/index.html

[2] J. L. MACARTHUR, C. E. HOICKA, H. CASTLEDEN, R. DAS AND J. LIEU, *Canada's Green New Deal: Forging the socio-political foundations of climate resilient infrastructure?,* in *Energy Research & Social Science,* Vol. 65, 2020

plan[3]. On top of that, today there is a plethora of other GND proposals waiting to be considered by the political actors[4]. It is not an exaggeration to claim that we are on the threshold of a global GND regulatory competition.

While claims for GNDs are not new, this time is different: they sound more convincing. By means of illustration, the UN Environment Programme (UNEP), in the aftermath of the 2008 financial crisis, made a call for Global GND with a view to «reviving the global economy and boosting employment while simultaneously accelerating the fight against climate change, environmental degradation and poverty»[5]. At a time in which the experiences gained through economic crisis were still fresh, the Global GND stressed the importance of a state intervention in order to reinvigorate the world economy and diminish carbon dependency and ecosystem deprivation in 2008-2009[6]. Similarly, while we are tackling another crisis, this time generated by a global pandemic, calls for a GND have been made all across the world.

Some argue that this is just another episode of the global regulatory competition we have been witnessing for the last three decades in various different sectors such as animal welfare, environmental regulation, data protection, consumer health and market competition (anti-trust laws)[7]. Against such claim, this article argues that the tide of GNDs has much more to do with the governance framework laid down by the Paris Agreement (PA) than with geopolitics. In other words, the GNDs represent the last link in the chain of international law's struggle with climate change. As climate change is a "polycentric problem", which cannot be dealt without

[3] J. H. LEE AND J. WOO, *Green New Deal Policy of South Korea: Policy Innovation for a Sustainability Transition,* in *Sustainability*, Vol.12, No. 23; see for Latin America D.A. COHEN - T. RIOFRANCOS, *Latin America's Green New Deal,* in *NACLA Report on the Americas*, Vol.52, No. 4, for South Africa https://www.esi-africa.com/industry-sectors/finance-and-policy/south-africa-sanedi-endorses-green-new-deal-for-economic-recovery/

[4] See for the UK and Australia respectively https://www.greennewdealuk.org/; https://greens.org.au/greennewdeal.

[5] UNEP *Global Green New Deal: An Update for the G20 Pittsburgh Summit* 2009.; see also the book written by one of the report's authors E. B. BARBIER, *A global green new deal: Rethinking the economic recovery*. Cambridge University Press, 2010.

[6] E.B. BARBIER, cit., pp. XIX.

[7] See for a very detailed and comprehensive study A. BRADFORD, *The Brussels effect: How the European Union rules the world*. Oxford University Press, USA, 2020; see also M. CREMONA - J. SCOTT (eds.) *EU law beyond EU borders: the extraterritorial reach of EU Law*, Oxford University Press, 2019.

a holistic approach, and a "legally disruptive" one[8], it forces law to find alternative ways to cope with it. Hence international organizations and international law have undergone significant transformations in the last three decades.

This article will uncover the reasons underlying such transformations with a particular focus on the climate change regime[9]. In the first part of the study, the article will bring in the three modes of global governance elaborated by de Búrca, Keohane and Sabel (§ 2). These tools will be employed in the remainder of this part in order to analyze changes, trends and turning points in the climate change governance. In doing so, it will also establish a connection between these three modes of governance and notions such as unilateralism, transnationalism and multilateralism. It will uncover the dynamic relationship between these modes of governance in three different phases: a) from Stockholm to Rio (integrated regime / multilateralism) (§ 2.1)., b) from Rio to Copenhagen (from integrated regime to regime complex / competitive multilateralism) (§ 2.2), and c) from Copenhagen to Paris and forward (from regime complex to experimental governance / soft multilateralism) (§ 2.3). In its second part, the article will delve deeper into the structures of the PA and show how experimental governance operates under the regime transmuted by the PA (§ 3). To this end, it will first discuss how the process of reaching a decision on international aviation emission standard is in fact an interplay between the EU and the ICAO, and as such a process of experimental governance (§ 3.1); later, it will focus on two recent and widespread transnational phenomena, namely climate change litigations (§ 3.2) and global GNDs (§ 3.3). The article will argue that there is an implicit connection or elective affinity between the PA and these two very recent phenomena, i.e., that the mode of governance established with the PA has provided a fertile ground by virtue of which these two recent phenomena could find their way to globalize. Consequently, the rise of global GNDs is only one facet of this global green movement in which transnational actors serve as the NDC watchdog, the courts serve as a gate-opener and legislators enact GNDs.

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[8] E. FISHER - E. SCOTFORD - E. BARRIT, *Legally Disruptive Nature of Climate Change*, in *The Modern Law Review*, Vol. 80, No. 2, 2017, p. 173

[9] In this study, the regime will be used in the broadest sense in a way encapsulating regime complex and integrated regime. See the next section (the three modes of global governance) for further explanations.

2. *Three Modes of Global Governance: Integrated international regimes, regime complexes and global experimentalist governance*

Observing the evolutional trajectory of international organizations and sectoral regimes from a historical perspective is quite useful to trace their transformations over time. This brings with it an acknowledgment that multilateral institutions spring from political coalitions depending upon compromise between different interest groups. Morse and Keohane, by adopting an internal point of view to multilateral institutions, put forward that states, non-state actors and international organizations, when they are dissatisfied with the existing institutional situation, are disposed to create alternative institutions in order to follow different policies than already pursued in the *status quo* institution[10]. Put differently, disenchanted or frustrated states, rather than resorting to unilateralism or isolationism, are inclined to use (*regime shifting*) or establish (*competitive regime creating*) another multilateral institution[11]. Thus, international organizations are not only open to qualitative transformations but also engaged in a competitive relationship between themselves. In other words, multilateralism is bound to be contested both from inside and outside. However, «what is contested is not the institutional form of multilateralism as such … but rather specific institutional forms of multilateralism»[12]. Thus, as suggested by de Búrca, it may be better to be couched in "competitive multilateralism" instead of contested multilateralism[13]. As the essence of contested multilateralism – in the form of both regime shifting and competitive regime creating - is competition between states or international organizations, it will be more appropriate to use the term "competitive multilateralism".

The idea of competitive multilateralism does not only enable us to see the path-dependent and historical evolutionary trajectory of international organizations.

[10] J.C. MORSE - R.O. KEOHANE, *Contested multilateralism,* in *The Review of international organizations*, Vol. 9, No. 4, 2014, p. 385.
[11] ID., *op. ult. cit.,* p. 386.
[12] ID., *op. ult. cit.,* p. 387.
[13] G. DE BÚRCA, *Contested or Competitive Multilateralism: A Reply to Julia C. Morse and Robert O. Keohane,* in *Global Constitutionalism,* Vol. 5, No. 3, 2016, p. 326.

It also opens up new possibilities for seeing traditional international organizations and regime complexes as a continuum within a dynamic relationship[14]. On the one side, there are international integrated regimes instituted by and large in the period following the Second World War, resting on an underlying consensus, involving top-down binding rules, and accompanied by a judicial body called to resolve treaty-related disputes. On the other side, we have regime complexes, marked by the existence of «partially overlapping and non-hierarchical institutions governing a particular issue-area»[15]. Even though the prototypical example of this integrated regime is the GATT, later succeeded by the WTO, the regimes active in fields such as air transport, food security, and climate change also fall into this category. Here, it is of utmost importance to accentuate that, in spite of the absence of a hierarchical structure, a regime complex is not devoid of any linkage. In other words, the components of a regime complex do not stand independently from each other but are necessarily linked. In a nutshell, they «stands near the midpoint of a continuum that runs from a single integrated organization to a wholly fragmented array of institutions with no significant linkages»[16].

In a political science perspective, it deserves to be mentioned that these integrated organizations came into existence in a period in which power was concentrated in the hands of Western countries under the hegemonic leadership of the US[17]. They were supposed to preserve the interests of a compact principal rather than competing principals. They therefore developed a monolithic and uniform appearance clouding the underlying and inherent power dynamics, contrary to today's highly transparent international organizations reflecting the underlying

[14] See for a study analyzing the role of Multilateral Environmental Agreements in the dynamic evolution of the international law. That the treaties take by and large a procedural form requiring further amendments provide a firm basis for dynamic interpretation because of the tacit amendment procedure, according to which amendments by default enter into force unless parties raise their objections in the depository K.N. SCOTT, *The dynamic evolution of international environmental law,* in *Victoria U. Wellington L. Rev.*, Vol. 49, No. 4, 2018.
[15] K. RAUSTIALA - D.G. VICTOR, *The regime complex for plant genetic resources,* in *International organization*, Vol. 58, No. 2, 2004, p. 279.
[16] K.W. ABBOTT, *Strengthening the transnational regime complex for climate change,* in *Transnational Environmental Law,* Vol.3, No.1, 2014, p. 65.
[17] G. DE BÚRCA - R.O. KEOHANE - C. SABEL, *New modes of pluralist global governance,* in *NYU Journal of International Law and Politics,* Vol. 45, 2013, pp. 728-732.

power relations. After the fall of Berlin Wall, and the subsequent collapse of the Soviet Union, this seemingly uniform picture has dramatically changed. Even though Fukuyama hailed the end of the world and announced the victory of liberal democracy, things have not gone as expected[18]. To begin with, the EU, after successive important steps taken with the Single European Act of 1986 and Maastricht Treaty of 1992, came into the international scene as an important and highly integrated actor. The following rise of the global south has drastically altered the status quo around since the early 2000s. The first clear sign of this shift from compact to fragmented world order came with the lack of universal support lent to the international treaties in the second half of 1990s[19]. For instance, a comprehensive climate change regime, despite all the successive steps, could not be brought into existence. Instead, first the exemption of developing countries from the Kyoto Protocol, and second the US' abstention from ratifying it, destroyed the hopes of a comprehensive and integrated climate change regime from the outset. Accordingly, the rise of first the EU and then the Global South intensified the divergence of interests among states such that it paved the way for a new mode of global governance when coupled with the institutional inertia of the IGOs[20]. The Cambrian explosion of transnational organizations (TNO), offsetting the insufficiencies of the intergovernmental organizations (IGOs) with the turn of the century, is not a coincidence[21]. The fact that transnational organizations, controlled by non-state actors and performing administrative-like functions have proliferated in the last three decades whilst the figures of the IGOs fluctuated around 250 gives a sense of how remarkable this shift was indeed[22]. To sum up, it is apparent that international law

[18] F. FUKUYAMA, *The end of history?,* in *The national interest*, Vol.16, 1989, pp. 3-18.
[19] G. DE BÚRCA - R.O. KEOHANE - C. SABEL, *New modes,* cit., p. 733.
[20] ID., *op. ult. cit.,* p. 735.
[21] K.W. ABBOTT, *The transnational regime complex for climate change,* in *Environment and Planning C: Government and Policy*, Vol. 30*,* No. 4, 2012, pp. 571-590; K. DINGWERTH - J.F. GREEN, *Transnationalism,* pp. 155, in K. BÄCKSTRAND – E. LÖVBRAND*, Research handbook on climate governance*, Edward Elgar Publishing, 2015, pp. 153-163.
[22] K.W. ABBOTT, J.F. GREEN and R.O. KEOHANE, *Organizational ecology and institutional change in global governance,* in *International Organization,* Vol. 70, No. 2, 2016, p. 249; S. BATTINI, *The proliferation of global regulatory regimes.* p. 47, in S. CASSESE*, Research Handbook on Global Administrative Law*. Edward Elgar Publishing, 2015, pp. 45-64.

experienced a significant shift from multilateralism to transnationalism, minilateralism and unilateralism with the turn of the century.

While regimes are «sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations»[23], a regime complex demands the existence of overlapping or intersecting regimes[24], which exhibiting coinciding membership and addressing similar issues despite their institutional independence. Thus, it seems fair to summarize that a regime complex places its focus on the interaction between regimes and on the quality of that interaction, i.e., whether the links establishing a loose connection between different components of the regime are in a more synergetic or conflictual nature. The more conflictual the linkages are the more it will resemble network structure, and by contrast the more they have synergetic characteristics the more it will move towards an integrated regime[25]. Therefore, even though the regime complex literature concentrates on overlapping regimes and on the rules flowing from this interaction, some conceives of regime complex as «fundamentally polycentric, consisting of multiple centers of authority, each involving different actors or actor combinations»[26]. Drawing on this latter conception of regime complex, this article will take regime complex as necessarily polycentric and treat transnational environmental organizations as the ideal type of a regime complex.

In addition to the climb of transnationalization, states, by circumventing formal and multilateral treaties like the UN-led climate change regime, made recourse to unilateralism and minilateralism, i.e., clublike structures to reach a decision having a global effect despite the absence of participation. From the foregoing, it may be inferred that this trend – transnational and unilateral movements in international law – demonstrates that the gap created by the deficiencies of IGOs

[23] S.D. KRASNER, *Structural causes and regime consequences: regimes as intervening variables,* in *International organization*, Vol. 36, No. 2, 1982, p. 186.
[24] See for the argument that regime complex requires at least three overlapping regimes A. ORSINI, J. F. MORIN and O. YOUNG, *Regime complexes: A buzz, a boom, or a boost for global governance?,* in *Global Governance: A Review of Multilateralism and International Organizations*, Vol. 19, No. 1, 2013, p. 30.
[25] ID., *op. ult. cit.,* p. 33.
[26] K.W. ABBOTT, *Strengthening the transnational regime complex,* cit., p. 65.

in addressing the new challenges of global governance has been filled by functionally equivalent institutions, be it in the form of unilateralism and minilateralism or transnationalism. Here it is worth emphasizing the distinction among them. Even though, transnationalism is sometimes regarded as any kind of action that conflicts with the traditional consent-based multilateralism[27], it should be distinguished from state's unilateralism and minilateralism. On this account, it seems useful to draw a distinction among different shades of unilateralism. Transnationalism stands for the activities and organizations that do stem from neither nation-states nor IGOs founded on treaties, but from the institutions in which private actors are involved[28]. By contrast, unilateralism amounts to any attempt made by nation states with the aim to reshape the existing multilateral situation. When it comes to minilateralism, as a special case of unilateralism, it pertains to the getting-together of like-minded states outside the borders of the formal multilateral organizations in small club-like associations such as the Major Economic Forum (MEF), G7, G8, G20, and the Asia Pacific Partnership (APP)[29].

Between these two poles of genuine integrated organizations and loosely coupled regime complexes, there are uncountable, different modes of governance, and (global) experimentalist governance[30] is a term, introduced to fill this gap. It helps us gain insight about global modes of governance with a claim that it is better to see governance as a «process of participatory and multilevel problem solving, in which particular problems (and the means of addressing them) are framed in an open-ended way and subjected to periodic revision by various forms of peer review in light of locally generated knowledge»[31]. In this case, the accent is on governance rather than government and there is a shift from the agent-centric approach of integrated

[27] G. SHAFFER - D. BODANSKY, *Transnationalism, unilateralism and international law*, in *Transnational Environmental Law*, Vol. 1, No. 1, pp. 31-41.
[28] See for a pertinent discussion P. ZUMBANSEN, *Piercing the legal veil: commercial arbitration and transnational law,* in *European Law Journal*, Vol. 8, No. 3, 2002, pp. 400-432.
[29] R. FALKNER, *A minilateral solution for global climate change? On bargaining efficiency, club benefits, and international legitimacy,* in *Perspectives on Politics*, Vol. 14, No. 1 *14*(1), pp. 87-101.
[30] Experimental governance is a term first used in the domestic legal orders see for an example G. DE BÚRCA - J. SCOTT, Law and New Governance in the EU and the US, Bloomsbury Publishing, 2006.
[31] G. DE BÚRCA - R.O. KEOHANE - C. SABEL, *New modes,* cit., p. 477.

regimes to the non-state actors[32]. Given the absence of a political leader having the power to impose its own solution, the core idea experimentalism tries to convey is that it is almost impossible to find one right answer to the highly complex problems. So, it is better to perceive governance as an experimental process through which essentially wicked problems will gradually dissolve and active participation of the majority of the actors will be achieved[33]. Put differently, it is an approach prioritizing the process over ex-ante and conclusive solutions. By doing so, it sets in motion an incessantly continuous process in which the solutions that work are improved while the others are siphoned away[34].

One of the underlying assumptions of experimentalism is that «when central actors have limited foresight and share a thin consensus»[35] leaving essential questions open and prioritizing the process and participation over output is the only viable strategy to follow. When compromise seems unpromising in the short term, to establish a general framework with open-ended goals, waiting to be revised and instantiated in the light of the feedback received in the process, and leaving the implementation of these broadly defined goals to lower-level actors appear to be much more encouraging than setting-specific goals without granting any discretion to implementing actors. Further, the feedback provided by the local actors will be used as an input for setting out new goals and principles, so this will result in a continuous flow of information from bottom to the top[36]. In this model, the framework treaty will provide a 'hub' for exchanging ideas between center and periphery and serve as an information-pooling center[37]. In short, what experimental governance places emphasis is the idea that process matters not only because it is

[32] C. ARMENI, *Global experimentalist governance, international law and climate change technologies,* in *The International and Comparative Law Quarterly*, Vol. 64, No. 4, 2015, p. 879.
[33] ID., *op. ult. cit.,* p. 740. «…uncertainty is a persistent feature of some issue areas and that to respond effectively, institutions must enable participants to learn continuously to redefine the problems they face in the very process of solving them».
[34] R.O. KEOHANE - D.G. VICTOR, *After the failure of top-down mandates: The role of experimental governance in climate change policy* p. 206, in S. BARRETT – C. CARRARO – J. DE MELO, *Towards a workable and effective climate regime*, CEPR Press, 2015, pp. 201-212.
[35] G. DE BÚRCA - R.O. KEOHANE - C. SABEL, *New modes,* cit., p. 484.
[36] ID., *op. ult. cit.,* p. 478.
[37] ID., *op. ult. cit.,* p. 483.

more legitimate, democratic or participatory per se, but because it has a significant potential for bringing about the best outcome. For, once initiated, it may render the realization of "unimagined alternatives" possible[38].

In what follows, the paper is going to analyze the evolutionary path of climate change governance not only from the perspective of the three different modes of governance introduced above (integrated international regimes, regime complexes and global experimentalist governance), but also with an eye on the dynamic relationship between multilateralism, unilateralism and transnationalism. It will argue that the UN-led climate change governance, commenced with the establishment of the UNFCCC, might be considered as an issue-specific integrated regime. Even so, it is plausible to argue that the entering into force of the Kyoto Protocol managed to create a partially integrated international regime, binding only for the developed countries. This multilateral but partially integrated attempt was not able to prevent the counter-institutional movements in the form of transnationalism and unilateralism. As a result, a regime complex has been flourished outside this formal UN-led treaty regime during the process spanning from Rio to Copenhagen. In the process running from Copenhagen to Paris, there have been some changes in the way in which states deal with the problem of climate change. This has set in motion an experimental mode of governance, which come to full fruition with the Paris Agreement in 2015. Such mode of governance has not only incentivized the rise of GNDs all around the world but also promoted climate change litigations. In brief, the fertile ground provided with the PA has begun to keep its early promises.

2.1. *From Rio to Copenhagen: climate change multilateralism squeezed in unilateralism and transnationalism*

Governing climate change is one the most complicated, tricky and multi-dimensional challenges of our age. For once, it is a global problem, cross-cutting disciplinary boundaries and calling for a multi-disciplinary and global action plan. For another, it is a highly complicated problem fraught with disagreements and

[38] ID., *op. ult. cit.,* p. 484.

contestations since it necessitates to transform our society from top to the bottom. It therefore goes without a saying that it is a problem of politics and governance. Despite uncountable efforts within the last three decades, the UN-led climate change regime has stopped notably short of its multilateral ambitions. The first significant step in that endeavor was taken in the 1972 Stockholm Declaration on the Human Environment, which marked a watershed moment in the evolution of international environmental law not because it replaced the term "nature conservation" with environment, but because it publicized the environmental law by setting it free from the shackles of private law[39]. The following next two decades bear witness to some small but important steps such as 1985 Vienna Convention and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. Having said that, none of them has been as determinative as the establishment of the UN Framework Convention of the Climate Change (UNFCCC), for it lay the foundations of a global climate change governance, stipulated some key principles, and set an ambitious, albeit highly abstract, target to be reached.

The UNFCCC has never been as fully-fledged integrated international regime as the international trade regime. Nevertheless, it exemplifies «the drive to establish new issue-specific international regimes, stimulating discussion of how such a climate regime would be linked to regimes for international trade, forestry, and transport»[40]. Thus, it seems safe to classify the UNFCCC as an issue-specific international regime, supposed to be complemented and fleshed out with the further annual conferences of the Parties (COP). So, the Convention, adopting «framework convention plus' model, took on essentially a procedural form» and «its substantial provisions were formulated in rather vague language»[41]. For instance, Article 2 of the UNFCCC laid down that the treaty aims at barring the GHG emission «at a level that would prevent dangerous anthropogenic (i.e., human) interference with the climate system». It was assumed that the framework convention will, putting flesh on its bones, be complemented with further conferences. The Kyoto Protocol was the first

[39] F. FRANCIONI - C. BAKKER, *The evolution of the global environmental system: Trends and prospects* (No. 8), in *Transworld Working Papers*, 2013, p. 3.
[40] G. DE BÚRCA - R.O. KEOHANE - C. SABEL, *New modes,* cit., cit., p. 730.
[41] D. COEN - J. KREIENKAMP - T. PEGRAM, *Global Climate Governance. Elements in Public and Nonprofit Administration,* Cambridge University Press*,* 2020, p. 18.

attempt in this endeavor; however, it could only enter into force in 2005 more than 8 years later after its ratification. To instantiate Article 3(1) of the UNFCCC, involving common but differentiated responsibilities (CBDR), it drew a distinction between developed and developing countries. According to the KP, whereas the former was obliged to reduce their GHG emissions, the latter was put under no obligation due to narrow interpretation of the CBDR principle, which is one of the most perennial and hot topics of the climate change regime due to its focus on allocating responsibilities and sharing burdens[42]. The KP, being inspired by effective Montreal Protocol on Substances that Deplete the Ozone Layer, took a top-down and highly prescriptive approach[43] and embraced a «legalized regulatory model» [44]. It paid meticulous attention to compliance and even included a punitive sanction triggered in case of non-compliance.

