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## Towards a new legal framework for sustainability under the European Green Deal

W kierunku nowych ram prawnych zrównoważonego rozwoju  
według Europejskiego Zielonego Ładu

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**Abstract:** The European Green Deal is a comprehensive initiative aimed at reshaping the functioning of the European Union towards sustainable development. While the immediate trigger for this initiative of the newly appointed European Commission under Ursula van Leyen was the need to address the challenges associated with climate change and to move towards carbon-free and circular economy – its goals seem to be much more ambitious: to put into practice the concept of sustainable development. Against the background of the concept of sustainability and its various ambiguities and interpretations, the article provides a brief description and analysis of the key pillars of the Green Deal, namely: the financial framework for promoting sustainability, the climate and energy strategy, and the strategy for industry and circular economy. It also presents and critically assesses the horizontal goals

of the Green Deal i.e. improving involvement of the public into the decision-making and assuring equal opportunities for marginalised groups.

**Keywords:** sustainable development, European Union, Green Deal, climate change, criteria for sustainability, environmental objectives

**Abstrakt:** Europejski Zielony Ład jest kompleksową inicjatywą mającą na celu przekształcenie funkcjonowania Unii Europejskiej w kierunku zrównoważonego rozwoju. Podczas gdy bezpośrednim powodem dla tej inicjatywy nowo wyznaczonej Komisji Europejskiej pod przewodnictwem Ursuli van Leyen była potrzeba rozwiązania wyzwań związanych z zmianami klimatycznymi oraz zapoczątkowania tworzenia niskoemisyjnej gospodarki o obiegu zamkniętym - jego cele wydają się być znacznie bardziej ambitne: realizacja w praktyce koncepcji zrównoważonego rozwoju. Na tle koncepcji zrównoważonego rozwoju i różnych sposobów jej rozumienia i interpretacji, artykuł zawiera krótki opis i analizę kluczowych filarów Zielonego Ładu, a mianowicie: ram finansowych promowania zrównoważonego rozwoju, strategii klimatycznej i energetycznej oraz strategii dla przemysłu i branży i gospodarki o obiegu zamkniętym. Prezentuje również i krytycznie ocenia horyzontalne cele Zielonego Ładu, mające na celu poprawę zaangażowania społeczeństwa w podejmowanie decyzji i zapewnienie równych szans dla grup marginalizowanych.

**Słowa kluczowe:** Zrównoważony rozwój, Unia Europejska, Zielony Ład, zmiany klimatyczne, kryteria zrównoważonego rozwoju, cele środowiskowe

## 1. Introduction: The European quest for environmental sustainability

Climate change and the global environmental crisis have become the over-riding threat and epochal challenge of our time. It is evident, today, that mankind will not be able to maintain decent living conditions unless it manages to overcome this crisis and adapt to ecologic boundaries both globally and locally. It is also evident that this challenge cannot be met on traditional carbon fuelled and resource intense growth paths but necessitates fundamental socio-technical and economic changes – transformation – in various key sectors such as energy, industry, mobility, agriculture, buildings and finance.

In view of this challenge, nations around the world have long pledged to fight the environmental crisis and to shift policy and development paths towards sustainability – particularly in environmental terms. Environmental sustainability goals were adopted, most notably within the Paris Agreement and the frame of the UN Sustainable Development Goals. As yet, however, the aspired transformation does not seem to proceed at a sufficient pace and, in fact, in many instances there is still high uncertainty as to how the global sustainability