Against this backdrop, the countries or transnational organizations, confronted with the failure of multilateralism, headed in different institutions for the sake of their own interests. These initiatives, taking place outside the formal boundaries of the UNFCCC, was even considered by some as a method of climate governance experimentation since it benefits from a heuristic methodology by finding any solution to common a problem in the face of institutional lethargy[45]. On the one side were 'fragmenters' resisting the UN-led formal climate change regime due to its strict mitigation targets and negative effects on economy, on the other were 'deepeners' pushing forward for more ambitious measures and policies by dint of their dissatisfaction with the ineffective UN regime[46]. Under these conditions, the fora such as G7/8, G20, MEF, APP, and countless transnational organizations served the interest of both groups. Whereas the US and the BASIC countries availed themselves of this transnational organizations for shying away from the shackles of

[42] B.A. DIKMEN, *Global Climate Governance between State and Non-State Actors: Dynamics of Contestation and Re-Legitimation,* in *Marmara Üniversitesi Siyasal Bilimler Dergisi*, Vol. 8, No. Special Issue, 2020, p. 64.
[43] D. COEN - J. KREIENKAMP - T. PEGRAM, *Global Climate*, cit., p. 18.
[44] D. HELD - C. ROGER, *Three models of global climate governance: From Kyoto to Paris and beyond,* in *Global Policy*, Vol. 9, No. 4, 2018, p. 529.
[45] M.J. HOFFMANN, *Climate governance at the crossroads: Experimenting with a global response after Kyoto*. Oxford University Press, 2011, p. 11.
[46] B.A. DIKMEN, *Global Climate*, cit., p. 64.

the KP, the EU mostly benefited from them for the progressive reasons. Further, the EU has taken advantage of its market power, making its market access conditional upon complying with its own environmental regulations. Thus, it somehow has implicitly imposed its own higher standards on the third countries without no regard to multilateralism. Against this backdrop, climate change gained significant momentum outside the formal boundaries of UN-led climate change regime in the first decade of the 21st century, not least resulted from the proliferation of transnational organizations, on the one hand, and from the EU's unilateralism on the other.

It is clear from the foregoing that the KP, the first-ever model geared towards addressing the climate change, was a state-centric treaty and almost blind to the transnational organizations. Thus, seen from the perspective of three modes of governance, it, had it been ratified by the majority of states it would have gave birth to one of the best examples of integrated international regimes However, its strict differentiation between developed and developing countries and exempting the latter from the treaty's obligations, coupling with the abstinence of key states such as the US, Australia and Japan seriously undermined this potential of the treaty. Now, it is apt to consider it with the benefit of hindsight as a partially integrated regime, which gives way to transnational and unilateral movements. In sum, even though from a substantial point of view, that is, when the characteristics of the KP taken into consideration, it lives up to the standards of the integrated regimes, it falls short of fulfilling the inclusiveness criteria inherent in these regimes.

2.2. *The modus operandi of Copenhagen Accord: an example of regime complex?*

Even a cursory glance at the Copenhagen Accord (CA) makes one take notice how different it is from the KP. It is a far cry from the KP in every aspect. It brought into existence a mode of governance «that would operate, at bottom, according to strictly voluntary governance logic»; therefore, it is fair to say that it «turned Kyoto

on its head»[47]. First of all, it was non-binding. Thus, it was somehow a mere declaratory document uttering the political intentions and aspirations of the signatories rather than being a stipulative one containing binding and legally dressed provisions. This is why, even though the Accord included some clauses related to the pledge and review for all countries, the states are not obliged to make pledges or honor their promises[48]. In that sense, it also breaks the continuity with as it gives up the strict interpreting of the CBDR. However, it, by paying no heed to the transnational organizations, followed the same logic with the KP. All in all, the CA was not an international agreement from a legal point of view, and it is therefore interpreted by some as a voluntary model of governance[49]. On this account, the CA falls also close to the regime complex within our three modes of governance since it is highly fragmented and not have substantial relevance from a legal point of view.

The CA demonstrates two different aspects of the global climate change governance. On the one hand, climate change regime has its own institutional history, going through different processes and experiences by means of which it is continuously shaped and reframed. On the other, under this process lies highly fragmented, contested and differentiated interests of nation states. Granted that international treaties and regimes are grounded in politics and hinge on political compromises that give birth to them; however, it does not come to mean that international regimes do not have any legal normativity independent of the political compromises upon which they are founded. In that regard, it is fair to say that the CA is the point that the normativity of international climate change regime was the lowest in its course of life. The fact that they could not find a common ground at a very important conference where the parties were expected to sign a new protocol, as a successor of the KP, in the 2009 Copenhagen COP casts light on how diverse the party's expectations are[50]. This is why, it is worth having a look at the political contestations underlying climate change regime.

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[47] D. HELD - C. ROGER, *Three models*, cit., p. 530.
[48] ID., *op. ult. cit.,* p. 531.
[49] ID., *op. ult. cit.,* pp. 527-537.
[50] H. VAN ASSELT – D. HUITEMA – A. JORDAN, *Global climate governance after Paris: setting the stage for experimentation?* p. 29, in B. TURNHEIM – P. KIVIMAA – F. BERKHOUT, *Innovating climate governance: Moving beyond experiments* Cambridge University Press, 2018, pp. 27-44.

It is obvious that the EU has been the most active and staunch defender of progressive climate change governance, in particular for the last two decades[51]. However, the picture was much more different in the first years of climate change governance. For instance, in the 1960s and 1970s, when environmental problems for the first time attracted global attention, the US was the most ardent supporter of the global environmental policies[52]. For instance, the 1972 Stockholm Conference and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer could not be materialized without the leadership of the US[53]. Yet, the EU took over the leadership of climate change beginning from the first half of the 1990s[54]. And Kelemen and Vogel argues that it is wrong to attribute this shift to the normative aspirations or to the commitment to multilateralism. Instead, by taking a regulatory political approach, they argue that it is because of the domestic political influence of the environmentalists[55] and of the regulatory competition between the US and the EU. In other words, not only did the environmentalist gained significant power in the EU while losing power in the US, but also did the EU have «little to lose from an international treaty restricting trade»[56]. After the US retreated from the KP in 2001, it almost became a duty for the EU to take on the leadership role. That is, it provided a stimulus for the EU to take the mantle of leadership.

The EU has been for the last two decades the main regional organization going beyond the UN-led climate change regime against the fragmenters such as the US and BASIC (Brazil, South Africa, India, and China) countries. Upon taking on the leadership, the EU demonstrated its leadership not only with words but also with deeds by leading by example[57]. In the period, spanning from Rio to Copenhagen, the

[51] A. BRADFORD, *The Brussels effect*, cit., p. 207-231.
[52] R.D. KELEMEN - D. VOGEL, *Trading places: The role of the United States and the European Union in international environmental politics,* in *Comparative Political Studies,* Vol. 43, No. 4, 2010, p. 428.
[53] ID., *op. ult. cit.,* p. 429.
[54] ID., *op. ult. cit.,* p. 440.
[55] See also a very similar argument focusing on the process following the US's withdrawal from the Kyoto Protocol and the EU's turn from carbon tax to the ETS and explain the global leadership with the domestic developments D. ELLERMAN, *The shifting locus of global climate policy leadership,* in C. BAKKER - F. FRANCIONI, *The EU, the US and Global Climate Governance*, Routledge, 2014, pp. 41-57.
[56] R.D. KELEMEN - D. VOGEL, *Trading places*, cit., p.447.
[57] C.F. PARKER - C. KARLSSON, *Climate leadership*, p. 195 in K. BÄCKSTRAND - E. LÖVBRAND*, Research handbook on climate governance.* Edward Elgar Publishing, 2015, pp. 191-201.

EU's fundamental climate change policy was to sustain the system of Kyoto Protocol, if not, to replace it with a new one in the same top-down logic. As to the US, it was the supporter of a symmetrical treaty as opposed to asymmetrical KP, differing developing countries from the developed ones. Therefore, for the US, «the new agreement should have a pledge-and-review structure that allows bottom-up, or 'nationally determined mitigation commitments,' rather than top-down, binding targets and timetables, such as the EU has pushed for in the past»[58]. As regards China, it has traditionally taken side with developing countries and presented itself as the representator of this bloc, and endorsed the ideas such as climate justice, historical responsibility of the West, and distributive financial policies[59]. It was therefore the supporter of an agreement that draws a distinction between developed and developing countries, thereby binding the former with top-down targets while the latter have the discretion to set up its own targets[60]. However, the rapid economic development of China and other BASIC countries have given rise to a discordance between these countries and the remainder of developing countries. For they also became the perpetrator of climate change rather than being a victim thereof.

Against this background, the parties convened at Copenhagen in 2009 with high expectations for a new comprehensive agreement. However, the parties could not arrive at an agreement, thereby the Copenhagen Accord (CA), having no legal force and involving no long-term goals, had bitterly shattered the hopes of environmental activist. Having said that, it also provided the basis for the subsequent period e.g., it obliged each member states without any discrimination to pledge their national contributions for 2020. This more relaxed approach to the CBDR was offset by setting a target for annual financial ($ 100 billion) transfer from developed to developing countries. Thus, the CA, despite the valid criticism levelled against it, laid the foundations of the landmark COP21 Paris Agreement (PA) which will transform drastically the *modus operandi* of the climate change governance[61].

[58] ID., *op. ult. cit.,* p. 198
[59] ID., *op. ult. cit.,* p. 196.
[60] ID., *op. ult. cit.,* p. 197.
[61] M. FERMEGLIA, *Comparative Law and Climate Change,* p. 238, in F. FIORENTINI - M. INFANTINO, *Mentoring Comparative Lawyers: Methods, Times, and Places,* Springer, 2020, pp. 237-259.

All in all, seen from the perspective of three modes of governance, it goes without saying that the CA is an example of regime complex. This may also be vindicated by looking at the academic writings in the wake of the CA. To illustrate, leading scholars in the field of comparative politics and international relations portrayed the climate change as a regime complex with paying particular attention given to the rise of transnational organizations. For them, climate change is composed of «loosely coupled system of institutions» without «no clear hierarchy or core»[62] as opposed to the full-fledged integrated regimes as exemplified by the WTO and trade regime. As may be implied, this was the moment when multilateralism is out of favor and unilateralism, transnationalism and minilateralism prove to be immensely popular. For by this time, the political tide was on the high flow whereas the (legal) normativity tide is on the ebb.

2.3. *The Paris Agreement: an example of experimental governance?*

The Copenhagen Accord (CA), laying down non-binding pledge and review procedure, was concluded between the US and BASIC countries despite the EU's ambitions for a more top-down agreement[63]. The EU, drawing on the lessons taken from this fiasco, gave up its «normative agenda and unrealistic expectations» and embarked on moving «towards a pragmatic strategy, attuned to the realities of changing power con-stellations» in Durban (COP 17)[64]. This strategy paid off with the support of developing countries and an agreement reached on extending the Kyoto Protocol up until 2020. What is more, the countries have come to a decision for a new legally binding treaty, finalized by 2015 (Durban Platform) and supported even by conventionally reluctant states such as the US and China[65]. The EU, during

[62] K. RAUSTIALA - D.G. VICTOR, *The regime complex,* cit., p. 9.
[63] C. F. PARKER - C. KARLSSON - M. HJERPE, *Assessing the European Union's global climate change leadership: from Copenhagen to the Paris Agreement,* in *Journal of European Integration*, Vol. 39, No. 2, 2017, p. 247.«the EU was not even in the room when the final details on the Copenhagen Accord were hammered out».
[64] K. BÄCKSTRAND - O. ELGSTRÖM, *The EU's role in climate change negotiations: from leader to 'leadiator',* in *Journal of European Public Policy*, Vol. 20, No. 10, 2013, p. 1369.
[65] ID., *op. ult. cit.,* p. 1382.

this process, act «as a 'leadiator', a leader-cum-mediator» since it «became a bridge builder between the major emitter»[66]. In the advance of Paris Agreement, the EU, once again exemplifying its directional leadership, recalibrated its 2030 GHG emission targets to 40% reduction, compared to 1990, with its 2030 Climate and Energy Framework on October 2014[67]. Against this backdrop, the bilateral agreement, concluded by China and the US, contributed to the EU's mediator leadership and flared up the hopes for a positive outcome from the Paris[68]. In Paris, the EU, adopting a similar approach to Durban, defended a «legally binding agreement with strong provisions for transparency and accountability, and a mechanism for raising the ambition over time»[69] and secured a «hybrid set up with bottom-up reduction pledges combined with a top-down review of performance»[70].

The PA explicitly stipulated that it will «be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties»[71]. Thus, it was a further movement from the top-down approach of the KP towards a designed «bottom-up architecture, consisting of national pledges and international scrutiny»[72]. In a nutshell, it was «a transition from a 'regulatory' model of binding, negotiated emissions targets to a 'catalytic and facilitative' model that seeks to create conditions under which actors progressively reduce their emissions through coordinated policy shift» [73]. In the first instance, the PA put an end to the strict interpretation of the principle of CBDR, so it dispensed

[66] ID., *op. ult. cit.,* p. 1380-1381.
[67] European Council *2030 Climate and Energy Policy Framework*, 2014, retrieved from https://data.consilium.europa.eu/doc/document/ST-169-2014-INIT/en/pdf
[68] R. FALKNER, *The Paris Agreement and the new logic of international climate politics* in *International Affairs*, Vol. 92, No. 5, 2016, p. 1114; Savaresi also considers the PA as a watershed moment signifies the beginning of a new cooperative era A. SAVARESI, *The Paris Agreement: a new beginning?,* in *Journal of Energy & Natural Resources Law,* Vol. 34, No. 1, 2016, p.26.
[69] European Parliament *EU Position for COP21 climate change conference,* 2015 *https://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572787/EPRS_BRI(2015)572787_EN.pdf*
[70] C. F. PARKER - C. KARLSSON - M. HJERPE, *Assessing the European,* cit., p. 249.
[71] Article 13 of the Paris Convention.
[72] D. BODANSKY, *Climate Change:Transnational Legal Order or Disorder?*, in T. C. HALLIDAY - G. SHAFFER (eds.), *Transnational Legal Orders*. Cambridge University Press, 2015, p. 293.
[73] T. HALE, *"All hands on deck": The Paris agreement and nonstate climate action,* in *Global Environmental Politics*, Vol. 16, No. 3, 2016, p. 12.

with the crude distinction between developed and developing countries. Instead, it took a more nuanced and cooperative approach to the principle of CBDR[74], and obliged each country to determine their own nationally determined contribution to the global emission cut. In other words, it rather than adopting a substantive rule valid for only developed countries, stipulated a self-differentiation principle[75] leaving its concretization to the member states. Even though the pledge and review approach has not been invented in Paris, it, contrary to Copenhagen, not only make it legally binding but also did not limit its temporal scope of application with a deadline. Thus, the parties are expected to pledge their NDCs until further notice and these pledges will be reviewed in the global stocktake every five year.

Second, it incorporated the transnational institutions into the UN-led climate change regime by considering them not «as an alternative to the UNFCCC process, or as merely a helpful addition, but as a core element of its logic of spurring rising action on climate over time»[76]. This breaks radically with the principal-agent model, characterizes the integrated international regimes and goes beyond it giving transnational organizations a prominent place[77]. Hence, the PA signifies a turn to transnationalism, whose origins could be traced back to the CA[78]. In other words, the agreement granted legal status to transnational organizations, empowered them, thereby rendered possible to call upon transnational organizations when the support of activists, journalists, scientist, civil societies, NGOs, and etc. are desperately needed. For instance, to observe and incentivize half-hearted states by means of 'naming and shaming' could only be realized with the support of NGOs and non-state actors in general[79].

Third, the PA is a compromise between deepeners and fragmenters, responded to both escaping from the shackles of Kyoto Protocol and UN-led climate

[74] D. COEN - J. KREIENKAMP - T. PEGRAM, *Global Climate,* cit., p. 21.
[75] D. HELD - C. ROGER, *Three models*, cit., p. 533.
[76] T. HALE, *"All hands*, cit., p. 13-14.
[77] D. BODANSKY, *Top 10 Developments in International Environmental Law: 1990-2020* in *Yearbook of International Environmental Law,* Oxford University Press*,* 2020, p. 19.
[78] T. HALE, *"All hands*, cit., p. 13 (paying attention to the increased scholarly interest in transnationalism studies).
[79] B.A. DIKMEN, *Global Climate*, cit., p. 74; see for the argument that states may also exert pressure to each other R. FALKNER, *The Paris Agreement*, cit., p. 1121-1123.

change regime on the one hand, and aiming to be as inclusive as much it can be on the other[80]. When seen from this perspective, it can be seen as a great achievement as it integrated both minilateral fragmenters and transnational deepeners into the UN framework[81]. Moreover, it, holding states under a procedural obligation to submit a more demanding pledge for each subsequent five-year-cycle, has yielded to the demands of recalcitrant states, on the one hand, and empowering transnational actors as the watchdog of the NDCs has been a response to the supporters of progressive climate change policies[82]. This new logic is described by Falkner as «domestically driven climate change action»[83]. The PA did not only find a delicate balance between different parties, but it also finds a middle way between Kyoto's integrated and legalistic approach and Copenhagen's highly fragmented, regime complex.

All in all, the PA embraces a novel and experimental approach and marks a significant shift in climate change governance[84]. If I were to describe this shift with one word, I would probably opt for describing it or associating it with proceduralization. That is, it «pins its hopes on a series of procedural obligation»[85]. For instance, it, by abstaining from giving a one right answer to the question the extent to which developed countries should contribute to the GHG emission reductions vis-à-vis developing ones, not only facilitates finding a middle way between parties but also nudges the states into taking on responsibility for addressing this problem[86]. Further, in the absence of binding substantive rules, transparency plays a key role in overseeing pledge-and-review process and compelling reluctant states by means of 'naming and shaming'. For this reason, transnational organizations are a *condicio sine qua non* for the success of the PA. That the figure of accredited organizations to the UNFCCC raised from 178 in 1995 to 2340 in 2020 is also telling, and this goes in the same direction with the general line of argumentation. Thus, it

[80] B.A. DIKMEN, *Global Climate*, cit., p. 74.
[81] ID., *ibidem.*
[82] ID., *op. ult. cit.,* p. 73-76; see for the watchdog role of non-state actors K. BÄCKSTRAND - J. W. KUYPER - B.O. LINNÉR - E. LÖVBRAND, *Non-state actors in global climate governance: from Copenhagen to Paris and beyond,* in *Environmental Politics,* Vol. 26, No. 4, 2017.
[83] R. FALKNER, *The Paris Agreement*, cit., p. 1118-1124
[84] H. VAN ASSELT – D. HUITEMA – A. JORDAN, *Global climate*, cit., p. 27.
[85] ID., *op. ult. cit.,* p. 31.
[86] R. FALKNER, *The Paris Agreement*, cit. p. 1115.

seems fair to say that the PA, albeit lacks explicit compliance mechanisms, have an implicit and collectively supported compliance system. To sum up, the PA as the epitome of post-sovereign global governance, did not only allocate responsibility by either giving more leeway to the actors (states) within the formal treaty mechanism or integrating some into the formal treaty framework but also struck a delicate balance between IGOs and its transnational competitors. In some sense, international law has been transnationalized while transnational law has been internationalized «through nonhierarchical 'orchestration' of climate change governance, in which international organizations or other appropriate authorities support and steer transnational schemes»[87].

Before moving on to the PA's analysis from the perspective of experimental governance, it is essential first to recall the assumption upon which the experimental governance is founded: in the case that the power is heterarchically distributed and that there is a lack of sufficient knowledge about how to govern, it is better to leave it to the process[88]. Discovering and learning how to govern by experiment, that is, a contextual, issue- and case-specific approach is the core of experimentalism. Even a cursory look at the climate change governance suffices to show that it has met experimentalists basic assumptions since the US' withdrawal from the regime till the PA. Granted that this is a very wide interpretation of these assumptions, and thus, it should be refined by considering the other conditions. In a nutshell, the five key features of experimental governance are: a) inclusive participation in non-hierarchical process, b) articulation of agreed common problem, c) devolution to local actors, d) continuous monitoring, and e) revision with peer review[89]. In a similar

[87] K.W. ABBOTT, *The transnational regime complex for climate change*, cit., p. 571; see for a very similar argument T. HICKMANN - O. WIDERBERG - M. LEDERER - P. PATTBERG, *The United Nations Framework Convention on Climate Change Secretariat as an orchestrator in global climate policymaking,* in *International Review of Administrative Sciences*, https://doi.org/10.1177/0020852319840425; see for a study questioning the effectiveness of this orchestration S. CHAN - W. AMLING, *Does orchestration in the Global Climate Action Agenda effectively prioritize and mobilize transnational climate adaptation action?,* in *International Environmental Agreements: Politics, Law and Economics*, Vol. 19, No. 4-5, p. 429-446.

[88] C.F. SABEL - J. ZEITLIN, *Learning from difference: The new architecture of experimentalist governance, in the EU*, in *European Law Journal*, Vol. 14, No. 3, p.280.

[89] G. DE BÚRCA - R.O. KEOHANE - C. SABEL, *New modes*, cit., p. 483.

vein, Keohane and Victor make the experimental governance conditional upon a) the articulation of specific goals by the participants, b) the existence of a penalty default to discipline the reluctant states, and c) the existence of an institutional review mechanism in order to assess national pledges[90].

First and foremost, the PA is indisputably the most inclusive treaty up to now concluded, for it gives a prominent place to non-governmental and sub-national organizations. Further, the PA has precisely objectified the long term formal and aspirational goals, embraced a pledge and review coupled with a ratchet mechanism, and left enough discretion to the member states. Thus, this «can be cited as evidence for the presence of a thin (or even 'medium thick') consensus among nation states»[91], thereby shows the lack of agreement on the solutions. In short, it meets the first two conditions – inclusiveness and articulation of common problem – of the experimentalism. As to the condition of decentralized governance, the PA, as aforementioned, struck a delicate balance, by taking on a procedural form, between the KP and the CA. For instance, none of the climate change treaties includes provisions as to how to reach the concrete emission targets; that is, they left the implementation phase to the member states[92]. Yet, the PA did leave not only the implementation phase but also the law-making phase to the member states on the proviso that the targets will be scaled up in each cycle. Thus, the PA assumed in some sense that it will be supported by the transnational actors, particularly NGOs. And it seems safe to say that the activist NGOs did so far meet this expectation by leveraging climate change litigations in the post-Copenhagen period[93]. What is more, we observed a turn to fundamental rights in climate change litigation[94]. The plaintiffs

[90] R. O. KEOHANE - D. G. VICTOR, *After the failure of top-down mandates*, cit., p.207-210.
[91] H. VAN ASSELT – D. HUITEMA – A. JORDAN, *Global climate*, cit., p. 35.
[92] ID., *op. ult. cit.,* p. 36.
[93] J. SETZER - R. BYRNES, *Global trends in climate change litigation: 2020* snapshot in *Grantham Research Institute for Climate Change and Environment, London School of Economics*, 2020, p. 7.
[94] J. PEEL - H. M. OSOFSKY, *A rights turn in climate change litigation?,* in *Transnational Environmental Law*, Vol. 7, No. 1, 2018, pp. 37-67; see for a study analyzing the interaction between environment and human rights before the Inter-American Court of Human Rights T. ZHUNUSSOVA, *Human Rights and the Environment Before the Inter-American Court of Human Rights*, in E. CHITI - A. DI MARTINO - G. PALOMBELLA, *L'eta della Interlegalità,* Il Mulino, 2021 (Forthcoming), available at https://www.cir.santannapisa.it/sites/default/files/Zhunussova%2C%20Human%20Rights%20and%20Environment%20before%20IACtHR.pdf

have begun to invoke fundamental rights, drawing support from the international human rights treaties, to provide a firm basis for the idea that state's inaction to take sufficient measures does violate citizen's fundamental rights[95]. When seen holistically, it can be contended that transnational organizations have been discharging their duties fallen upon them with the PA, even though it is still contestable whether this was resulted from the PA or not. The other aspect of the devolution to local actors is the global rise of the GNDs[96]. With respect to continuous monitoring, reporting and reviewing, the PA provides some review and monitoring mechanism, though it remains to be seen how it will play out over time. Nonetheless, Asselt et.al. argue that the PA contains «the basic elements of monitoring, reporting and peer review, as required for global experimentalist governance, are in place»[97].

3. *Three examples of experimental governance in climate change regime*

3.1. *Unilateralism as a default sanction: the interplay between the EU and the ICAO*

[95] See for the two seminal cases Ashgar Leghari v. Federation of Pakistan (W.P. No. 25501/2015), Lahore High Court Green Bench, Orders of 4 Sept. and 14 Sept. 2015, available at: https://elaw.org/pk_Leghari (Leghari); Urgenda Foundation v. The State of the Netherlands Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment), ECLI: NL:RBDHA:2015:7145, Rechtbank Den Haag [District Court of The Hague], C/09/456689/HA ZA 13-1396, available at: https://www.urgenda.nl/wp-content/uploads/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf; and Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment), ECLI:NL:GHDHA:2018:2591, Gerechtshof Den Haag [The Hague Court of Appeal], C/09/456689/HA ZA 13-1396, available at: https://www.urgenda.nl/wp-content/uploads/ECLI_NL_GHDHA_2018_2610.pdf; on 20 Dec. 2019, the Dutch Supreme Court upheld the previous decisions: Stichting Urgenda v. Government of the Netherlands (Ministry of Infrastructure and the Environment), ECLI:NL:HR:2019:2006, Hoge Raad [Supreme Court], C/09/ 456689/HA ZA 13-1396, available at: https://www.urgenda.nl/wp-content/uploads/ENG-Dutch-Supreme-Court-Urgenda-v-Netherlands-20-12-2019.pdf

[96] The idea of global Green New Deals does not only include the movements having a special program named as "Green New Deal", but also legal documents addressing the duties deriving from the obligations PA imposed upon member states such as the French Law on Energy and Climate Action, issued on 8 November 2019. See for this act https://perma.cc/5XYM-8VDA

[97] H. VAN ASSELT – D. HUITEMA – A. JORDAN, *Global climate*, cit., p. 39.

For experimentalists, the process matters, but it ought to be braced by some disciplining mechanisms for compelling the unwilling actors to cooperation. A default sanction or a threat to unilateral action, triggered not in case of non-compliance but in case of non-participation[98], may be a typical example of these disciplining mechanisms. From the foregoing, it seems acceptable to raise the question of «what is so bad about unilateral action to protect the environment?», not least when its alternative is inaction rather than multilateralism[99]. For instance, the EU's unilateral action on airline emission cuts in a period when the US shied away from being bound to the Kyoto Protocol, may be assessed not only as «a legitimate case for taking unilateral initiatives»[100], but also as an example of default penalty in case of non-compliance. That said, some may argue that it is not right to resort to unilateral action in every instance since it may significantly vitiate the international legal order based on multilateralism. Thus, it is better that international law exerts discipline over unilateral action than leaving unilateral action without any response. Here, the process unfolded between the EU and international legal order about the aviation emissions is highly telling and deserves to be zoomed in not only because it reveals the «dynamic process of action and reaction, reassessment and response, in which international law plays an uneasy role as both a check and a potential consolidator»[101], but also because it represents a perfect example of experimental governance.

In 2008, with an amendment to the 2003 Aviation Directive, the EU extended its ETS's scope of application to all flights leaving and arriving to the EU territory beginning from 2012 in disregard of its extraterritorial effects[102]. The Directive exempted the countries having equivalent level of protection with that of the EU from

[98] G. DE BÚRCA - R.O. KEOHANE - C. SABEL, *New modes*, cit., p. 484.
[99] D. BODANSKY, *What's so bad about unilateral action to protect the environment?,* in *European Journal of International Law,* Vol. 11, No. 2, 2000, pp. 339-347.
[100] G. SHAFFER - D. BODANSKY, *Transnationalism, unilateralism*, cit., p. 37.
[101] ID., *op. ult. cit.,* p. 40.
[102] European Parliament and the Council (EC) Directive 2008/101 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, available at: https://op.europa.eu/en/publication-detail/-/publication/174ef6bb-5ada-469a-9a4e-c0e7f6d284a2/language-en

the EU's ETS system[103]. Further, it gave some time to the ICAO, at least by 2012, to reach a decision on global aviation emission cuts[104]. As expected, this unilateral move was lambasted by a manifold of airline firms, associations, and countries on the ground that this measure, due to its obvious extraterritorial jurisdiction, does violate the other states' sovereignty[105]. In turn, it was challenged before the UK courts on the grounds that the regulation conflicts with some international agreements, particularly Chicago Convention, and principles of customary international law[106]. To cut a long story short, the Court upheld the directive and stressed that the directive did not fall outside the scope of the wide discretion granted to the EU authorities under the Article 2(2) of the Kyoto Protocol[107]. However, the EU, upon harshly criticized and having received significant economic and political threats[108], postponed the measures and stated that it will not apply the directive by September 2016 in order to wait and see the outcome of the 2016 ICAO Assembly (aka Stop the Clock Decision) [109]. To put it bluntly, the clock was stopped on the condition that a multilateral treaty will be concluded by 2016 in line with the expectations of the EU. From this it may be inferred that the EU, in case of failure, would not abstain from using its unilateral measures.

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[103] I. HADJIYIANNI, *The Court of Justice of the European Union as a Transnational Actor through Judicial Review of the Territorial Scope of EU Environmental Law,* in *Cambridge Yearbook of European Legal Studies*, Vol. 21, 2019, p. 150

[104] ID., *ibidem*.

[105] V.K. GONÇALVES, *Climate Change and International Civil Aviation Negotiations,* in *Contexto Internacional*, Vol. 39, No. 2, 2017, p. 448.

[106] Case C-366/10, *Air Transport Association of America, American Airlines, Inc, Continental Airlines, Inc, United Airlines, Inc v. The Secretary of State for Energy and Climate Change* [2011] ECR I-13755 (ATAA case)

[107] ATAA, para. 185-188

[108] N.L. DOBSON, *Competing Climate Change Responses: Reflections on EU Unilateral Regulation of International Transport Emissions in Light of Multilateral Developments,* in *Netherlands International Law Review*, Vol. 67, No. 2, 2020, p. 189.

[109] Parliament and the Council Regulation (EU) 421/2014 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions Text with EEA relevance, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2014.129.01.0001.01.ENG

In the shadow of the EU's unilateralism, the negotiations over global market-based mechanism (MBM) for reducing the GHG continued until 2016. In the negotiations, the US and the BASIC countries along with the aviation firms played the role of "laggards" while the EU, as is usual, was the main supporter of a global regulation for emissions[110]. Almost 20 years later after it was first decided, the countries finally arrived at a decision on global GHG regulation in 2016 even though it does plainly fall short of the EU's ambitions[111]. For it adopts an MBM based upon the principle of compensation rather than reducing the GHGs directly[112]. Be that as it may, it seems apparent that the EU, once again, played the role of mediator between different parties in reaching a consensual decision even though they have diverged and generally conflicting interests. And by doing so, it took advantage of its market and regulatory power while using unilateralism as a stick in order to drive the other parties towards the consensus. This strategy, as argued by Hadjiyianni, may be considered as an attempt «to achieve a balance between unilateralism and multilateralism by justifying EU unilateral action in light of insufficient international action and validating the existence of (unitary action) as necessary, albeit second-based, solutions to global environmental problems»[113]. In a nutshell, even though unilateral action may be seen as potentially destructive to international legal order, it shows significant potential for serving as a stabilizer like the sword of Damocles[114].

3.2. *Climate change litigations*

Even in the first six month of 2020, the climate change cases brought before the courts all around the world has almost doubled compared to 1997, which only 884 cases came before the court[115]. Climate change litigation is not a new

[110] V.K. GONÇALVES, *Climate Change*, cit. p. 449.
[111] ID., *op. ult. cit.,* p. 450.
[112] ID., *op. ult. cit.,* p. 454.
[113] I. HADJIYIANNI, *The Court*, cit., p. 151.
[114] D. BODANSKY, *What's so bad*, cit., p. 339-340. «…unilateralism is not necessarily destabilizing. Sometimes, it can play a catalytic role, promoting the development of international environmental regimes. In such cases, another less pejorative term for unilateralism is ledership».
[115] UNEP (2020) Global Climate Litigation Report, p.4, available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/34818/GCLR.pdf?sequence=1&isAllowed=y

phenomenon, yet it is by all means «prospering across the globe» so much so that it is on the cusp of «becoming a globally visible transnational phenomenon of growing importance»[116]. It is not easy to reach a conclusive decision the extent to which global climate change litigation is linked to the PA, yet it seems still a persuasive argument that there is an elective affinity between the upsurge in climate change litigations and the PA. This connection or affinity has become highly visible in a case decided in December 2019 by the Dutch Supreme Court. In Urgenda, the court, drawing support from Article 2 (right to life) and Article 8 (right to respect for private and family life) of the ECHR and from the PA's temperature goals, hold the Dutch government to account on the ground that it did violate the fundamental rights of its citizens by reducing its emission cut from 30% to 20% in 2011[117]. It is an inspiring decision in every aspect, and that the court establish a connection between fundamental rights and environment deserves every kind of praise. Further, this case has had a huge impact on the way in which climate change litigation can be employed in order to force countries to reach their NDCs. The inspiration triggered by the Urgenda's unprecedented success set the similar lawsuits in motion all around the world ranging from France to India, and to Ireland. One of the latest nodes in this complex web of litigations resolved on the 3rd of February 2021 with the French Administration Court's holding the view, similar to the rulings of the Dutch and Irish Courts, that the French government stopped short of «implementing public policies to allow it to achieve objectives it had set on the reduction of greenhouse gas emissions»[118]

From the foregoing, it may be implied that the provisions of the PA can be employed in the climate change litigation. Even though the provisions are by and large not justiciable in the domestic legal orders, the precise temperature goals set

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[116] L. WEGENER, *Can the Paris Agreement Help Climate Change Litigation and Vice Versa?,* in *Transnational Environmental Law*, Vol. 9, No. 1, 2020, p.18.

[117] See for an extensive analysis of the ruling J. SPIER, *'The "Strongest" Climate Ruling Yet': The Dutch Supreme Court's Urgenda Judgment,* in *Netherlands International Law Review*, Vol. 67, No. 2, pp. 319-391.

[118] https://www.vox.com/2021/2/4/22265316/france-climate-change-paris-court; available at http://paris.tribunal-administratif.fr/content/download/179360/1759761/version/1/file/19049671904968190497219049 76.pdf

out in the treaty would lend considerable interpretive support to the domestic courts[119]. In that respect, the principle of consistent interpretation with the international law can also play a critical role in establishing a connection between domestic and international legal orders[120]. The domestic courts in turn may check administrative and legislative discretions with the help of scientific evidence provided by the ICCP and the broadly defined yet specific targets to be achieved by 2050 and 2100[121]. Later, the PA, albeit devoid of any substantive NDC requirements to be achieved, includes several procedural obligations, e.g., to set up, communicate, provide transparency, and uphold NDCs[122]. The courts can benefit from these procedural obligations first and foremost to hold the states into account and to stave off inadmissibility argument by establishing a firmer connection between climate change and responsibility of states for taking further steps. Moreover, the courts may unlock the untapped potential of the transparency requirement by demanding from the government to provide reasons and justification in support of their decisions[123]. To conclude, climate change litigation, as summarized by Wegener: «does not replace the accountability and ratcheting mechanisms established at the international level. It rather adds a complementary, multifaceted second mechanism which allows for the direct involvement of non-governmental actors. … it connects the right of access to justice with public participation in decision making in climate matters at national and international levels and thus provides an additional role for private actors in the governance framework»[124].

Viewed from this angle, it can be argued that the PA could only reach its true potential only if the courts act as a gate-opener and the transnational organizations as a watchdog. At it seems that it has already began to lead up to its promises as today not only the states but also companies are holding to account due to their

[119] L. WEGENER, *Can the Paris Agreement*, cit., p.24.
[120] ID., *ibidem*; see also the South African case in which the court made use of this argument Earthlife Africa Johannesburg v. Minister of Energy, Case No. 65662/16, Judgment of High Court of South Africa, Gauteng Division, Pretoria (South Africa), 8 Mar. 2017
[121] L. WEGENER, *Can the Paris Agreement*, cit., p.26.
[122] ID., *op. ult. cit.,* p. 28-30.
[123] ID., *op. ult. cit.,* p. 35.
[124] ID., *op. ult. cit*, cit., p.36.

responsibility on climate change[125]. And it is no surprise that the PA plays a very crucial role here providing a normative background for the courts all across the world to take advantage of[126].

3.3. *Enabling the Global Green New Deals*

Even though there have been some notable developments in the wake of the PA such as the Global Pact for the Environment[127] and Paris Rulebook, which marks a transition from negotiation to implementation phase[128], none of them is as much important as the rise of global Green New Deal (GND). Loaded with the positive connotations of Roosevelt's New Deal, the aim of the global GND is to achieve climate neutrality by 2050 «in a way that also expands decent job opportunities and raises mass living standards for working people and the poor throughout the world»[129]. To this end, the two things are crucial: clean energy transformation and state's intervention to the market[130]. As it is implied even from these two crucial points, the GND crosscuts different sectors ranging from industry to agriculture, from consumption to transportation, thereby requires a large-scale restructuring of our relationship not only with environment but also with ourselves.

The IPCC's 2018 climate change report, showing the negative consequences of a 1.5 °C increase in global average temperature and the ways how to rein in the

[125] See the Hague District Court 26 May 2021 no C/09/571932 / HA ZA 19-379, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339

[126] The PA is not only used as a normative source, it also served as a mechanism holding the transnational actors such as Schell to account «To buttress the conclusion that the Paris goals were legally relevant for RDS, the Court found it relevant that under the Paris Agreement, the signatories ensured support of non-state stakeholders» A. NOLLKAEMPER, *Shell's Responsibility for Climate Change: An International Law Perspective on a Groundbreaking Judgment.* in *VerfBlog,* (28 May 2021), available at https://verfassungsblog.de/shells-responsibility-for-climate-change/.

[127] See for the explanations about how unsatisfying the content of the treaty when compared to its title L. KOTZÉ, *A global environmental constitution for the Anthropocene?* In *Transnational Environmental Law*, Vol. 8, No. 1, pp. 23-27.

[128] L. RAJAMANI - D. BODANSKY, *The Paris Rulebook: Balancing International Prescriptiveness with National Discretion,* in *International & Comparative Law Quarterly*, Vol. 68, No. 4, 2019, p. 1025.

[129] N. CHOMSKY - R. POLLIN - C. J. POLYCHRONIOU, *Climate Crisis and the Global Green New Deal: The Political Economy of Saving the Planet,* Verso, 2020, p.54 (ebook version).

[130] ID., *op. ult. cit.,*

global warming within these range, had a positive impact on awakening the big powers from their sleep. First, the US's democrat party, under the leadership of Alexandra Ocasio-Cortez, proposed a resolution for a Green New Deal. Upon having criticized due to its ambitious, on account of the US, targets, the Green New Deal has morphed into the CLEAN (Climate Leadership and Environmental Action for Our Nation's) Future Act[131]. Though the presidency of Donald Trump hindered the US Green New Deal, it was to be assumed, even before the election results, that Joe Biden's presidency will turn the US back into the game as a much more motivated player. In a way satisfying this expectation, Joe Biden, in his first speech after the election results, clearly stated that America is «going to make sure that labor is at the table and environmentalists are at the table in any trade deals» that will be made[132]. As to China, despite the absence of a comprehensive Green New Deal regulation, the Chinese president announced that China aspires to be climate neutral country by 2060[133]. On top of this, the EU signed a new trade agreement with China on the last days of 2020 and as Valdis Dombrovskis, the EU commissioner for trade, stated, it contains some positive developments with respect to the China's approach to the climate change[134]. Considering that the EU has also rolled out its own GND on December 2019, which was already at the top of Ursula von der Leyen's political guideline, it may be argued that the PA has already evoked positive responses[135]. Additionally, it not only empowered and subjectivized nation states by devolving

[131] J. CONCA, *Democrats' Green New Deal Becomes The CLEAN Future Act*, 2020, retrieved 31 December 2020, from https://www.forbes.com/sites/jamesconca/2020/01/15/democrats-green-new-deal-becomes-the-clean-future-act/

[132] A. FANG, *Biden says US needs to align with democracies after RCEP signing*, 2021, retrieved 1 January 2021, from https://asia.nikkei.com/Economy/Trade/Biden-says-US-needs-to-align-with-democracies-after-RCEP-signing

[133] W. CHANGHUA, *China's Great Green Reset: Carbon neutrality by 2060*, 2020, retrieved 31 December 2020, from https://news.cgtn.com/news/2020-09-24/China-s-Great-Green-Reset-Carbon-neutrality-by-2060-U2EvAoswHS/index.html

[134] European Commission Press Release, Eu and China reach agreement in principle on investment, (30 December 2020), available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2541

[135] U. VON DER LEYEN, *Political Guidelines for the next European Commission 2019-2024. A Union that strives for more: My agenda for Europe*, 2019, p. 16, European Commission *'The European Green Deal',* Communication from the Commission, COM (2019) 640, (11 December 2019)

responsibility to them but also invigorated a regulatory competition among the big powers.

As aforementioned, there is a global climate change regime, orchestrated by the UN framework, and it contains different national legal orders' climate change policies among which the EU, the US and China bear significant importance. They are important actors because they have the power to shape the global climate change regime by merely regulating their own legal orders and leveraging their market power. Taking a cue from Bradford's Brussels Effect, there may be a Beijing Effect or a Washington Effect one day[136]. According to Bradford, the EU, by merely regulating its own market, has been regulating the global marketplace[137]. For her, what differs the EU from the US and China is its regulatory capacity, which seems absent in the latter due to its recent economic rise[138]. When it comes to the US, the quality of its regulations, even though it has also as much regulatory capacity as the EU, differs significantly from the EU. For instance, «the US authorities are often more mindful of the detrimental effects of inefficient intervention» whereas «the EU is more fearful of the harmful effects of nonintervention»[139]. To this, we may add numerous other differences such as the EU's integration through law strategy as being an uncompleted federation and the EU's becoming a regulatory state due to the scarcity of its budget. To put it differently, the EU, having neither purse nor sword, took advantage of the only thing it had: regulation[140]. Consequently, these created a culture for minimalist regulation in the US as opposed to the EU where a race to the

[136] A. BRADFORD, *The Brussels effect*, cit., p.64.
[137] ID., *op. ult. cit.,* p. 1, There are five components of the Brussels effect: *market size*, *regulatory capacity*, *stringent standards, inelastic targets*, and *non-divisibility.* See for explanations p. 25-63.
[138] A. BRADFORD, *The Brussels effect,* cit., p.31. «This is evident in the case of China, where the country's impact on global financial regulation has been limited, despite its vast capital reserves and extensive holdings of US treasuries. China's limited influence can be traced, in part, to its lack of effective and independent bureaucratic institutions overseeing national market rules in this area. Thus, acknowledging that sophisticated regulatory institutions are required to activate the power of sizable domestic markets means that few jurisdictions aside from the United States or the EU today have the capacity to be regulators with global reach».
[139] ID., *op. ult. cit.,* p. 102.
[140] ID., *op. ult. cit.,* p. 24. «In the world where the United States projects hard power through its military and engagement in trade wars, and China economic power through its loans and investments, the EU exerts power through the most potent tool for global influence it has—regulation».

top has prevailed. As such, the EU has become the global regulator in the policies ranging from data protection to market competition, from environment to consumer health and safety[141].

It is fair to say that when it comes to climate change, the EU's unilateral global regulation is likely to change due to the new mode of governance established with the Paris Agreement. The conflictual relationships both between developing and developed countries, on the one hand, and between the US and the EU, on the other, are likely to turn into a cooperative one. One of the main reasons for this expectation is the obligations, primarily the obligation to pledge NDC for every 5 years, set out by the Paris Agreement. They impel the states to take further measures and act as an active participant in climate change governance. Thus, it is not an exaggeration to assume that the countries will move towards the same direction, reducing net CO2 emission to zero, even though their pace varies. To this end, some countries such as the EU, the US, India, and South Korea have already adopted their own Green New Deal policies[142]. What is more, the EU, rather than leveraging its market power unilaterally, is more intended to use bilateral agreements on climate policy. On the 7th of October 2017, India and the EU signed a joint statement on clean energy and climate change, by means of which both countries «are committed to lead and work together with all stakeholders to combat climate change, implement the 2030 Agenda for Sustainable Development and encourage global low greenhouse gas emissions, climate resilient and sustainable development»[143]. As for the relationship with the US, the (EU) Commission, with the intention to turn the election of Joe Biden into an opportunity, drew up «A new EU-US agenda for global change» in which climate change is one of the most important headings alongside the COVID 19 measures. It is clear from the agenda that the EU makes a call for collective and collaborative action with the US by stressing out the importance of the stance that will be taken by the US for climate change policies. Last but not least, it is important to underline that

[141] ID., *op. ult. cit.,* pp. 99-231, for environment see ch.7.
[142] J.H. LEE - J. WOO, *Green New Deal Policy of South Korea: Policy Innovation for a Sustainability Transition,* in *Sustainability*, Vol. 12, No. 23, 2020.
[143] EU – India Joint Statement on Clean Energy and Climate Change, New Delhi, (6 October 2017), available at: https://www.consilium.europa.eu/media/23517/eu-india-joint-declaration-climate-and-energy.pdf

the agenda touches also upon the EU-China relations and clearly underscores the importance of taking similar approach against China, which «is a negotiating partner for cooperation, an economic competitor, and a systemic rival»[144].

If we return to the question raised in the beginning of this article, it may be assumed that the fertile ground provided with the PA paved the way for the turn to rights-based climate change litigation as well as for the global GND. Pursuant to the PA, each country is expected to prepare a comprehensive climate change strategy and a legal document, showing how it is going to reach the targets set out in the treaty. Therefore, the PA showed deference to the nation states by granting them wide discretion, on the one hand, and turned them into active subjects by putting them under an obligation to take further steps no matter how tiny are. Seen from this angle, it is not an exaggeration to assume that this trend of global GNDs is going to expand its scope and reach even the farthest corners of the world. As regards the interaction between these GNDs, it may be implied that the interaction among them will probably be more collaborative and coordinated than the pre-Paris period. The legalities, rather than competing whether to regulate or not, will cooperate in order to fight effectively against climate change[145]. The treaties the EU signed with China and India and the message it sent to the US for an enhanced transatlantic collaboration are the first signs of this change in the quality of interaction between different legal orders.

4. *Conclusions*

[144] European Commission *A new EU-US agenda for global change.* Joint Communication to the Parliament, the European Council, and the Council, JOIN (2020) 22, p. 8.

[145] See for a study analyzing the post-Paris period from the perspective of inter-legality G.ÇAPAR, *From Conflictual to Coordinated Interlegality: The Green New Deals within the Global Climate Change Regime Complex* in *Center for Inter-Legality Research*, Working Paper No: 03/2021, available at https://www.cir.santannapisa.it/sites/default/files/%C3%87apar%20-%20Coordinated%20Interlegality_0.pdf; see for the theory of interlegality G. PALOMBELLA, *Theory, Realities and Promises of Inter-legality: A Manifesto, in* J. KLABBERS AND G. PALOMBELLA, *The Challenge of Inter-Legality*, Cambridge University Press, 2019; see how inter-legality can be used as an analytical tool between different legalities E. CHITI, *Shaping Inter-Legality*, in J. KLABBERS – G. PALOMBELLA, *The Challenge*, cit., pp. 271-301.

This article has traced the historical trajectory of the climate change regime. It has relied on the three modes of global governance elaborated by de Búrca, Keohane, and Sabel (integrated international regimes, regime complexes and global experimentalist governance) in order to shed light on the evolution of the climate change governance in the last three decades. The analysis has brought to the fore the importance of historical and institutional analysis with an eye on the underlying political context and political actors.

By embracing an internal point of view to the climate change regime, it has recalled that the conclusion of the 1992 UNFCCC opened the way to a heterarchical and pluralist political situation, beyond the US hegemonic leadership, and it has represented the UNFCCC as an issue-specific integrated regime. The EU's gradual move towards leadership began around this time, followed by the proliferation of transnational organizations which was due to the lack of political leadership, on the one hand, and to the withering effect of globalization, on the other. This period, spanning from the US's withdrawal from the KP to Copenhagen, bears all the hallmarks of regime complex, which reached its apex at the CA by the end of the 2000s. As for the period from Rio to 2001, it can be considered as a transition period from an integrated regime to a complex regime, characterized by the absence of regime normativity and increasing tension among participants. The model of regime complex implies an attenuation of normativity: to put it bluntly, a regime complex, contrary to integrated regimes representing monism and unity, is positioned at the pluralist end of the spectrum. States, in this pluralist and conflictual environment, could not find a common ground for reaching a legally binding agreement; therefore, they have been only able to conclude a non-binding document, the Copenhagen Accord. This period in which politics gained priority over normativity lasted more or less up until the ratification of the PA. The PA has marked a turning point in the mode of governance from regime complex to experimental governance. Yet, its root can be traced back to the CA, that is to the moment experimental governance started to be used. In short, in the darkest moment of the night, experimental governance has brought a glimmer of fresh hope for the future.

In its second part, this article has turned its attention to the ways in which experimental governance operates in the governance of climate change. To this end,

it has first drawn attention to the procedural characteristics of the PA and has shown how they may prove useful in empowering both states and transnational organizations. Then, it has pointed to three different experimentalist examples having occurred before and after the PA. First, it has demonstrated how the aviation emission negotiations turned out to be successful in the shadow of the threat that the EU may unilaterally impose its own regulations on the other states. As a second example, the article has shown how the PA is used as a leverage to oversee whether the NDCs is honored. It has also been emphasized that this climate change revolution could only be possible by virtue of transnational organizations, for they began to act as a watchdog of the NDCs all around the world after the Urgenda case. Third, the emerging of different GNDs or similar legal documents across the globe has been ascribed to the procedural obligations imposed on states with the PA, as the latter brings pressure to bear on each country with respect to preparing a comprehensive climate change strategy and a legal document. Such procedural responsibilities nudge states into taking further action, no matter how limited it is.

ABSTRACT

Gürkan Çapar - *What have the green new deals to do with the Paris Agreement?: an experimental governance approach to the climate change regime*

The article highlights the particular role played by the PA in the global climate change governance institutional structure as an enabler of the global climate change litigations and global green new deals. In doing so, it benefits from the three-fold distinction provided by de Búrca, Keohane and Sabel as integrated regimes, regime complexes, and global experimental governance. The article aims at analyzing the institutional evolution of the global climate change regime with these three different modes of governance, pointing out the importance of particular turning points such as the Rio Declaration, Copenhagen Accord, and the Paris Agreement (PA). On top of this, the article embeds this institutional evolutionary trajectory of the global climate change regime in the tensions among multilateralism, unilateralism, and transnationalism. Lastly, it argues that the mode of governance established with the PA can be nominated as soft multilateralism, for it not only needs the cooperation of non-state actors and NGOs but also distance itself from both mere unilateralism and Kyoto-style top-down multilateralism. In short, it seems fair to argue that global climate change regime is in the process of cooperation, dialogue and iterative integration.

KEY WORDS: *Global Green New Deal(s); Global Experimental Governance; Paris Agreement; Climate Change Regime; Multilateralism.*

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Bad Moon Rising: the Green Deals in the Globalization Era

TABLE OF CONTENTS: 1. *Introduction* – 2. *The globalization era, families of techniques and the frontrunner's benefits* – 2.1. *Families of techniques* – 2.2. *The fourfold pillar of globalization* – 2.3. *Frontrunner's benefits* – 3. *Contexts in which the EU Green Deal is arising in/from* – 3.1. *The context of the Law: technique and technology* – 3.2. *A tipping point for our epoch?* – 4. *Key-concepts of the EU Green Deal* – 5. *Battle fields, lines of action and regulatory framework* – 6. *A new family of techniques on the brink?*

1. *Introduction*

Often when studying the colonization process of the Americas one will stumble upon an interesting event that happened to Christopher Columbus. He and his crew were stranded in Central America, in Jamaica, for around six months when the natives grew weary and decided to cease the furnishing of food to the "guests". Worried with the situation and not knowing when would have been possible to leave the island and get back to Europe, Columbus came up with a solution. After consulting his navigation materials, the Italian discovered that a lunar eclipse would happen in three days, that is, on March 1st of 1504, and gathered the native leaders to say that his God was not pleased with their attitude and because of it He would inflame the moon with wrath. The day arrived and with it the lunar eclipse. When the natives saw the moon changing and becoming red, they fearfully urged Columbus to do something for they would from then on cooperate and restart feeding him and his crew. The Italian then went back in his cabin (to supposedly reason with his God) and calculated how much more time the eclipse would last, exiting the room right before it ended only to announce that his God had agreed to change the moon back to normal for He was pleased

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with the natives' decision. And so Columbus and his men were nourished by the natives for another six months until a Spanish fleet came to their rescue[1].

This story exemplifies, among many other things, that the dominion of technologies[2] brings great advantages to whom possesses them. So when different parties are at dispute for something, technology will most likely play a definitive role on the outcome of it. Especially if, like in the case at hand, one of the parties enjoys a lopsided control over the main important technologies of the time[3].

The analysis and analogies that can be extracted from the Columbus tale in Jamaica are innumerous, but I would like to abstract from it and focus mainly on the aspects related to *i)* the dominion of techniques and technologies and on *ii)* the benefits that derive from it. I will do so in order to account for some of the contexts in which the so called European Union's Green Deal is arising from and to analyze one specific set of impacts it might have on the globalized legal space.

2. *The globalization era, families of techniques and the frontrunners' benefits*

More than five hundred years passed since Columbus combined sagacity and practical knowledge to obtain what he needed at the beginning of the sixteenth century. History has seen the development of innumerous other "techniques" throughout the centuries and in the last three hundred years three

[1] The tale is available from different historical sources. For the purpose of this article, I used the following: <<https://www.space.com/2729-lunar-eclipse-saved-columbus.html>> Last seen on 15th February, 2021.

[2] I am for now referring to "technology" in its most wide and common sense usage, as in the employing of scientific discoveries for practical purposes. I will specify and distinguish it from "technique" in a more philosophical sense throughout the article. On the common usage of "technology" as done for now, see: <<https://dictionary.cambridge.org/us/dictionary/english/technology>> Last seen on 15th of February, 2021.

[3] From the mentioned story we can assert the obvious facts that Columbus dominated sea navigation and astronomy techniques, without which he wouldn't have been able to arrive in the Americas in the first place and therefore wouldn't have been stranded in Jamaica. His astronomy knowledge was precisely what gave him the power to "convince" the Jamaican natives that his God wanted them to feed him and his crew. Such power, for instance, derived from the fact that the natives did not know how to predict (or for that matter, what was) a lunar eclipse. Simply put, said power was sustained by the disproportionate dominance of a very particular set of techniques by one of the parties of the story.

different – though continuous – *industrial revolutions* took place, each of them being characterized by the emergence of different techniques.

It is possible to summarize these revolutions by stating that the first saw the emergence of the mechanization of production through the use of steam power (i.e. water and coal); the second, the emergence of electricity and petroleum (oil) as an enhancement of the mechanized production; the third, the rise of technology of information and its countless implications on daily social and political life.

2.1 *Families of techniques*

In other words, each of these so called industrial revolutions saw the emergence of different techniques (water sourced power, electricity based power and the technology of information, respectively). The great late Brazilian geographer Milton Santos, in his studies on globalization stated that «[n]owhere in the history of humankind does a technique appear in isolation; what is installed is a group of techniques», that is, «true systems»[4]. This means the three mentioned revolutions saw, each at their time, the development of a combination of different techniques accounting for a unified "system" (or a family) of techniques, which can be said to characterize each period of our history. Or, in the words of Santos, «each technical system represents an epoch»[5].

The second half of the last century was strongly marked by the fast developments of the family of techniques related to the technology of information that spread on a worldwide scale the means of mass communication like the television, computers, the internet and electronic systems of automate processing. The global reach of such family of techniques, especially in the final two decades of the twentieth century, served «as a link between the others [systems of techniques], uniting them and ensuring that the new technical system would be present all across the planet»[6].

[4] M. SANTOS, *Toward an Other Globalization: From the Single Thought to Universal Conscience,* Translated and edited by Lucas Melgaço and Tim Clarke, Springer International Publishing, 2017, p. 6. Santos goes furthers and gives a «trivial example», like «the sickle, the hoe, and the rake, which constitute, at a given moment, a family of techniques». ID., *ibidem.*
[5] ID., *ibidem.*
[6] ID., *op. ult. cit.,* p. 5.

2.2 *The fourfold pillar of globalization*

Observing the hegemonic nature of the techniques of technology of information, which has fasten the pace for the unfolding of globalization – that allowed «the emergence of the so-called global market» as we experience it –, Milton Santos explains such phenomena through a fourfold pillar: «the unicity of techniques, the convergence of moments, the knowability of the planet, and the existence of a single motor of history, represented by globalized surplus value»[7].

The four are intrinsically related to one another and together they account for the architecture of globalization, according to Santos. In a nutshell, the unicity of techniques refers to the hegemonic nature of the systems of technology of information that allows the various techniques at hand to communicate between themselves, involving the planet as a whole and making its presence felt globally[8]; at the same time, said unicity of techniques creates the unicity of time for it allows the simultaneity of actions and accelerates the historical process[9], which means that not only different places (worldwide) have the same "clock time" but that there is a "confluence of moments" through different spaces[10];

[7] ID., *ibidem.* Santos goes further and affirms that «a global market utilizing such a system of advanced techniques results in this perverse globalization» (p. 5). "Perverse globalization" is how the brazilian thinker described the process of naturalization of the ill effects of the transforming of the world into a global market, as if this were to cause a beneficial homogenization of the planet, when, instead, it deepens even further the local inequalities and social differences, for such "homogenization" benefits mostly the hegemonic actors that are able to profit from the "shortening of the distances" worldwide precisely because they are hegemonic (p. 2). Said naturalization is conceptualized by Santos as "globalization as a fable", that is, the make-believe that said ill effects are actually beneficial. Santos is aware that such situation «could be different if the political use of these techniques were other than it is» and states that it is precisely this possibility of a different usage of them that allows «us to have hope of utilizing the contemporary technical system through other forms of action» (p. 5-6). The author's effort to understand what this "different usage" could be is concentrated on the last three parts of the book and give meaning to its title, i.e., «Toward an Other Globalization».

[8] M. SANTOS, *Toward an Other Globalization*, cit., p. 6.

[9] ID., *ibidem.*

[10] Santos' take on such matter explains with great clarity the «planet-wide operation of large global companies» that «revolutionized the financial world, allowing its respective market to function in various places 24 h a day» (ID., *op. ult. cit.,*, p. 8). A note for clarity here is needed: Santos was a geographer and his main study object was the impact of globalization on local spaces, that is, the influences and impacts of the "global", supra-national, on the territories that receive the flow of changes imposed by the former. So his referring to "different places" and "different spaces" are to be understood as synonymous of "territories", because "places" and "spaces" in Portuguese, in the way Santos uses them, have all the same meaning. For more of Milton Santos' works on "spaces",

these two pillars set the foundation for «the possibility of knowing the planet in an extensive and deep manner»[11], not just within Earth's places/territories but also of Earth herself, from the outside, the space, rendering possible the «knowing of the world taken as a whole and knowing the particularity of places, which includes physical, natural and artificial characteristics and political conditions»[12].

Finally, the "single motor" of our time, the universal surplus value, which has become possible since production processes are «being made on a universal scale»[13] by (private or state) companies that are present globally and that «function in a fragmented way, since a portion of their production can be made in Tunisia, another in Malaysia and another even in Paraguay» to be «put together at a later moment and articulated through the "intelligence" of the company»[14]. The "transnationalization" of production is only conceivable through the «mundialization of products, money, credit, debt, consumption, and information»[15], which are a characteristic of our present epoch. So the universal surplus value is not just something that could be quantified, that is «precisely measurable»[16], but instead the form by which the competitiveness between companies in the global market is exercised[17].

2.3 *Frontrunner's benefits*

This is, according to Milton Santos, the main characteristics of our epoch. And as argued so far, it is all due to the massive hegemonic nature of the family of techniques that emerged from the third industrial revolution, which have set in one way or another, the main hegemonic global actors of the twentieth century "on the same page" when it comes to the understanding of the need of the

see: M. SANTOS, *A natureza do espaço: técnica e tempo, razão e emoção,* 4ª ed, Editora da Universidade de São Paulo, São Paulo, 2006.

[11] M. SANTOS, *Toward an Other Globalization*, p. 10.

[12] ID., *ibidem.*

[13] ID., *op. ult. cit.,* p. 9.

[14] ID., *op. ult. cit.,* p. 7.

[15] ID., *op. ult. cit.,* p. 9. Santos uses the neologism "mundialization" (*mundialização*, in Portuguese) to counterpose "internationalization" and "globalization". In his writing, internationalization and globalization, even though not having a strictly equal meaning, can be understood as the process of going beyond the local frontiers and having ties with other places/spaces. "Mundialization", instead, seems to refer to the *being* already "globalized", "internationalized", in a unified process that renders it natural to the world (*mundo* in Portuguese).

[16] ID., *ibidem.*

[17] ID., *op. ult. cit.,*, p. 10.

dominion of the new emerging family of techniques, as a way to avoid falling behind on the competition to hold a position as a hegemonic global actor.

But even though it is possible to describe with moderate accuracy the main characteristics of our epoch by way of pointing the current or the new, the emerging, system of techniques, this does not mean that the previous systems disappear or cease to exist. «They persist», Santos explain, «but the new ensemble of instruments comes to be used by the new hegemonic actors», which causes a setback in importance for those actors that do «not meet the conditions necessary to mobilize those techniques considered to be more advanced» at the present time[18]. The first few to take the lead and dominate the new systems of techniques, before they are homogenized, benefit from such leverage. They have a sort of frontrunner's benefit.

So a new family of techniques does not necessarily substitute the existing ones. History shows that an emerging system of techniques is most likely to be accumulated along with the ones already in play instead of causing an abrupt discontinuation of these. This is the context in which Santos' words about the mobilization of new techniques are to be understood in the present investigation.

Our current epoch, heiress of the aforementioned industrial revolutions, greatly exemplifies said accumulation of families of techniques *i)* for its paradigm (globalization) is defined by the aforementioned systems of technology of information and its structural impacts on the world (the unicity of techniques, the convergence of moments, the single motor and the knowability of the planet), which play a keen role in the way we interact daily in the public sphere and on how contemporary economies are sustained; *ii)* all aspects of said paradigm (the globalization epoch and the aforementioned "mundialization" of the market) depend upon the energy (re)sources that arose from the first two industrial revolutions, that is, mainly by coal and oil (petroleum), respectively. And as we now know, said (re)sources are not only not renewable but also harmful to the sustainability of the planet and to human life because of its carbon emissions, which produce the greenhouse effect that is responsible for climate change and its ever-worsening effects worldwide.

[18] ID., *op. ult. cit.,*, p. 6.

3. *Contexts in which the EU Green Deal is arising in/from*

The reason why Milton Santos' assessment on globalization was chosen to lead this essay's propaedeutical part can be funneled down to *i)* the key role attributed to (the family of) techniques as a guiding concept on the observation of historical developments, especially because it offers an important tool to distinguish one epoch from the other, that is, to distinguish relatively long periods of time on the basis of their "epochal systems of techniques" and *ii)* because *Toward an Other Globalization* was published in the year 2000, at the changing of centuries, or even, on a poetic note, at the beginning of the new millennium.

Said assessment painted the figure of the state of the art of globalization then, therefore providing fundamental tools to understand its developments on the first two decades of the twentieth first century. And that leads us to our *now*. Even though our present reveals itself to still be at the same *epoch*[19] described by the Brazilian thinker, though clearly with a further intensification of the aforementioned paradigm, it might be already possible to begin to wonder if our present is preparing a historical tipping point, for there might be subtle indications of such.

Before deepening on what such tipping point might be, I would like to offer what I believe to be an important backdrop of the current *epoch*. Though related to globalization, it should not be confused as strictly originated by its fourfold pillar. I am referring to the Law as a specific technique[20]. But first, a digression regarding the delicate – though important – distinction between technique and technology is needed.

3.1 *The context of the Law: technique and technology*

The philosophical considerations on the questions concerning technique and technology[21] have been developing since the end of the nineteenth century

[19] In the meaning attributed by Santos to such expression.
[20] I am using a slightly different meaning than that attributed to the Law by Kelsen, who defined it as a specific "social" technique. Cfr. H. KELSEN, *The Law as a specific social technique,* University of Chicago Law Review, nº 75, 1941. See also R. SUMMERS, *The technique element in Law,* 59 California Law Review, 733, 1971.
[21] I am here referring not only to Heidegger's «The questions concerning technology» (*Die Frage nach der Technik),* but to the myriad of reflections that have been made since Ernst Kapp's «Elements of a philosophy of technology» (*Grundlinien einen Philosophie der Technik*).

and by mid-twentieth century had already generated a profuse debate on what came to be known as "philosophy of technology", especially, for instance, between the minds of Ernst Junger and Martin Heidegger. In it, there is a constant – though subtle – distinction between "technique" (or sometimes "technicity") and "technology", being the former the philosophical sense of the "epochal principle" identified by the mentioned authors, while the latter refers to the material manifestation of the developments of the first. That is, the "entification", the concretization of said developments into material things.

Though mainly intended to reflect upon the advancements of techniques-technologies as scientific results and/or discoveries, such a distinction might be very much positive if transplanted into the world of the Law. Based on the aforementioned terms of the debate I would like to propose the possibility of considering a more abstract sense of the Law as technique, as the rationale, which sustains the general sense of law in its regulatory function of societal life, i.e. civil law, criminal law, procedural law and so on. In this sense, from now on, I will use *Law* when referring to it as *technique* in the terms so far developed and whenever needed to refer to the normative production, as in a civil code, or a specific content-oriented type of law, I will refer to it as *law*.

In parameterization with the philosophical debate above mentioned, the *Law* is equivalent to the technique, the rationale[22] that guides the developments of the *law*, which is a form of technology[23], for it is used with a practical purpose. In other words, the *law* is the "entification", the embodiment, of a fraction of a certain rationale always susceptible of further developments and enhancements throughout the long course of human legal reasoning, i.e., the more abstract sense of *Law* as previously specified.

So when I mentioned above «an important backdrop of the current epoch that though related to globalization was not originated by its fourfold pillar», I was implying the current hegemonic aspect that the *Law* acquired throughout the

[22] In this sense, the *Law*, as technique, would be the object of legal Jurisprudence – understood in its broader sense, as Philosophy of Law or Legal Theory.

[23] I am using the expression («law is a form of technology») in a very similar way, I believe, as Jorge E. Viñuales did («[l]aw can to some extent be analyzed as a technology») in his article *Law and the Anthropocene.* Though the Argentinian author does not provide the philosophical-based distinction I am trying to put forward here, I believe our usage of the mentioned expressions are coherent and point at the same direction. Cfr. J. E. VIÑUALES, *Law and the Anthropocene. In:* C-EENRG *Working paper,* 2016-5 (August 1, 2016), p. 42. Available at SSRN: <<https://ssrn.com/abstract=2842546>>. Last seen on 15th of February, 2021.

twentieth century, having international *law* (in its broadest meaning) and the regulations put forward by international bodies and organizations as the "technology" produced under such a "technique" to regulate the international sphere. And by "hegemonic aspect of the *Law*" I am explicitly referring to Santos' "technical unicity", that is, what allows the various existent techniques (systems of Law) to communicate between themselves, involving the planet as a whole and making its presence felt globally, hence making it possible the global market (and therefore the international sphere) as we experience it today. So the fourfold pillar put forward by Santos, takes place not simply having *Law as a technique* as its backdrop, but also having it as the terrain where it – the fourfold pillar – lays its roots and in which it has been spreading and nourishing from.

3.2 A tipping point for our epoch?

As brought up by the end of the second chapter, our current epoch depends upon the energy sources and resources that arose from the previous two industrial revolutions, especially fossil fuels (coal and petroleum), despite being non-renewable and harmful to the sustainability of the planet and to human life in it for they are responsible for the greenhouse effect and climate change. And since humanity started consistently burning coal in the first industrial revolution (two and half centuries ago) and oil on the second (around a century afterwards), their usage has nothing but increased, the Earth is closer than ever to reaching a "tipping point", that is, a point from where the damages caused by climate change will be irreversible[24].

Along with the ever-increasing worries on global warming and with the growing scientific consensus about it being caused by our current mode of existence and production, the international sphere started to put forward regulations as means to try to contain the worsening of Earth's conditions. Said regulations have come in the form of, for example, the Montreal Protocol, the United Nations Framework Convention on Climate Change, the Kyoto Protocol

[24] O. HOEGH-GULDBER-D. JACOB, M. TAYLOR, *et al*. *Impacts of 1.5ºC Global Warming on Natural and Human Systems. In: Global Warming of 1.5ºC. An IPCC Special Report on the Impacts of global warming of 1.5ºC above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty,* 2018, pp. 175-311. p. 262 Available at <<https://www.ipcc.ch/site/assets/uploads/sites/2/2019/02/SR15_Chapter3_Low_Res.pdf>> Last seen on 5th of January, 2021.

and its Doha Amendment and the Paris Agreement – along with national regulations trying to account for emissions and environmental pollution within national borders.

When the European Commission, on December 11th of 2019, proposed the so called the European Green Deal it did so within the contexts that I have so far tried to illuminate. Strictly speaking, the EU Green Deal represents the emergence of a new rationale within the realm of the *Law*, for it puts forward the ambition for robust changes on the regulation of all aspects related to the activities that have an impact (direct or indirectly) on climate change (from the extraction of raw material and its transportation in all spheres of production, farming, consumption, etc). Such rationale ought to be – speaking in the terms aforementioned – *embodied* in a yet-to-be-produced far-reaching regulatory framework. In other words, it still has to be "entified" into the broad sense of *law*.

But these "robust changes" will not be sufficient if they are limited within the territorial area of the European Union, since the deleterious impacts of global warming are, as the concept itself shows, globally felt. And also because its causes are produced worldwide.

Alongside the EU Green Deal, other countries such as the United Kingdom and China have also taken some initial steps in the same direction, although the EU Green Deal seems to be more ambitious and further developed for it is an overarching plan to restructure all spheres of life in the EU. The UK, for instance, amended its 2008 Climate Change Act[25], on the 27th of June of 2019, to reduce 100% of its greenhouse emissions by 2050, to what it's being called the «net zero target»[26]. China, on the other hand, recently announced[27] it has its own "net zero" plan to be achieved by 2060, with the peak emissions of carbon dioxide to arrive by 2030. These efforts seem to be – themselves – a tipping point on the trials to contain global warming for they begin to show the possible start of

[25] Said amendment is available at <<https://www.legislation.gov.uk/uksi/2019/1056/contents/made>> The Climate Change Act can be seen at <<https://www.legislation.gov.uk/ukpga/2008/27/contents>> Last seen on 15th of February, 2021.

[26] Expression found at: UNITED KINGDOM, *House of Commons Library: Net Zero in the UK*. Available at <<https://commonslibrary.parliament.uk/research-briefings/cbp-8590/>> Last seen on 15th of February, 2021.

[27] The Chinese President Xi Jinping made such announcement during a United Nations virtual meeting on the 22 of September of 2020, without providing further details of the steps it plans to take. Available at <<https://www.independent.co.uk/environment/china-xi-jinping-carbon-emissions-net-zero-2060-climate-change-b534004.html>> Last seen on 15th of February, 2021.

structural changes on important hegemonic global actors[28]. By "tipping-point" I am referring to «the point at which an issue, idea, product, etc., crosses a certain threshold and gains significant momentum, triggered by some minor factor or change»[29].

And even though said tipping point might probably have as result the emergence of new techniques and technologies (for example, green and renewable energy (re)sources, non-emitting carbon dioxide fuels and means of transportation, etc.), which can be described as a sort of "green" industrial revolution, it seems this will be the first time that the regulatory framework regarding the impact of new technologies will be laid down (globally) either before the arrival (or the "hegemonization") of said new technologies or as they start to appear.

So recalling Milton Santos' lessons on our *epoch*, the main hegemonic actors of the beginning of this century are "on the same page" regarding the need for dominance of the new emerging family of techniques – in order not to lose space as hegemonic global actors.

So if the language used by the European Union Commission's Vice President, Mr. Frans Timmermans, are not to be ignored, we are on the brink of a new industrial revolution[30]. A green and planned one. And both the *Law* and the *law* will play a definitive role in its development alongside the new scientific techniques and technologies. They will also be decisive on defining the frontrunners and so the advantages and benefits to be reaped by those who can better mobilize said *techniques*[31].

4. *Key-concepts and characteristics of the EU Green Deal*

Leaving the United Kingdom and the Chinese's initial steps aside, I would like to focus on what seems to be the most significant aspects of the so called EU Green Deal – and will do so while trying to stay within the borders of the contexts above mentioned.

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[28] Such a tipping point crowns the long list of efforts that have emerged on the international sphere on the last forty years – some of which were mentioned above in this chapter.
[29] Available at <<https://www.dictionary.com/browse/tipping-point?s=t>> Last seen on 15th of February, 2021.
[30] F. TIMMERMANS, *On the European Green Deal as a growth strategy at the Bruegel Annual Meetings.* Brussels, 1 September 2020.
[31] See above, note 18.

When Mrs. Ursula von der Leyen was elected as the European Commission President, on June 2019, she had established as a political priority to work toward transforming Europe into «the first climate-neutral continent» and had committed to propose a European Green Deal in her first 100 days in office[32]. In order to achieve so, her political agenda had also established the goal to reduce in 55% the EU's emissions by 2030, securing that said goal would be «based on social, economic and environmental impact assessments that ensure a level playing field and stimulate innovation, competitiveness and jobs»[33].

On December 11th, 2019, the Commission proposed the European Green Deal, presenting it as «a new growth strategy that aims to **transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy**», with zero greenhouse gases emissions by 2050 and «**where economic growth is decoupled from resource use**»[34]. The proposal opens up with a statement on the Commission's commitment to tackle «climate and environmental-related challenges» for it recognizes that the «atmosphere is warming and the climate is changing with each passing year», with forests and oceans being polluted and destroyed[35].

Aware of the risks of dangerously simplifying such a broad political intent, the EU Green Deal can be said to aggregate the United Nation's Sustainable Development Goals with the above mentioned ambition to transform the EU into a fair and prosperous society, having as its unnegotiable pillar the decoupling of economic growth from non-renewable (re)source use. The steps so far taken have further developed the idea of a planned transformation of the current state of affairs of energy sources usage and of the current mode of production, alongside with the Commission's concern in not allowing the industrial (and therefore economical) developments to detach from its social ambitions[36]. Said steps have been thus far taken mainly through regulation.

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[32] U. V. LEYEN, *A Union that strive for more: my agenda for Europe,* Political guidelines for the next European Commission 2019-2024, p. 5.
[33] ID., *op. ult. cit*., p. 6. The 55% reduction goal was accepted by the European Council on the night between the 10 and 11th of December, 2020. Available at <<https://www.consilium.europa.eu/en/meetings/european-council/2020/12/10-11/#>> Last seen on 15th of February, 2021.
[34] EU COMMISSION, *The European Green Deal*, Brussels, 11.12.2019, COM(2019) 640 final, p. 2, bold evidence on the original.
[35] ID., *ibidem.*
[36] In this context, the Commission has already proposed, for instance, the new Circular Economy Action Plan for a cleaner and more competitive Europe (substituting the one proposed in 2015), the

In a nutshell, the EU Green Deal is the political[37] intent to *i)* decouple economic growth from non-renewable (re)sources use (through the restructuration of its industries and its mode of production), all the while *ii)* without allowing the detachment of industrial and economic developments from the Commission's social concerns.

The key-concepts, or macro areas, found on the EU Green Deal proposal can be delineated as *i)* "regulation policy"; *ii)* "ecological transition" and "just transition"; *iii)* "climate change" and "biodiversity loss"; *iv)* "sustainable development" and "sustainable finance"; *v)* "global transition, global trade and trade policy" and "international cooperation". These are basically the fields where the EU will focus its regulation concerns in order to transform the EU, to use Mrs. Ursula von der Leyen terms, into «a fair and prosperous society, with a modern, resource-efficient and competitive economy»[38]. All depends upon the regulation policies that are to be taken regarding the mentioned key-concepts.

Some of these macro areas heavily rely upon researches on new technologies, as for example, to innovate on transport, batteries, clean hydrogen and low-carbon steel making, and on all of the already accessible topnotch data-driven and digital innovations[39]. And here lies an apparent virtuous circle that is at the same time an apparent paradox of the essentially strong regulatory aspect of the EU Green Deal.

As the EU starts to rule out (the Green Deal refers to "phasing out"[40]) fossil fuels, carbon dioxide and methane emissions, it relies on its replacement by new technologies (not all yet possible to be implemented, i.e. clean hydrogen energy) and on the possibility it will be cost-accessible in large scale, in order to substitute its energetic demands. While ruling out, I mean, regulating the discontinuing of the current greenhouse-emitting energy sources, the EU will try to "rule in" new technologies that, as mentioned, are not all yet (as for now) ready to be utilized in large scale.

The virtuousness of said circle seems to lie precisely on the circularity of the mentioned regulatory process, for it seems to function as a revolving door: as

Biodiversity Strategy for 2030 and the Farm to Fork Strategy (for a fair, healthy and environmentally-friendly food system), all of which try to tie social, economic and environmental beneficial aspects to the industrial developments that are (for the most part) yet to come.

[37] More on the matter on the sixth chapter.

[38] See above, note 34.

[39] EU COMMISSION, *The European Green Deal*, cit., p. 18.

[40] ID., *op. ult. cit*., p. 6.

it circles, it allows what is *in* to exit and what is out to enter. The apparent paradox depends on whether or not there is something on the outside and on the brink of getting in. So the EU is trying to rule out the use of non-renewable energy sources in order to decouple economic growth from it while, at the same time, regulating "in", as in "ruling in", the new technologies that ought to fulfill the goal of transforming the EU into a carbon-neutral continent.

As so far seen, this "revolving door characteristic" of the EU Green Deal's regulatory policy has at its basis the aforementioned «social, economic and environmental impact assessments»[41], mentioned at Mrs. von der Leyen's political guidelines. I would like to concentrate on the latter of the three.

While advancing the regulatory framework of the EU Green Deal, the EU Institutions are bound to take into account scientific assessments on the current status of the objects it is regulating and on the impact of what is yet to be regulated (new technologies, new standards for carbon emission, pollution, etc.). Said scientific assessments are responsible for the rotation of the "regulatory revolving door".

As a matter of fact, the awareness itself of the need for a "European Green Deal" is based on the scientific assessments that planet Earth cannot keep being polluted with greenhouse gases as it currently is, for it is at the brink of a temperature rise that greatly endangers human life in it.

Recalling the above distinction between *Law* and *law*, as in *technique* and *technology*, it seems that the current diverse "Green Deals" (UK, UE and China's), even though they might differ in innumerous ways, all have in common the broadening of the *Law*'s scope of rationality to include – and therefore take into account – scientific evidence and assessments on *i)* what should be "ruled out" and *ii)* what can/might be "ruled in". This seems to indicate that in our current *epoch*, three decades into this century, *Law*'s rationality is being enlarged to give rise to a science-oriented fact-based policymaking – which seems to be already in a process of homogenization. If so, this might as well be a (new) landmark of our *epoch*. Or, to be coherent with the language above used, a tipping point in it[42].

[41] See above, note 32. U. v. LEYEN, *op. cit.,* p. 6.

[42] I am not suggesting that said "enlargement" of *Law's* rationality has begun just now or that it is a consequence of our epoch. What I am trying to illustrate is that it seems to be a gradually rising enlargement that, just now, began to gain momentum and therefore has begun to be homogenized by the global actors of our time. For such reason I suggest it might be a "tipping point", that is,

5. *Battle fields, lines of action and regulatory framework*

The aforementioned five macro areas of the EU Green Deal proposal can be immediately identified along three main courses of actions, which are directly connected to the challenges the EU will face with its regulatory framework. They cover all its major areas and are in constant intersection with each other. Said courses of action can be circumscribed as *i)* within the EU area, *ii)* to the relationship with its neighbors and partners and *iii)* to the international sphere.

As indicated above, the desire for robust changes of the different Green Deals depend on a worldwide implementation, otherwise they will have very limited to no effect on global scale. The EU Green Deal shows that the Commission is aware of such need and it shows in a rather clear manner what needs to be done so the desired changes may take place.

For instance, the first of the three lines of action, is delimited to the territorial extension of the EU, which means the regulatory framework may have a direct impact in the EU's area of authority. In this case, the EU can regulate, for example, a schedule on the reduction of carbon emissions, the use of hazardous chemicals and how to better preserve and restore its ecosystems and biodiversity. This is the case of the Farm to Fork Strategy[43], a far-reaching plan on how to enhance the European food-chain, transforming it into a sustainable production system that works both for the community and the environment.

This type o regulation may also have an impact on third countries. That is yet again the case of the Farm to Fork Strategy, because even though its scope is predominantly for the EU's territorial extension (the first line of action) it interferes in its relations with its commercial partners (second line of action), for the EU is the biggest importer of agri-food products in the world[44]. In an imaginative exercise, one may speculate on the need for commodities exporting countries to adapt, up to a certain level, to the EU's regulations at the risk of losing their market shares in EU's territory.

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something that has been quietly on the rise for a while but, since it is now gaining more and more adherence, it might indicate a structural change and/or the beginning or the development of a new phase.

[43] EU COMMISSION, *Farm to Fork Strategy*, Brussels, 20.5.2020, COM(2020) 381 final.

[44] ID., *op. ult. cit*.,, p. 5.

Said adaptation would cause, for instance, the commodities exporting countries to internally adapt their regulatory framework up to the standards set by the EU[45]. This could possibly have, in one way or another, a positive impact on moving toward "green" regulations on third countries. At least on the ones that are commercial partners with the EU.

This type of regulatory impact could also play a significant role globally as a "market share reservoir" for green companies, which would mean that the frontrunner companies (private or public ones) on green technologies could push for regulations to have their technological standards set as *the* green standards. This would be precisely what was above mentioned as the reaping of benefits and advantages by those who can better mobilize the new families of techniques. And yet again can be seen the pivotal role that the mentioned "*Law*'s new rationale" will have on the "entifiying" of the *law*[46].

If these first two lines of action are defined by a sort of direct influence of the EU Green Deal, whether on the EU territory or on its various partners and neighbors, the third course of actions cannot count on to have an impact or influence that can be immediately identified. It is, or so it seems, where the EU's biggest challenge lies.

The wording of the EU Green Deal and the correlated Commission's communications, such as the Farm to Fork and the Biodiversity Strategies, provide the understanding that the EU wants to play an active role on speaking up for the importance of the "green transition" in the international legal space. And it seems to be willing to do so by promoting the global transition «in

[45] This phenomena, I mean, the influence the EU's internal market regulation has over non-european countries (for the rest of the world, for that matter) was defined by Anu Bradford through the term "the Brussels Effect" – that is, the fact that the EU «can exercise genuine unilateral power» by «fixing the standards of behavior for the rest of the world», while regulating its own territory. A. BRADFORD, *The Brussels Effect: how the European Union rules the word,* Oxford University Press, New York, 2020, p. 24. The author coined said term inspired by David Vogel's "the California Effect", which has shown, among other things, that the leading corporations tend to support stricter regulations of their own field of action for they have the ability to adapt to it better than their smaller competitors, therefore advancing over their market-shares and this tends to help spreading new regulatory standards. The term was coined by Vogel having the example of the State of California, which has been a leading State when it comes to environmental protection standards, therefore regulating "up". Hence the title "trading up". See D. VOGEL, *Trading up: consumer and environmental regulation in a global economy,* Cambridge, Massachusetts, Harvard University Press, 1995. Most recently, Vogel wrote a comprehensive analysis of California's historical leading role on environmental protection innovative standards. See D. VOGEL, *California greenin': how the Golden State became an environmental leader,* Princeton University Press, 2018.

[46] See around note 22, *supra*, §3.1.

international standard setting bodies, relevant multilateral fora and international events», where it «will seek ambitious policy outcomes»[47]. All the while having clear that «[t]rade policy will actively support and be part of the ecological transition»[48].

This dispute for setting green standards on the international legal space (in other words, the dispute for regulatory frameworks on the green transition) further illustrates the aforementioned image of Milton Santos' globalization's fourfold pillar having *Law as a technique* not simply as its background, but also as the terrain where it spreads its roots and where it nourishes from. This is to say that the five macro areas of the EU Green Deal, which can be divided into three major courses of actions, each represent a different – so to speak – regulatory battle field in the globalized legal space.

The so called EU's «green deal diplomacy»[49] will play an important role by actively working toward the aforementioned enlargement of the *Law*'s rationality on the international sphere, as a way of thrusting international *law* into greener frameworks, therefore spreading its green ambitions worldwide.

If it is still allowed a reference to the case in which Columbus combined sagacity and the dominion of techniques, the hegemonic global actors of our epoch when at dispute (at the globalized legal space's multilateral for a) on setting the standards for the green transition, will be all on the same page when saying that there is something about to go wrong. The difference this time being that the ones who will benefit from it will be the ones showing to have the better techniques on how to avoid, and/or to prepare, for the "bad moon rising"[50]. For this time it is real.

6. A new family of techniques on the brink?

This essay tried to describe[51] some of the contexts in which the EU Green Deal is arising *in* and *from*. I have tried to account for one specific set of impacts

[47] EU COMMISSION, *Farm to Fork Strategy*, cit., p. 18.
[48] EU COMMISSION, *Biodiversity Strategy*. Brussels, 20.5.2020. COM(2020) 380 final, p. 21.
[49] EU COMMISSION, *European Green Deal*, cit., p. 20; ID., *Biodiversity Strategy*, cit., p. 19.
[50] Creedence Clearwater Revival, *Green River album*, side two – first track, San Francisco, CA, 1969.
[51] I tried to focus primarily on the second set of impacts, although I recognize sometimes this essay seemed to slide towards a more socio-political interpretation of our time (which I believe was due to the inseparable nature of both sets of impacts).

that I believe it might have on the globalized legal space, i.e., the aforementioned overall enlargement of the *Law'*s rationale in order to take into account scientific assessments (at least when it comes to outputting regulation on matters of the health of the Earth). This is what I above defined as the rise of «a science-oriented fact-based policymaking», which I believe it is already being homogenized – in the sense it is becoming the standard rationale for the hegemonic global actors of our epoch. And for such reason, I believe this represents a tipping point both *i)* on the global efforts to preserve the Earth and *ii)* on the development of the *Law*. With this in mind, I would like to conclude my remarks by further clearing my take on said second assortment of effects, the one that regards *Law as technique.*

By the fourth chapter I defined the EU Green Deal as a «broad political intent». And I did so as an effort to reassure, though in a subtle and initial manner, the role of politics in the matter of the possible tipping point we might be living – the one that regards the efforts to take better care of the Earth. At the same time, by attributing to said political intent the quality of a "science-oriented fact-based policymaking", I am trying to shed a light at the entanglement of science and politics on the outputting of the *law.* Of this new branch of *law*.

This entanglement between politics and science, as a way of establishing a regulatory framework as wide-ranging as the Green Deals ought to be in order for them to work, is precisely what I tried to point out as the «enlargement of the *Law'*s rationality», that is, the enlargement of the *technique* that the *Law* is. Such enlargement seems to represent the point of intersection between these three major spheres of contemporary life: Politics, Science and *Law*.

The image of an intersection, of the interweaving, of the three does not necessarily mean they blend together and become a new body of knowledge or something of the sort. At least not if we imagine the intersecting of three different lines of rope that, as they interweave, become one braid made of different ropes. This way each rope, I mean, each sphere of contemporary life, preserves its characteristics all the while contributing to the existence of the newly formed three-roped braid. The point in which they agree on and come together to lay down the above mentioned new branch of *law*, is where the referred "entification" of the *Law'*s enlarged rationality takes place. Said entification comes in the form of a knot in the three-roped braid. The question whether or not said knot might

be held to be the possible "retying" of "the Gordian Knot" that Bruno Latour called for in his *We have never been modern*[52] is still to be further investigated.

One last clarification is due. Whenever I have referred to the enlargement of the *Law'*s rationality, there has always been a silent point at the background, for the "enlargement of" implies an addition onto something. In our case, the "something" *to which* something *is added to* is the current rationale of the *Law*, which was said to be the object of Jurisprudence[53] – that is, the effort to understand the socio-political phenomenon that the Law is.

Generally and broadly speaking, said effort tries to understand the reasons for legal validity, as in why the law can *be* and why it must be obeyed (or not). From this derives the debate between theories of *natural law* and *legal positivism*, which try to account for the conditions for legal validity and whether or not the content of the law plays a role in its validity. This has set the general tone for the current relationship between Politics, Law and Morality.

Said three-faced relationship is what has been dominating the *Law'*s rationality so far. And this is where the said enlargement takes place and purports its impact. In other words, it is the adding of Science to the equation of Politics-Law-Morality. In this sense, if the Law has so far been the intermediary of the relationship between Politics and Morality, it might now have to intermediate, more than ever, the relationship between Politics, Morality and Science.

Though we seem to be at the brink of a green and planned industrial revolution, it is still to be seen if the Green Deals and the new scientific techniques and technologies they depend upon will rise up to the challenge that lies ahead. And if so, if the *Law* will play the significant role it seems to be expected of it.

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[52] B. LATOUR, *Nous n'avons jamais étés modernes: essai d'anthropologie symétric*, La Découvert, 1991. In his later works, Latour goes further and instead of thinking in terms of "philosophy of technology" or "philosophy of science", he pushes forward for the notion of a "political philosophy of nature", contrasting it also with "political ecology". The French philosopher's take is to include science in the mix between politics and nature, therefore thinking in terms of "*polis, logos* and *phusis*". B. LATOUR, *Politics of Nature: How to bring the Sciences into Democracy*, Translated by Catherine Porter, Harvard University Press, 2004, p. 231.

[53] See note 22 *supra*, §3.1.

ABSTRACT

Guilherme Pratti S. M. – *Bad moon rising: the green deals in the globalization era*

This paper purports the conceptions of *Law* as a *technique* and as a *technology*, while accounting for its role in some of the contexts in which the so called EU Green Deal is arising *in* and *from*. The analysis undertaken focuses on explaining some of the aspects related to *i)* the dominion of *techniques* and *technologies* and on *ii)* the benefits that derive from said dominion; taking into account the fact that the Green Deal depends upon techniques and technologies that have not yet been fully developed; all the while depending on the adaptation of normative frameworks to allow for the substitution of the current technologies for the ones that are still to come. The role of *Law* in this process is hence of fundamental importance and the paper suggests a possible change in its – the *Law's* – rationale due to the challenges posed by the Green Deals in our epoch.

KEY WORDS: *EU Green Deal; Globalization; Law; Technique; Technology.*

OPINIONI E SEGNALAZIONI

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La transizione verde nel Piano Nazionale di Ripresa e Resilienza «Italia Domani»

SOMMARIO: 1. *Piano Nazionale di Ripresa e Resilienza e Green Deal europeo: profili introduttivi.* – 2. *Il vincolo del 37% delle risorse da destinare alla transizione verde e il principio DNSH.* – 3. *Piano Nazionale di Ripresa e Resilienza «Italia domani»: la missione «Rivoluzione Verde e Transizione Ecologica».* – 3.1 *Investimenti per la transizione energetica.* – 4. *Le riforme per la transizione verde.* – 5. *Conclusioni.*

1. *Piano Nazionale di Ripresa e Resilienza e Green Deal europeo: profili introduttivi*

La crisi pandemica Covid-19, che ha conosciuto un'espansione del tutto straordinaria, con più di 150 milioni di casi e 3 milioni di morti, di cui più di un milione in Europa, ha ben presto spiegato i suoi effetti anche sulle economie, europee e mondiali, affiancando alla crisi sanitaria una profonda crisi economica[1].

Con il PIL nell'eurozona in caduta[2], il Next Generation EU[3], proposto dalla Commissione europea a maggio 2020, ha rappresentato la risposta dell'Unione europea per la ripresa di tutta l'eurozona. Il pacchetto per la ripresa dal Covid-19, prevede lo stanziamento di 750 miliardi tra prestiti e sovvenzioni, di cui circa il 90% destinato al dispositivo per la ripresa e resilienza[4]. Ciascuno

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[1] Si veda il Considerando 3 al Regolamento (UE) 240/2021, che mette in luce come l'emergenza sanitaria Covid-19 abbia cambiato radicalmente le prospettive economiche e sociali per l'Unione europea e su più vasta scala. Da qui l'emergere di nuove priorità, che hanno richiesto una risposta urgente per attenuare le ricadute sociali ed economiche della crisi pandemica.

[2] Per gli effetti della pandemia su occupazione ed economia si veda la Comunicazione della Commissione al Parlamento europeo, al Consiglio europeo, al Consiglio, alla Banca centrale europea, alla Banca europea per gli investimenti e all'Eurogruppo, *Risposta economica coordinata all'emergenza COVID-19*, del 13 marzo 2020, COM(2020) 112 *final*.

[3] Per un inquadramento generale si veda F. SALMONI, *Recovery Fund, condizionalità e debito pubblico*, CEDAM, 2021.

[4] La quota rimanente è stata suddivisa in più voci, la principale delle quali è rappresentata dal programma React-EU per le politiche di coesione (47,5 miliardi). La restante parte è ripartita tra: (i) Fondo per la transizione giusta (10 miliardi); (ii) Orizzonte Europa (5 miliardi); (iii) sviluppo rurale (7,5 miliardi); (iv) RescEU (1,9 miliardi) e (v) InvestEU (5,6 miliardi).

Stato membro che ha inteso richiedere un contributo finanziario, ha dovuto presentare alla Commissione un piano per la ripresa e la resilienza[5], definendo un programma di riforme ed investimenti *inter alia* coerente con le sfide e le priorità individuate nell'ambito del semestre europeo e con le raccomandazioni del Consiglio. L'Italia, insieme alla Spagna, risulta beneficiaria della quota maggiore di fondi, pari a 191,5 miliardi. Come è stato evidenziato[6], si tratta di un'occasione irripetibile per il futuro del Paese, in un momento di aggravamento delle difficoltà strutturali che già segnavano l'economia italiana.

In questo quadro, gli obiettivi di ripresa economica non possono che coniugarsi con la *road map* di sostenibilità[7] illustrata a dicembre 2019 nella presentazione del *Green Deal* europeo[8]. Il dispositivo per la ripresa e la resilienza, come chiarito nella Strategia annuale per la crescita sostenibile 2021[9], affonda le sue radici nell'obiettivo dell'Unione di conseguire una sostenibilità e una coesione competitive, mediante la nuova strategia di crescita delineata nel *Green Deal* europeo. In questa prospettiva, la stessa Strategia ha, inoltre, tracciato la strada per l'elaborazione delle linee di azione della transizione verde nell'ambito del dispositivo, definendo le sfide comuni ed individuando specifici settori che

[5] In questa prospettiva, sono individuati sei pilastri di intervento: (i) transizione verde; (ii) trasformazione digitale; (iii) crescita intelligente, sostenibile e inclusiva; (iv) coesione sociale e territoriale; (v) salute; e (vi) resilienza economica, sociale e istituzionale, ed è richiesto a ciascuno Stato membro di presentare un piano che contribuisca in modo appropriato a ciascuno dei sei pilastri e che contemporaneamente costituisca una risposta concreta alla situazione economica e sociale del paese di riferimento. Si veda il Considerando 10 al Regolamento (UE) 2021/241.

[6] Per una disamina delle opportunità, ma anche delle responsabilità connesse all'elaborazione del piano, accompagnata da un approccio critico nei confronti delle prime bozze, si veda C. BASTASIN-L. BINI SMAGHI-M. BORDIGNON-S. DE NARDIS-C. DE VINCENTI-V. MELICIANI-M. MESSORI-S. MICOSSI-P. C. PADOAN-G. TONIOLO, *Una visione del Paese per una grande opportunità. Le necessarie scelte del governo italiano in vista di Next Generation-EU*, Luiss SEP Policy Brief, 42/2020, 6 dicembre 2020.

[7] Come del resto indicato nel Regolamento (UE) 2021/241, di istituzione del dispositivo per la ripresa e resilienza (c.d. Regolamento Dispositivo).

[8] Si veda, *inter alia*, il documento della Commissione europea, *The sectoral impact of the Covid-19*, del 3 marzo 2020, che sul punto chiarisce quanto segue: «The COVID-19 crisis has acted as an accelerator for the support to the green transition, which was already high on the EU agenda with the European Green Deal. At EU level, the Commission maintains the implementation of the Green Deal roadmap as a new growth strategy to build a more resilient, sustainable and fair Europe. In this context, one of the main priorities of the Recovery and Resilience Facility is to support this reform effort and boost green investment».

[9] Comunicazione della Commissione al Parlamento europeo, al Consiglio europeo, al Consiglio, alla Banca centrale europea, al Comitato economico e sociale europeo, al Comitato delle Regioni e alla Banca europea per gli investimenti, *Strategia annuale per la crescita sostenibile 2021*, del 17 settembre 2020, COM(2020) 575.

gli Stati membri sono incoraggiati ad includere nei piani nazionali di ripresa e resilienza[10].

D'altra parte, l'obiettivo neutralità climatica entro il 2050, a cui è volta la *road map* per il *Green Deal* europeo, impone scelte radicali che richiedono il superamento della logica classica di composizione dello sviluppo sostenibile, che fa dell'ambiente un limite esterno allo sviluppo[11]. L'obiettivo neutralità climatica richiede sinergia tra ambiente e sviluppo[12] e comporta la scelta di una crescita qualitativamente differente[13]. Tale mutamento di prospettiva, impone un diverso ruolo dei pubblici poteri: emerge l'esigenza di affiancare le misure di regolazione pro-concorrenziale con piani e programmi che possano accompagnare la transizione energetica ed ambientale[14]. Questa, la prospettiva di fondo nella quale

[10] I settori individuati sono (i) *power up* (premere sull'acceleratore), per anticipare la diffusione delle tecnologie pulite; (ii) *renovate* (ristrutturare), per la riqualificazione degli edifici pubblici e privati, con particolare attenzione all'efficienza energetica; (iii) *recharge and refuel* (ricaricare e rifornire), per la promozione di tecnologie per il trasporto sostenibile; (iv) *connect* (connettere), per l'accesso a servizi di banda larga rapidi; (v) *modernise* (modernizzare) per la modernizzazione dei principali servizi europei; (vi) *scale-up* (espandere), per l'aumento delle capacità industriali europee di *cloud* di dati e della capacità di sviluppare processori più potenti; (vii) *reskill and upskill* (riqualificare e aggiornare le competenze), per la riqualificazione e valorizzazione delle competenze fondamentali a sostegno della transizione verde e digitale.

[11] Sul principio dello sviluppo sostenibile si veda F. FRACCHIA, *Lo sviluppo sostenibile. La voce flebile dell'altro tra protezione dell'ambiente e tutela della specie umana*, Editoriale Scientifica, Napoli, 2010. Si veda anche G. MONTEDORO, *Spunti per una "decostruzione" della nozione di sviluppo sostenibile e per una critica del diritto ambientale*, in *Amministrazione in Cammino,* 30 aprile 2009.

[12] Sul punto si veda G. ROSSI, *Dallo sviluppo sostenibile all'ambiente per lo sviluppo*, in *Rivista Quadrimestrale di Diritto dell'Ambiente*, n. 1/2020, p. 10, dove afferma che la possibilità di una sinergia tra ambiente e sviluppo, non esclude radicalmente modi di produzione dannosi o "compatibili" con l'ambiente. Nell'incertezza definitoria della dannosità di un'attività economica, che nella maggior parte dei casi è chiamata a consumare fattori naturali, l'Autore propone di superare la bipartizione tra attività dannose e attività non dannose, proponendo una tripartizione che individui quelle attività idonee a determinare un miglioramento oggettivo delle condizioni ambientali o che richiedono un consumo minimo di beni ambientali sproporzionato rispetto ai vantaggi che ne derivano. Sono queste attività a dare corpo ad un nuovo tipo di sviluppo che non si basa più sul parametro della compatibilità, ma che è del tutto sinergico con l'ambiente.

[13] Si veda A. MOLITERNI, *La sfida ambientale e il ruolo dei pubblici poteri in campo economico*, in *Rivista Quadrimestrale di Diritto dell'Ambiente*, n.2/2020, p. 42.

[14] In Italia già nel 2017, seppur in assenza di una specifica disposizione di legge che ne disciplinasse contenuto e modalità di adozione, è stata adottata con decreto del Ministero dello sviluppo economico e del Ministero dell'ambiente e della tutela del territorio e del mare, la Strategia Energetica Nazionale, che, pur indossando la veste di atto politico, ha costituito un primo recente ed importante elemento di pianificazione energetica. Per un'analisi approfondita delle tematiche giuridiche inerenti si rimanda a L. CARBONE-G. NAPOLITANO-A. ZOPPINI, *Annuario di Diritto*

si sviluppa il G*reen Deal* europeo e nella quale si inserisce il *Next Generation EU,* con i dispositivi per la ripresa e la resilienza[15].

Come richiesto dal Regolamento Dispositivo, sono due i vincoli gravanti sui piani nazionali di ripresa e resilienza, che ne segnano la forte connessione con la *road map Green Deal*: da un lato, il 37% delle risorse richieste da ciascuno Stato membro deve contribuire alla transizione verde; dall'altro, nessuna misura del piano deve essere idonea a produrre effetti negativi per l'ambiente e deve dunque rispettare il principio «*Do Not Significant Harm*» (di seguito, «DNSH»), di cui all'articolo 17 del Regolamento (UE) 2020/852, relativo all'istituzione di un quadro che favorisce gli investimenti sostenibili e recante modifica del Regolamento (UE) 2019/2088 («Regolamento Tassonomia»).

Si tratta di principi che permeano la più grande programmazione di risorse mai affrontata dal piano Marshall[16]. Sembra, dunque, opportuno interrogarsi in via preliminare sulle modalità di ottemperamento del requisito del 37% di investimenti in «transizione verde», per poi soffermarsi più nel dettaglio sul significato di tale espressione, anche alla luce della disciplina europea.

2. *Il vincolo del 37% delle risorse da destinare alla transizione verde ed il principio DNSH*

L'articolo 18 («Piano per la ripresa e resilienza») del Regolamento Dispositivo ha stabilito che tutti i piani per la ripresa e la resilienza sono tenuti all'espressa previsione di specifici elementi, tra i quali sono ricompresi: (i) una spiegazione del modo in cui il piano garantisce che nessuna misura per

dell'energia. La Strategia energetica nazionale: «governance» e strumenti di attuazione, Bologna, il Mulino, 2019. In generale sulla programmazione si veda N. RANGONE, *Le programmazioni economiche. L'intervento pubblico tra piani e regole*, il Mulino, Bologna, 2007.

[15] Si veda il Considerando 7 al Regolamento (UE) 240/2021 che chiarisce come il dispositivo «contribuirà all'attuazione del Green Deal europeo, all'integrazione delle azioni per il clima e al conseguimento dell'obiettivo globale di destinare il 30% della spesa di bilancio dell'Unione al sostegno degli obiettivi climatici e l'ambizione di destinare il 7,5% della spesa annuale nell'ambito del quadro finanziario pluriennale agli obiettivi relativi alla biodiversità dal 2024 e il 10% nel 2026 e nel 2027, tenendo conto nel contempo delle sovrapposizioni esistenti tra obiettivi in materia di clima e biodiversità».

[16] Sul punto, si veda il discorso della Presidente della Commissione von der Leyen del 16 aprile 2020 al Parlamento europeo in cui, con riferimento alla necessità di ampliare il bilancio europeo, afferma che è necessario un nuovo «Piano Marshall per la ripresa dell'Europa», disponibile online: https://ec.europa.eu/commission/presscorner/detail/it/speech_20_675?fbclid=IwAR2uVKMo_qHEATlptr6c8yfb65AYZov5_xxWVe6MCMXVvZqJqm4aEoxZeM4.

l'attuazione delle riforme e degli investimenti previsti arrechi un danno significativo agli obiettivi ambientali[17]; (ii) una spiegazione qualitativa del modo in cui le misure previste sono in grado di contribuire alla transizione verde, indicando se tali misure rappresentano almeno il 37% della dotazione totale del piano, da calcolarsi sulla base della metodologia di controllo del clima di cui all'allegato VI[18]. Conformemente all'articolo 19 del Regolamento Dispositivo, inoltre, l'ottemperanza alla prima e alla seconda richiesta di motivazione sarà oggetto dell'analisi di pertinenza da svolgersi da parte della Commissione nella valutazione dell'idoneità dei piani presentati.

Il principio del 37% di investimenti nella transizione verde dovrà, dunque, rispettare le modalità di calcolo rappresentate nell'Allegato VI, che riporta un elenco di differenti tipologie di interventi (più di centoquaranta) e, per ciascuna di esse, rappresenta due diversi indicatori: un coefficiente per il calcolo del sostegno agli obiettivi in materia di cambiamenti climatici e un diverso coefficiente di calcolo del sostegno agli obiettivi ambientali. Sulla base di tali coefficienti dovrebbe essere calcolata la quota del 37%.

Tale meccanismo, tuttavia, genera, almeno ad un primo esame, non poca confusione sulle modalità di quantificazione del vincolo del 37%. Non risulta, infatti, di immediata comprensione quale dei due coefficienti debba essere utilizzato nel calcolo e se, più in generale, ne sia prevista una commistione[19]. Nella ricerca di maggiori chiarimenti all'interno dei differenti atti regolatori inerenti alla predisposizione dei piani per la ripresa e la resilienza, si osserva che il rispetto della quota del 37% più frequentemente viene riferito alla spesa relativa alla componente climatica: il documento «Guidance to Member States, Recovery and Resilience Plans»[20], ad esempio, nel dettagliare la transizione verde, chiarisce che «additionally, each plan should allocate at least 37% of plan's total allocation to climate action», riferendosi, dunque, non agli obiettivi ambientali, ma alle azioni in materia di clima.

[17] Cfr. articolo 17, comma 1, lettera d), del Regolamento Dispositivo.
[18] Cfr. articolo 17, comma 1, lettera e), del Regolamento Dispositivo.
[19] A titolo esemplificativo, i campi di intervento «energia rinnovabile: energia eolica» e «energia rinnovabile: solare» mantengono un coefficiente per il calcolo del sostegno agli obiettivi in materia di cambiamenti climatici pari al 100%, mentre il coefficiente per il calcolo del sostegno agli obiettivi ambientali è pari al 40%, senza che risulti chiaro dal Regolamento Dispositivo quale coefficiente debba essere utilizzato nel calcolo della quota del 37%.
[20] SWD(2021) 12 *final*.

Più nello specifico, il medesimo documento precisa le modalità di valutazione della componente verde dei piani, individuando due distinti profili[21]: (i) una dimensione quantitativa relativa agli obiettivi climatici[22], da valutarsi nella misura pari ad almeno il 37% delle risorse, e (ii) una componente qualitativa, in relazione alla spiegazione di come i piani contribuiscono effettivamente a raggiungere la transizione verde[23].

Se, dunque, il coefficiente da tenere in considerazione per quanto riguarda il calcolo del 37% di investimenti nella transizione verde è riferito al clima, prima di esaminare nel dettaglio le scelte allocative di cui al PNRR (come di seguito definito), sembra opportuno focalizzare l'attenzione sul significato dell'espressione «transizione verde». Nel Regolamento Dispositivo, si evince che la «transizione verde» ricomprende al suo interno differenti macrosettori, tra cui la biodiversità, l'efficienza energetica, la ristrutturazione degli edifici, l'economia circolare e la crescita sostenibile[24], ma non ne viene ricostruita una

[21] «The green dimension of the plan's components will be assessed under both a qualitative approach (to assess the link with the energy, climate and environmental challenges) and a quantitative approach (to verify the compliance with the 37% climate expenditure target)», cfr. SWD(2021) 12 *final,* punto 5.

[22] Tra gli obiettivi climatici rientrano, ad esempio, l'obiettivo neutralità climatica al 2050, nonché la proposta di riduzione del quantitativo di CO2 da un target del 40% al 55% entro il 2030. Si veda sul punto la Comunicazione della Commissione, *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* del 4 marzo 2020. Per recenti commenti alla proposta di legge europea sul clima si vedano R. CAPRITTI, *Legge UE sul clima: riduzione emissioni del 55% entro il 2030 e neutralità climatica al 2050*, 21 aprile 2021, disponibile online: https://www.infobuildenergia.it/commissione-europea-riduzione-emissioni/; nonché *Proposal for European Climate Law for EU net zero emissions by 2050*, in *Practical Law Environment*, marzo 2021, disponibile online: https://uk.practicallaw.thomsonreuters.com/w-026-0856?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&firstPage=true#co_pageContainer.

[23] «While the quantitative target of 37% applies only to climate change related measures, Member States should use a qualitative approach to explain how their plans contribute to broader environmental objectives of the green transition, including biodiversity», cfr. SWD(2021) 12 *final* p. 24.

[24] Cfr. Considerando 11 Regolamento Dispositivo. Si veda più nel dettaglio il Considerando 7 del Regolamento (UE) 2021/240 («Regolamento che istituisce uno strumento di sostegno tecnico»), che chiarisce come «lo strumento dovrebbe inoltre affrontare sfide ambientali e sociali più ampie all'interno dell'Unione, tra cui la protezione del capitale naturale, la conservazione della biodiversità e il sostegno all'economia circolare e alla transizione energetica, in conformità dell'Agenda 2030 per lo sviluppo sostenibile. Lo strumento dovrebbe inoltre sostenere la transizione digitale e contribuire alla creazione del mercato unico digitale», ma anche l'articolo 5, lettera f) dello stesso

dettagliata definizione. Si tratta di un passaggio indispensabile per comprendere quali politiche mettere in atto e quali interventi favorire. Il citato Allegato VI aiuta nell'individuazione delle misure idonee a produrre un impatto positivo sul clima, ma, seppur nella consapevolezza che lo strumento del *Next Generation EU* rappresenta una misura straordinaria ed eccezionale, che si differenzia dalle precedenti politiche europee per l'ambiente tanto per contenuto quanto per approccio, sembra opportuno recuperare una visione sistematica, ricercando le radici della «transizione verde» nel previgente *legal framework* europeo.

In questa prospettiva, emerge il collegamento con il Regolamento Tassonomia: il documento della Commissione europea «Orientamenti per i piani per la ripresa e la resilienza degli Stati membri» di settembre 2020, per meglio orientare le scelte in tema di transizione verde, richiama il Regolamento Tassonomia ed in particolare i sei obiettivi climatici e ambientali *ivi* definiti. Nello specifico, il Regolamento Tassonomia ha costituito senza dubbio un importante progresso nel chiarimento dei criteri di valutazione della sostenibilità degli investimenti mediante l'individuazione di sei specifici obiettivi ambientali, che confluiscono nella transizione verde.

Gli obiettivi ambientali che compongono la transizione verde nel Regolamento Tassonomia sono, dunque, richiamati per la predisposizione dei piani nazionali per la ripresa e la resilienza[25] e riguardano: (i) la mitigazione dei cambiamenti climatici; (ii) l'adattamento ai cambiamenti climatici; (iii) l'uso sostenibile e la protezione delle acque e delle risorse marine; (iv) la transizione verso un'economia circolare; (v) la prevenzione e la riduzione dell'inquinamento; nonché (vi) la protezione e il ripristino della biodiversità e degli ecosistemi. Il Regolamento Tassonomia[26], tuttavia, non si è limitato ad individuare questi distinti aspetti, ma ha individuato i contributi sostanziali per il perseguimento di

regolamento, che nel delineare l'ambito di applicazione dello strumento di sostegno tecnico si riferisce *inter alia* a (i) le politiche per la mitigazione dei cambiamenti climatici; (ii) la realizzazione della transizione verde e giusta; (iii) il pilastro ambientale dello sviluppo sostenibile e la tutela dell'ambiente; (iv) l'azione per il clima, i trasporti e la mobilità; (v) la promozione dell'economia circolare, dell'efficienza energetica e delle risorse e delle fonti di energia rinnovabile; (vi) il conseguimento della diversificazione energetica; (vii) la lotta alla povertà energetica; (viii) il conseguimento della sicurezza energetica; (ix) la protezione del suolo e della biodiversità; (x) la pesca e lo sviluppo sostenibile delle zone rurali, remote e insulari.

[25] Si veda anche SWD(2021) 12 *final*, pagina 24.

[26] Per un approfondimento sul Regolamento Tassonomia, si veda OCSE, *Overview of sustainable finance definitions and taxonomies*, in *Developing Sustainable Finance Definitions and Taxonomies*, OECD Publishing, Parigi, 2020.

ciascuno dei sei obiettivi descritti [27], contribuendo allo sviluppo di una impostazione dettagliata e sistematica, capace di guidare le linee di programmazione e di valutazione delle specifiche misure.

Tale definizione sistematica di transizione verde, seppur non richiamata direttamente all'interno del Regolamento Dispositivo, sembra coerente con il quadro generale e soprattutto avvalora la stretta correlazione tra il *Next Generation EU* e il *legal framework* europeo nel quale si inserisce anche il piano per il *Green Deal* europeo[28].

Non a caso, è sempre il Regolamento Tassonomia ad aver introdotto e disciplinato il principio DNSH, richiamato a principio generale nella predisposizione di tutti i piani per la ripresa e la resilienza. All'interno del Regolamento Tassonomia, il principio DNSH è strettamente correlato agli obiettivi ambientali: una attività è considerata sostenibile solamente quando non arreca un danno significativo a nessuno dei sei obiettivi. L'articolo 17, tuttavia, si occupa di delineare nello specifico le misure che arrecano un danno significativo, ed individua per ciascun obiettivo ambientale specifici elementi di una attività idonei a produrlo e pertanto in contrasto con il principio DNSH. A titolo esemplificativo, una attività economica arreca un danno significativo alla prevenzione e alla riduzione dell'inquinamento (obiettivo 5), se detta attività comporta un aumento significativo delle emissioni di sostanze inquinanti nell'aria, nell'acqua o nel suolo rispetto alla situazione esistente prima del suo avvio[29]. Per ogni intervento, dunque, dovrà essere condotta una puntuale analisi in relazione ai sei obiettivi ambientali illustrati, alla ricerca di potenziali effetti negativi su ciascuno di essi.

Il principio DNSH è richiamato con puntuale riferimento al Regolamento Tassonomia; in aggiunta, la Commissione ha ritenuto opportuno elaborare gli «Orientamenti tecnici sull'applicazione del principio "non arrecare un danno significativo" a norma del regolamento sul dispositivo per la ripresa e la

[27] Cfr. articoli da 10 a 15 del Regolamento Tassonomia.
[28] Si veda la Comunicazione della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle Regioni, *Tassonomia dell'Ue, comunicazione societaria sulla sostenibilità, preferenze di sostenibilità e doveri fiduciari: dirigere i finanziamenti verso il Green Deal europeo*, del 21 aprile 2021, COM(2021) 188 *final*.
[29] Cfr. articolo 17, comma 1, lettera e), Regolamento Tassonomia.

resilienza»[30], al fine di fornire elementi di guida nell'applicazione e nella valutazione del principio DNSH in relazione ai piani. In particolare, il documento fornisce come strumento di ausilio nella valutazione del principio DNSH, una lista di controllo divisa in due sezioni. La prima sezione prevede che, per ciascuna misura che si voglia adottare (*e.g.*, investimenti) si svolga una preliminare analisi sulla necessità di sottoporre la stessa ad una valutazione DNSH, in relazione a ciascuno dei sei obiettivi ambientali descritti nel Regolamento Tassonomia. In caso di riscontro negativo, ossia nel caso in cui si ritenga che una specifica misura non leda nessun obiettivo ambientale, occorrerà fornire adeguata e sintetica motivazione delle ragioni di detto riscontro, ad esempio chiarendo che la misura determina un impatto nullo o trascurabile sull'obiettivo ambientale in analisi, o rappresentando un coefficiente 100% di sostegno ad un obiettivo legato ai cambiamenti climatici. Nel caso in cui, invece, il riscontro sia positivo e si ritenga che la misura abbia un impatto su uno o più obiettivi ambientali, si dovrà utilizzare la seconda parte della lista di controllo, strutturata nel prevedere specifiche domande in relazione a ciascun obiettivo ambientale, al fine di valutare la compatibilità della misura con il principio DNSH. Le specifiche domande sono poste sulla falsariga del contenuto di cui al Regolamento Tassonomia e si rivelano pertanto mirate a valutare specifiche incompatibilità delle misure con gli obiettivi ambientali. Ad esempio, in relazione alla prevenzione e alla riduzione dell'inquinamento, viene chiesto se l'attività comporti un aumento significativo delle emissioni di sostanze inquinanti nell'aria, nell'acqua o nel suolo rispetto alla situazione esistente prima del suo avvio. Anche in questo caso, qualora si ritenga che l'impatto di cui alla domanda sia assente, occorrerà fornire una adeguata motivazione di fondo.

In conclusione, il principio del 37% e il principio DNSH sono due elementi chiave nella predisposizione dei piani nazionali di ripresa e resilienza e mostrano come il *Next Generation EU*, pur essendo una misura del tutto straordinaria che comporta un salto qualitativo nella sfida della transizione, non manchi di sistematicità con lo sviluppato contesto regolatorio.

[30] Comunicazione della Commissione, *Orientamenti tecnici sull'applicazione del principio "non arrecare un danno significativo" a norma del regolamento sul dispositivo per la ripresa e la resilienza*, del 12 febbraio 2021, C(2021) 1054 *final*.

3. *Piano Nazionale di Ripresa e Resilienza «Italia Domani»: la missione «Rivoluzione Verde e Transizione Ecologica»*

A seguito dell'elaborazione delle linee guida per la redazione del piano, proposte dal Comitato interministeriale per gli Affari Europeo (CIAE) e sottoposte all'esame delle Camere, e dopo una prima bozza di piano, approvata dal Consiglio dei ministri del 12 gennaio 2021, il 27 aprile 2021 è stato approvato da Camera e Senato, e poi trasmesso alla Commissione europea, il Piano di Ripresa e Resilienza «Italia Domani» («PNRR»).

Rispetto ai documenti di preparazione, il PNRR si discosta significativamente dalle linee guida, documento preliminare che non sembrava indicare investimenti all'altezza delle sfide della transizione. Si discosta, in parte, anche dalla prima bozza di Piano, disponendo una diversa allocazione delle risorse e prospettando investimenti più in linea con le principali novità del settore (*e.g.,* del tutto assenti nel primo piano sono gli investimenti per la promozione di comunità di energia rinnovabile, supportate all'interno del PNRR con più di due miliardi di investimenti). La seconda missione [31] del PNRR, denominata «Rivoluzione verde e transizione ecologica», prevede lo stanziamento di 59,47 miliardi [32] ripartiti in macrosettori di intervento: (i) economia circolare e agricoltura sostenibile (5,27 miliardi); (ii) transizione energetica e mobilità sostenibile (23,78 miliardi); (iii) efficienza energetica e riqualificazione degli edifici (15,36 miliardi); nonché tutela del territorio e della risorsa idrica (15,06 miliardi). Complementare al piano di investimenti per la transizione verde, è la «transizione burocratica», ossia il piano di riforme settoriali presentato all'interno della seconda missione, a cui si accompagnano le riforme trasversali e abilitanti previste per l'intero PNRR.

[31] Il PNRR si sviluppa su sei missioni: (i) digitalizzazione innovazione competitività e cultura (40,32 miliardi); (ii) rivoluzione verde e transizione ecologica (59,47 miliardi); (iii) infrastrutture per una mobilità sostenibile (25,40 miliardi); (iv) istruzione e ricerca (30,88 miliardi); (v) inclusione e coesione (19,81 miliardi); e (vi) salute (15,63 miliardi). Inoltre, ai fondi di cui al PNRR, si sommano gli investimenti di cui al programma React EU – da spendere negli anni 2021-2023 – e al fondo complementare.

[32] Le risorse del fondo complementare, varato con decreto-legge 6 maggio 2021, n. 59, destinate alla transizione verde, ammontano ad ulteriori 9 miliardi, spesi principalmente nel campo dell'efficienza energetica e della riqualificazione degli edifici.

Si tratta di interventi fondamentali, che riprendono le specifiche strategie delineate, sia nei *Sustainable Development Goals*[33] che nel *Green Deal* europeo, nel tentativo di affrontare le più profonde criticità legate alla transizione verde all'interno del Paese. Così, gli investimenti, di cui, senza pretesa di esaustività, si darà riscontro nel prosieguo, si incardinano in linea con i precedenti atti di programmazione[34] e, combinati con gli interventi di cui alle altre missioni, si rivelano a tutti gli effetti un prezioso strumento di rielaborazione delle necessarie scelte di transizione del Paese, muovendo verso una sostenibilità sempre più improntata ad uno sviluppo territoriale omogeneo[35].

Scendendo più nel dettaglio, la prima componente della seconda missione («Agricoltura sostenibile ed economia circolare») risulta focalizzata su due assi portanti: da un lato, l'incentivo allo sviluppo di modelli di economia circolare mediante il miglioramento della gestione dei rifiuti; dall'altro, lo sviluppo di una filiera agroalimentare sostenibile. Tale linea d'azione si coniuga con il recepimento delle direttive del pacchetto economia circolare di settembre 2020[36] e dedica al versante rifiuti due miliardi e cento milioni; mentre al versante filiera agroalimentare sostenibile, inclusivo dell'investimento Parco Agrisolare[37], destina due miliardi e ottocento milioni.

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[33] In generale, sui *Sustainable Developement Goals* si vedano C. KARLSSON- D. SILNADER, *Implementing Sustainable Development Goals in Europe: The Role of Political Entrepreneurship*, Edward Elgar, 2020; L. NIKLASSON, *Improving the Sustainable Development Goals. Strategies and the Governance Challenge*, Routledge, 2019; M. MONITNI-F. VOLPE, *Sustainable Development at a Turning Point*, in *federalismi.it*, 21, 2016.

[34] Più volte richiamata è la relazione con il Piano Nazionale Integrato Energia e Clima, in fase di revisione.

[35] L'attenzione per lo sviluppo omogeneo dell'intero Paese emerge anche in relazione alla prima e alla quinta missione del PNRR: nella prima missione, di deciso interesse sembrano tutte quelle misure volte al rilancio dell'economia culturale nei piccoli borghi, dal valore di più di un miliardo. In questa prospettiva, viene pianificata la predisposizione di un programma di sostegno allo sviluppo culturale, economico e sociale fondato sulla rigenerazione culturale dei piccoli centri (c.d. Piano Nazionale Borghi). Parimenti la quinta missione dedica ottocento milioni al supporto alla Strategia Nazionale per le Aree Interne. Tali misure, pur non rilevando in maniera determinante nell'economicità complessiva del piano, testimoniano un'impostazione di massima, che riemerge in più punti, attenta ai contesti locali.

[36] Si vedano i commenti di T. RONCHETTI-M. MEDUGNO, *Pacchetto Economia Circolare: al via il recepimento*, in *Ambiente & sviluppo*, n. 4, 1° aprile 2020; A. MURATORI, *Quattro decreti legislativi per l'attuazione delle direttive del "pacchetto Economia Circolare"*, in *Ambiente & sviluppo*, n. 10, 1 ottobre 2020; nonché S. ANTONIAZZI, *Transition to the Circular Economy and Services of General Economic Interest*, in *federalismi.it,* n. 7, 10 marzo 2021.

[37] Infra, § 3.1.

La gestione dei rifiuti in Italia sconta, notoriamente, le difficoltà connesse ad un forte divario territoriale che caratterizzano sia la differente capacità impiantistica che il livello di *standard* qualitativi del servizio e delle strutture[38]. In questa prospettiva gli investimenti previsti puntano alla creazione di nuovi impianti di trattamento rifiuti e all'ammodernamento di quelli già esistenti, riservando circa il 60% delle risorse – una misura che forse poteva essere più ambiziosa – al Centro-Sud Italia. Vengono, inoltre, previsti ulteriori investimenti nel potenziamento della rete di raccolta differenziata e degli impianti di trattamento e riciclo, nella prospettiva di conformazione con gli obiettivi di cui al piano d'azione dell'Unione europea per l'economia circolare[39]. Tra i traguardi previsti si ricordano: il 55% di riciclo di rifiuti di apparecchiature elettriche e elettroniche; l'85% di riciclo nell'industria della carta e del cartone; il 65% di riciclo dei rifiuti plastici; nonché il 100% di recupero nel settore tessile[40].

[38] Si vedano ISPRA, *Rapporto Rifiuti Urbani*, Edizione 2020; OPENPOLIS, *L'Italia è ancora lontana dall'obiettivo sulla raccolta differenziata*, 11 settembre 2020, disponibile online: https://www.openpolis.it/litalia-e-ancora-lontana-dallobiettivo-sulla-raccolta-differenziata/; e F. MAZZARELLA-L. MARIOTTO ET. AL., *Report Green Book 2020. I dati sulla gestione dei rifiuti urbani in Italia*, Fondazione Utilitatis, 2020.

[39] Si veda la Comunicazione della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle Regioni, *Un nuovo piano d'azione per l'economia circolare. Per un'Europa più pulita e più competitiva*, del 11 marzo 2020, COM/2020/98 *final*. Sul tema economia circolare si rimanda a: S. K. GHOSH, *Circular Economy: Global Perspective*, Springer, 2020; ELLEN MACARTHUR FOUNDATION, *The circular economy: a transformative Covid-19 recovery strategy. How policymakers can pave the way to a low carbon, prosperous future*, 2020; E. MAITRE-EKERN, *The Choice of Regulatory Instruments for a Circular Economy*, in K. MATHIS-B. HUBER, *Environmental Law and Economics. Economic Analysis of Law in European Legal Scholarship*, vol. 4. Springer, Cham, 2017; F. DE LEONARDIS, *Studi in tema di economia circolare*, eum, 2021; nonché ID., *I rifiuti: da "problema" a "risorsa" nel sistema dell'Economia Circolare,* in G. ROSSI, *Diritto dell'Ambiente*, Giappichelli Editore, 2021, pp. 324-352; M. COCCONI, *La regolazione dell'economia circolare*. *Sostenibilità e nuovi paradigmi di sviluppo*, FrancoAngeli, 2020; E. SCOTTI, *Poteri pubblici, sviluppo sostenibile ed economia circolare*, in *Dir. econom*., 2019; R. FERRARA, B*rown economy, green economy, blue economy: l'economia circolare e il diritto dell'ambiente*, in *Il Piemonte delle Autonomie – Rivista quadrimestrale di scienze dell'Amministrazione promossa dal Consiglio regionale del Piemonte*, n. 4/2018; T. FEDERICO, *I fondamenti dell'economia circolare*, Fondazione per lo sviluppo sostenibile, Marzo 2015, www.fondazionesvilupposostenibile.org.

[40] Sul settore moda e sostenibilità, fortemente correlato al recupero dei rifiuti tessili si veda G. CRIVELLI, *Dal recupero dei rifiuti tessili una spinta alla circolarità della moda*, in *Il Sole 24 Ore,* 22 aprile 2021; e ID., *Dalla moda la spinta all'economia circolare*, in *Il Sole 24 Ore*, 29 aprile 2021. In considerazione dell'importanza della filiera della moda, soprattutto in Italia, investimenti che puntino alla sostenibilità del settore sembrano di estremo interesse anche per l'accrescimento del valore del *Made in Italy*. Sul punto si veda CASSA DEPOSITI E PRESTITI-ERNEST YOUNG-LUISS

Contemporaneamente, gli interventi in materia di economia circolare e gestione dei rifiuti sono sostenuti da due importanti riforme: l'elaborazione di una nuova strategia per l'economia circolare, da adottare entro giugno 2022 e lo sviluppo di una programmazione nazionale per la gestione dei rifiuti, il cui avvio era già stato annunciato a novembre 2020[41].

Per quanto riguarda, invece, la sostenibilità della filiera agroalimentare[42], gli investimenti previsti comprendono interventi sulla logistica dei differenti settori agroalimentari, mediante la predisposizione di un piano logistico che punti *inter alia* alla riduzione dell'impatto ambientale del sistema dei trasporti, al miglioramento della capacità di stoccaggio delle materie prime, alla digitalizzazione della logistica, al miglioramento della tracciabilità dei prodotti e alla riduzione degli sprechi alimentari. Inoltre, muovendo dalla strategia «farm to fork»[43], sono previsti interventi per l'ammodernamento di macchinari agricoli e l'utilizzo di tecnologie avanzate di agricoltura.

All'interno della seconda missione, inoltre, una notevole quantità di risorse è dedicata da un lato all'efficienza energetica e alla riqualificazione degli edifici (15,36 miliardi), dall'altro alla tutela del territorio e della risorsa idrica (15,06 miliardi). Gli interventi a sostegno dell'efficienza energetica[44] sono stati recentemente potenziati grazie alla disciplina prevista nel decreto-legge 19

BUSINESS SCHOOL, *L'economia italiana dalla crisi alla ricostruzione. Settore Moda e Covid-19. Scenario, impatti, prospettive*, luglio 2020, disponibile online: https://assets.ey.com/content/dam/ey-sites/ey-com/it_it/generic/generic-content/ey-settore-moda-e-covid-19-v5.pdf.

[41] Si veda il comunicato dell'ex Ministro dell'ambiente Sergio Costa del 14 novembre 2020, disponibile online: https://www.minambiente.it/comunicati/avviata-la-definizione-del-programma-nazionale-la-gestione-dei-rifiuti.

[42] Per un'analisi puntuale del rapporto tra alimentazione e ambiente si veda M. MONTEDURO, *Alimentazione e Ambiente*, in G. ROSSI, *Diritto dell'Ambiente*, cit., pp. 352-366.

[43] Si veda la Comunicazione della Commission, *A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system,* del 20 maggio 2020, COM(2020) 381 *final*; H. SCHEBESTA-J.J.L. CANDEL, *Game-changing potential of the EU's Farm to Fork Strategy*, in *Nature Food*, 1, 2020, pp. 586–588; H. SCHEBESTA-N. BERNAZ-C. MACCHI, *The European Union Farm to Fork Strategy: Sustainability and Responsible Business in the Food Supply Chain*, in *European Food and Feed Law Review*, Vol. 15, No. 5, 2020, pp. 420-427.

[44] Per un'analisi generale del tema delle politiche e dei progetti per l'efficienza energetica si vedano i contributi L. AMMANATI, *Una nuova governance per la transizione energetica dell'Unione europea*. S*oluzioni ambigue in un contesto conflittuale*; S. QUADRI, *la nuova multi-level governance dell'efficienza energetica*; L. LAVECCHIA, *il modello italiano per l'efficienza energetica*; G. LANDI, *Progetti per l'efficienza energetica degli edifici: il patrimonio delle amministrazioni e gli immobili privati*, tutti in L. AMMANATI (a cura di), *La transizione energetica*, Giappichelli Editore, 2018.

maggio 2020, n. 34[45], che agli articoli 119 e 121 ha introdotto il c.d. Superbonus 110%, prevedendo una detrazione del 110% per una serie di interventi funzionali al raggiungimento degli obiettivi di efficienza energetica[46]. All'interno del piano sono previsti in particolare investimenti destinati all'efficientamento energetico di edifici scolastici ed edifici giudiziari, nonché misure di semplificazione e accelerazione delle procedure per la realizzazione degli interventi.

Da ultimo, richiamando la strategia per la biodiversità entro il 2030[47], molte risorse sono spese per la tutela del territorio e della risorsa idrica, a difesa dell'ecosistema naturale italiano. L'*asset* di interventi previsto contiene misure che spaziano dalla necessità di contrastare i cambiamenti climatici attraverso misure di prevenzione e di gestione del dissesto idrogeologico e della vulnerabilità del territorio, alla tutela e valorizzazione del verde, per concludere con ingenti investimenti nelle infrastrutture idriche e più in generale nella gestione della risorsa idrica, che ancora ad oggi rappresenta un *vulnus* importante tanto per la tutela dell'acqua come bene comune, quanto per l'effettiva sicurezza dell'approvvigionamento idrico[48].

3.1 *Investimenti per la transizione energetica*

La prima componente «Agricoltura sostenibile ed economia circolare» sopra richiamata, accanto alla strategia su economia circolare, rifiuti e agricoltura sostenibile, prevede investimenti che incidono sulla transizione energetica.

[45] Convertito con modificazioni dalla legge 17 luglio 2020, n. 77.
[46] In questo quadro, il decreto-legge 34/2020 ha previsto la possibilità di beneficiare della detrazione del 110%, mediante utilizzo diretto della detrazione, o, più convenientemente, mediante sconto diretto in fattura o cessione del credito di imposta di un ammontare pari alla detrazione spettante per interventi denominati "trainanti" (*e.g.,* interventi di isolamento termico degli involucri edilizi, c.d. cappotto termico) e per interventi secondari se realizzati insieme con gli interventi trainanti, i c.d. interventi trainati.
[47] Si veda Comunicazione della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle Regioni, *Strategia dell'UE sulla biodiversità per il 2030*, del 20 maggio 2020, COM(2020) 380 *final*,.
[48] Si veda il report dell'ISTAT, *Utilizzo e qualità della risorsa idrica in Italia*, 2019, disponibile online: https://www.istat.it/it/archivio/234904; nonché la nota ISTAT del 10 dicembre 2020 sul censimento delle acque per uso civile che evidenzia l'aumento delle perdite idriche in distribuzione, pari al 42% del volume d'acqua immesso in rete. Per una ricostruzione del rapporto tra acqua e ambiente, si veda A. PIOGGIA, *Acqua e ambiente,* in G. ROSSI, *Diritto dell'Ambiente*, cit., pp. 277-297.

All'interno del PNRR, alla transizione energetica[49] è dedicata, sotto diverse forme, una rilevante parte degli investimenti stanziati e le relative riforme sono, inoltre, destinate a produrre effetti determinanti sul raggiungimento degli obiettivi di *phase-out* dal carbone.

Si tratta, di previsioni di primaria importanza, previste principalmente nella seconda componente «Energia rinnovabile, idrogeno, rete e mobilità sostenibile», che accanto ad interventi in tema di trasporto locale sostenibile (a cui sono dedicati più di otto miliardi, per investimenti focalizzati su trasporto rapido di massa e rinnovo delle flotte di autobus e di treni), prevede investimenti a sostegno della produzione di energia da fonte rinnovabile e di idrogeno, accompagnati da un importante rafforzamento delle *smart grids*[50].

Già nella prima componente figurano alcuni investimenti che connettono il mondo dell'agricoltura con lo sviluppo di energia da fonte rinnovabile[51]. Sono, inoltre, previsti investimenti con *focus* ristretto a piccole realtà territoriali: da un lato, duecento milioni sono destinati alla promozione dello sviluppo del modello «100% green e autosufficienti» per diciannove piccole isole; dall'altro, centoquaranta milioni sono stanziati per quei territori rurali di montagna, intenzionati a sfruttare in modo equilibrato le risorse di cui dispongono, prevedendo la nascita di comunità locali che elaboreranno piani di sviluppo sostenibile con l'obiettivo di integrazione degli orizzonti energetici, ambientali, economici e sociali.

Accanto alla misura del parco agrisolare, sempre in prospettiva di integrazione tra impianti alimentati da fonti rinnovabili e agricoltura, è previsto

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[49] Sulla transizione energetica si veda: S. HESELHAUS, *Energy Transition Law and Economics*, in K. MATHIS-B. HUBER, *Energy Law and Economics. Economic Analysis of Law in European Legal Scholarship*, vol. 5, Springer, Cham, 2018; nonché L. AMMANATI, *La transizione energetica*, cit., 2018.

[50] Sulle *smart grids*, si veda R. LEAL-ARCAS-F. LASNIEWSKA-F. PROEDROU, *Smart Grids in the European Union: Assessing Energy Security, Regulation & Social and Ethical Considerations,* in *Columbia Journal of European Law*, vol. 24, no. 2, 2018, pp. 291-390; R. LEAL-ARCAS, *Smart Grids and Empowering the Citizen,* in *Solutions for Sustainability. European Yearbook of International Economic Law*. Springer, Cham, 2019, pp. 249 ss.; R. J. CAMPBELL, *The Smart Grid: Status and Outlook*, Congressional Research Service, 2018; F. GIGLIONI, *La "domanda" di amministrazione delle reti intelligenti*, in *Istituzioni del federalismo*, n. 4, 2015, pp. 1049 ss.; ID., *La sfida dell'innovazione sulla regolazione pubblica. Il caso delle smart grid*, in *Munus*, n. 3, 2013, pp. 463 ss.

[51] L'investimento «Parco Agrisolare» prevede lo stanziamento di un miliardo e cinquecento milioni di euro per l'installazione di pannelli fotovoltaici su tetti di edifici ad uso produttivo per i settori agricolo, zootecnico e agro industriale.

un investimento di più di un miliardo dedicato all'obiettivo di diffusione di impianti agro-voltaici di medie e grandi dimensioni; inoltre, ulteriori investimenti sono previsti per la realizzazione di sistemi di generazione di energia rinnovabile che utilizzino tecnologie particolarmente innovative, come gli impianti *off-shore* e sistemi capaci di sfruttare il moto ondoso. Sempre con particolare attenzione all'utilizzo di tecnologia avanzata, sono previsti specifici investimenti per la produzione dell'idrogeno e la creazione delle c.d. *hydrogen valleys* nelle aree industriali dismesse, così come per la promozione della produzione e utilizzo dell'idrogeno nei settori *hard-to-abate* (*e.g.,* acciaio, cemento, carta), nonché per il suo impiego nel settore dei trasporti, con possibilità di creazione di stazioni di rifornimento e di conversione delle linee ferroviarie non elettrificate[52].

Allo sviluppo del biometano, settore strategico per il potenziamento dell'economia circolare, data la massimizzazione del recupero energetico dei residui organici, sono destinati circa due miliardi per la riconversione di impianti a biogas agricoli esistenti, per la realizzazione di nuovi impianti e per la promozione di pratiche ecologiche nella fase di produzione.

Da ultimo, in questa disamina di interventi tra loro correlati, particolare importanza rivestono le misure di sostegno per le comunità energetiche[53] e le strutture collettive di autoproduzione, a cui sono destinati due miliardi e duecento milioni. Le comunità energetiche, introdotte dalla c.d. Direttiva RED II[54] e attuate

[52] Sulle potenzialità del settore, si veda M. ALVERÀ, *Rivoluzione idrogeno. La piccola molecola che può salvare il mondo*, Mondadori, 2020.

[53] Sulle comunità energetiche si vedano i seguenti contribuiti: A. BALLOCCHI, *Comunità energetiche: opzione anti NIMBY per la transizione energetica*, 11 febbraio 2021, disponibile online: https://www.infobuildenergia.it/approfondimenti/comunita-energetiche-opzione-anti-nimby-transizione-energetica/; C. BEVILACQUA, *Le comunità energetiche tra governance e sviluppo locale*, in *Amministrazione in cammino*, 2020; A. CAEAMIZARU-A. UIHLEIN, *Energy communities: an overview of energy and social innovation*, Publications Office of the European Union, Luxembourg, 2020; M.A. HELDEWEG-S. SAINTIER, *Renewable energy communities as 'socio-legal institutions': A normative frame for energy decentralization?,* in *Renewable and Sustainable Energy Reviews,* n. 199, 2020.

[54] Direttiva 2018/2001 del Parlamento europeo e del Consiglio dell'11 dicembre 2018 sulla promozione dell'uso dell'energia da fonti rinnovabili. Le comunità di energia rinnovabile si differenziano sia dagli auto-consumatori individuali e collettivi, di cui all'articolo 21 della Direttiva RED II, che dalle comunità energetiche di cittadini di cui alla Direttiva 2019/944 del Parlamento europeo e del Consiglio del 5 giugno 2019 relativa a norme comuni per il mercato interno dell'energia elettrica. Si tratta di figure per alcuni tratti assimilabili, ma che per differenti profili si differenziano le une dalle altre. Nel caso degli auto-consumatori collettivi, forma aggregata degli auto-consumatori individuali, si tratta di clienti finali che agiscono in maniera collettiva senza che

in via transitoria nell'ordinamento interno con l'articolo 42-*bis* del decreto-legge 30 dicembre 2019, n. 162[55], sono soggetti giuridici autonomi, partecipati su base aperta e volontaria e controllati da azionisti o membri (*i.e.,* persone fisiche, piccole e medie imprese e autorità locali) localizzati nelle vicinanze degli impianti di produzione, sviluppati dalle comunità stesse.

La c.d. Direttiva RED II individua pochi tratti delle comunità di energia rinnovabile, rimettendo alla normativa nazionale ulteriori elementi di dettaglio. Gli investimenti di cui al PNRR sono volti a fornire un sostegno a questo modello, da realizzarsi mediante la selezione di pubbliche amministrazioni, famiglie e microimprese in comuni con meno di 5000 abitanti, coniugando la spinta alla transizione energetica con la promozione dello sviluppo economico dei piccoli comuni a rischio di spopolamento. Tale misura, affiancata agli altri incentivi previsti nelle differenti missioni e componenti del PNRR (*e.g.,* investimenti per

sia necessaria la costituzione di un soggetto giuridico autonomo e che si trovano localizzati in un contesto territoriale fortemente ristretto, quale un edificio o condominio. Gli auto-consumatori collettivi producono energia rinnovabile per proprio autoconsumo, con la possibilità di immagazzinarla e venderla. Con riferimento, invece, alle comunità energetiche di cittadini, si tratta di soggetti giuridici partecipati da persone fisiche, autorità locali e/o piccole imprese, che condividono pienamente lo scopo delle comunità di energia rinnovabile, ossia fornire benefici ambientali, economici e/o sociali ai partecipanti senza il perseguimento di profitti finanziari, ma da queste si differenziano in modo sostanziale: l'articolo 2 della Direttiva 2019/944, al numero (11), definisce infatti le comunità energetiche dei cittadini, chiarendo che tali soggetti giuridici possono partecipare alla generazione *anche* da fonti rinnovabili (corsivo aggiunto), alla distribuzione, fornitura, consumo, aggregazione e stoccaggio dell'energia, così come ai servizi di efficienza energetica o ai servizi di ricarica per veicoli elettrici o, più in generale, alla fornitura di altri servizi energetici ai membri o soci. Se da un lato si amplia il campo di azione, dall'altro si perde sia il carattere di prossimità territoriale che non viene richiamato nella disposizione, che il carattere esclusivo dell'approvvigionamento energetico da fonte rinnovabile, che invece qualifica le comunità di energia rinnovabile di cui alla Direttiva RED II e che sembra meglio rispondere alle esigenze di compenetrazione tra obiettivi energetici e ambientali.

[55] Il decreto-legge 162/2019 ha introdotto le comunità di energia rinnovabile all'interno dell'ordinamento italiano prevedendo limiti tecnici ulteriori (*i.e.,* impianti dalla potenza non superiore a 200 kW, collegati in bassa tensione, i cui punti di immissione e i punti di prelievo degli utenti si trovano localizzati sotto la medesima cabina secondaria), delineando una disciplina transitoria valida ed efficace fino al recepimento della Direttiva RED II. Così come previsto nella Direttiva RED II, le comunità di energia rinnovabile costituiscono dei nuovi soggetti giuridici, ai quali possono partecipare persone fisiche, piccole e medie imprese, nonché enti territoriali/autorità locali, con la precisazione che la partecipazione alla comunità non può costituire attività commerciale e industriale principale. Parimenti, viene chiarito che l'obiettivo è fornire benefici ambientali, economici e sociali a livello di comunità e non profitti finanziari; da ultimo, viene precisato che la partecipazione alle comunità è aperta a tutti i consumatori, «compresi quelli appartenenti a famiglie a basso reddito o vulnerabili», purché ubicati in prossimità. Per le comunità di energia rinnovabile costituite in ottemperanza al decreto-legge 162/2019, sono stati, inoltre, previsti specifici incentivi (d.m. 16 settembre 2020).

le aree interne), potrebbe rivelarsi da un lato, di strategica importanza nel dare avvio ad una transizione energetica attenta agli elementi di equità territoriale e sociale, e dall'altro, potrebbe rappresentare un interessante punto di osservazione di un nuovo modello di interazione tra pubblico e privato nell'orizzonte delle politiche energetiche[56].

4. *Le riforme per la transizione verde*

Come anticipato, nel PNRR un rilevante programma di riforme si affianca al piano di investimenti. Alcune riforme sono già state menzionate nei precedenti paragrafi, ma la «transizione burocratica», necessaria per la corretta attuazione degli investimenti, prevede quale misura più importante la revisione della normativa in materia ambientale, inclusa nella riforma abilitante della semplificazione. La revisione della normativa ambientale, come si vedrà, coinvolge tutti i progetti del PNRR.

Il decreto-legge 16 luglio 2020, n. 76[57] recentemente aveva già riformato la normativa in materia ambientale, modificando *inter alia* il procedimento di *screening*, di valutazione di impatto ambientale e il procedimento autorizzatorio unico regionale e prevedendo rilevanti novità, rimaste frequentemente inattuate, per i progetti ricompresi nel Piano Nazionale Integrato Energia e Clima («PNIEC»). Per i progetti PNIEC era stata, infatti, istituita una procedura accentrata di valutazione di impatto ambientale, con sottoposizione dei progetti ad una speciale commissione PNIEC appositamente istituita[58].

Secondo l'articolo 7-*bis,* comma 2-*bis*, del c.d. Codice ambiente, come modificato dal decreto-legge 76/2020, il Presidente del Consiglio dei ministri, su proposta del Ministro dell'ambiente e della tutela del territorio e del mare, del Ministro dello sviluppo economico, del Ministro delle infrastrutture e dei

[56] Le comunità di energia rinnovabile sono aperte alla partecipazione degli enti territoriali, che, tuttavia non è prevista quale requisito obbligatorio. La partecipazione degli enti territoriali in un contesto così fluido come quello delle comunità energetiche, dove la quasi totalità della disciplina è ad oggi rimessa alla regolazione dei rapporti interni, sembra di fondamentale importanza a garanzia della richiamata apertura delle comunità anche ai consumatori più vulnerabili, nonché ad allontanare le ombre della disuguaglianza urbana. Sul punto si veda B. SECCHI, *La città dei ricchi e la città dei poveri*¸ Laterza, 2013.
[57] Convertito con modificazioni con legge 120/2020.
[58] Si veda L. PERGOLIZZI, *Il d.l. n. 76/2020 nel processo di attuazione del Piano Nazionale Integrato per l'Energia e il Clima*, in *Rivista Giuridica AmbienteDiritto.it*, fasc. 4/2020.

trasporti e del Ministro per i beni e le attività culturali e per il turismo, previa intesa con la Conferenza permanente per i rapporti tra lo Stato, le regioni e le province autonome di Trento e Bolzano, avrebbe dovuto individuare, con uno più decreti, successivamente aggiornati, «le tipologie di progetti e le opere necessarie per l'attuazione del PNIEC, nonché le aree non idonee alla realizzazione di tali progetti o opere, tenendo conto delle caratteristiche del territorio, sociali, industriali, urbanistiche, paesaggistiche e morfologiche e delle aree sia a terra che a mare caratterizzate dalla presenza di siti di interesse nazionale da bonificare ovvero limitrofe, con particolare riferimento all'assetto idrogeologico e alle vigenti pianificazioni, da sottoporre a verifica di assoggettabilità a VIA o a VIA in sede statale ai sensi del comma 2». Si trattava di una novità di decisa rilevanza, volta ad anticipare ad una valutazione *ex ante* uno tra i principali motivi di *impasse* dei procedimenti autorizzativi, ossia la localizzazione delle aree idonee alla realizzazione dell'intervento.

Le nuove modifiche previste alla normativa ambientale nel PNRR si pongono nel solco già tracciato dal decreto-legge 76/2020 e prevedono[59]:

(i) l'estensione del meccanismo previsto per i progetti PNIEC all'articolo 7-*bis* del c.d. Codice Ambiente (*i.e.,* speciale procedura di valutazione di impatto ambientale statale) anche alle opere PNRR, estendendo la portata delle previsioni inattuate di cui al decreto-legge 76/2020, con la previsione di una congiunta commissione tecnica PNIEC-PNRR;

(ii) la modifica del provvedimento unico ambientale ad oggi previsto dall'articolo 27 del c.d. Codice ambiente, come disciplinato dall'articolo 16, comma 1, del d.lgs. 16 giugno 2017 n. 104, prevedendone l'ampliamento dell'operatività; nonché

(iii) una maggiore compenetrazione tra gli strumenti di programmazione e pianificazione in materia ambientale e gli strumenti generali operanti nel settore energetico, in ragione delle competenze del neoistituito Ministero per la transizione ecologica.

Accanto a tali misure, si pongono le specifiche riforme settoriali previste nella seconda missione anche con riferimento alla transizione energetica. Sul versante autorizzativo, è prevista l'adozione di un quadro semplificato per l'autorizzazione alla costruzione e all'esercizio di impianti alimentati da fonti rinnovabili. Anche in questo caso, analoghe misure erano previste nel decreto-

[59] Cfr. p. 67 del PNRR.

legge 76/2020[60]. Nel PNRR, tuttavia, la riforma prevista non sembra tanto andare nella direzione dell'istituzione di nuove procedure semplificate per l'autorizzazione di interventi minori, quanto di una progressiva, auspicabile, omogeneizzazione delle procedure sull'intero territorio nazionale. Parimenti, sotto il versante degli incentivi, viene prevista l'estensione del meccanismo incentivante di cui al decreto ministeriale 4 luglio 2019, le cui ultime procedure competitive erano programmate per l'autunno 2021, nonché l'adozione di nuove agevolazioni normative per investimenti in sistemi di stoccaggio.

Si tratta di importanti misure che puntano al rilancio del settore delle rinnovabili a partire dalla semplificazione dei procedimenti autorizzativi quale incentivo amministrativo allo sviluppo di impianti di produzione di energia elettrica da fonti rinnovabili[61].

5. *Conclusioni*

Il quadro qui rappresentato, seppur non esente da critiche da parte delle associazioni di settore [62], sembra ricco di elementi destinati a mutare profondamente l'itinerario della transizione verde nel Paese. La stretta correlazione con la *road map* del *Green Deal,* resa evidente dal ripercorrere tematiche proprie di quest'ultimo negli investimenti previsti nel PNRR, rende il PNRR un'occasione unica per una ripresa che conduca allo stesso tempo verso una transizione verde e digitale sostenibile ed equa.

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[60] A titolo esemplificativo, si veda la disciplina della dichiarazione di inizio lavori asseverata (DILA), di cui al neo-introdotto articolo 6-*bis* del decreto legislativo 3 marzo 2011, n. 28.

[61] Si veda A. MOLITERNI, *La regolazione delle fonti energetiche rinnovabili tra tutela dell'ambiente e libertà di iniziativa economica privata: la difficile semplificazione amministrativa*, in *federalismi.it*, 2017.

[62] In questo senso, le principali associazioni ambientaliste e di settore, pur riconoscendo la significatività degli importi complessivi dedicati alla transizione verde, si sono pronunciate con severe critiche lamentando, rispetto alla sfida della decarbonizzazione, una scarsa efficacia del PNRR, determinata *inter alia* da insufficienti e mal coordinati investimenti nelle rinnovabili, nei sistemi di accumulo, nel segmento dell'efficienza energetica e nella mobilità elettrica e riscontrando una visione limitata e poco lungimirante sia per la biodiversità che per le città. Si veda a titolo esemplificativo il comunicato stampa delle organizzazioni WWF, Legambiente, Kyoto Club e Transport & Environment, disponibile online: https://www.legambiente.it/comunicati-stampa/ambientalisti-su-pnrr-e-clima-occasione-imperdibile-eppure-rischiamo-di-sprecarla/, nonché sul tema città e PNRR, G. VIESTI-N. MARTINELLI-W. VITALI-G. PASQUI-P. COPPOLA-C. PERRONE-A. BALDUCCI-M. ANNESE, *Position paper su Piano di Ripresa e Resilienza (PNRR) e città*, in *Urban@it*, 19 marzo 2020.

Il PNRR costituisce un banco di prova decisivo per la credibilità delle misure di programmazione pubbliche[63], troppo spesso messa in crisi da segnali contraddittori che hanno scoraggiato investimenti privati[64]. In questo senso è stata mancata l'occasione di disciplinare all'interno del PNRR la rimodulazione dei sussidi ambientalmente dannosi [65], rimessa al neoistituito Comitato interministeriale per la transizione ecologica [66]. Perché ci sia credibilità, occorrono politiche coerenti che non lancino segnali intermittenti; un sistema di *governance* solido, capace di dare attuazione a quanto oggetto dei piani e dei programmi, nel rispetto degli impegni e delle tempistiche delineate; nonché un sistema di controlli efficace. Si rivela così di primario interesse l'attento monitoraggio delle forme di attuazione delle misure previste, di cui il decreto-legge 31 maggio 2021, n. 77 su «Governance del Piano nazionale di rilancio e resilienza e prime misure di rafforzamento delle strutture amministrative e di accelerazione e snellimento delle procedure», costituisce un primo importante tassello.

Da ultimo, il PNRR rappresenta uno straordinario acceleratore per la sfida della transizione verde, anticipando misure proprie del *Green Deal* europeo[67]. La transizione nel PNRR non è vista come un tema a sé stante, ma pervade l'intero Piano, influenzando la riforma e il mutamento dell'intero sistema istituzionale. In questa prospettiva, ambiente e sviluppo nel PNRR non sono più temi contrapposti alla ricerca di bilanciamento e compatibilità, ma sono aspetti in compenetrazione, tra loro in sinergia. Così, la transizione verde può diventare un importante volano per la ripresa economica[68].

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[63] Si veda G. BELLANTUONO, *I modelli e gli strumenti della programmazione energetica: un'analisi comparata*, in L. CARBONE-G. NAPOLITANO-A. ZOPPINI (a cura di), *La Strategia energetica nazionale: «governance» e strumenti di attuazione*, cit., pp. 43 ss.

[64] Sulle caratteristiche e i requisiti di una programmazione credibile ed efficace si veda A. MOLITERNI, *La sfida ambientale e il ruolo dei pubblici poteri in campo economico*, cit., pp. 57 ss.

[65] Cfr. articolo 68 della legge 28 dicembre 2015, n. 221.

[66] Cfr. articolo 4 del decreto-legge 1 marzo 2021, n. 22.

[67] A sostegno di una più forte indipendenza tra il *Green Deal* europeo e il *Next Generation EU*, si ricorda l'intervento del prof. E. Chiti in occasione della *lectio* moderata dal prof. A. Moliterni «*New Green Deal* europeo. Le sfide per il diritto e l'economia», tenutasi presso l'Università degli studi di Roma "La Sapienza" il 12 maggio 2021, con la partecipazione del prof. L. Becchetti.

[68] Sul punto si veda G. ROSSI, *Dallo sviluppo sostenibile all'ambiente per lo sviluppo*, cit., p. 10, dove evidenzia come «l'ambiente può essere non solo compatibile con lo sviluppo ma può e deve diventare un volano per la ripresa economica, da molto tempo stagnante, e per un nuovo tipo di sviluppo. Alle fasi della contrapposizione e a quella della (auspicata) compatibilità si unisce ora quella della possibile sinergia».

ABSTRACT

Silvia Lazzari – *La transizione verde nel Piano Nazionale di Ripresa e Resilienza «Italia Domani»*

Il contributo è volto a fornire una prima disamina degli investimenti e delle riforme in materia di transizione verde, previsti nel Piano Nazionale di Ripresa e Resilienza «Italia Domani».

In prima battuta, ci si soffermerà sugli elementi di connessione tra il piano e il *legal framework* europeo, con riferimento al principio «Do Not Significant Harm» (DNSH) e al rispetto del vincolo del 37% delle risorse da destinarsi alla transizione verde.

Successivamente si fornirà una prima analisi della strategia prevista nella seconda missione del PNRR «Rivoluzione Verde e Transizione Ecologica», focalizzando l'attenzione sui diversi investimenti individuati e dando più ampio rilievo agli aspetti della transizione energetica.

Da ultimo, verranno approfondite le misure della c.d. transizione burocratica, che insistono in particolar modo sulla revisione della normativa ambientale.

PAROLE CHIAVE: *transizione verde; ambiente; Piano Nazionale di Ripresa e Resilienza; Green Deal; normativa ambientale.*

Silvia Lazzari – *The Green Transition in the Italian National Recovery and Resilience Plan «Italia Domani».*

The article is a first analysis of the investments and reforms to be implemented under the National Recovery and Resilience Plan «Italia Domani», in order to achieve the green transition.

First, the article will focus on the interplay between the PNRR and the European legal framework, with specific reference to the principle «Do Not Significant Harm» (DNSH) and to the compliance with the 37% constraint of resources devoted to green transition.

Secondly, the mission «Green Revolution and Ecological Transition» of the PNRR will be extensively examined: attention will be focused on the investments therein provided, with further emphasis on the key aspects of energy transition.

Finally, the measures to achieve the so-called bureaucratic transition will be examined in depth, with specific reference to the proposed revision of the environmental legislation.

KEY WORDS: *green transition; environment; Recovery and Resilience Plan; Green Deal; environmental regulation*.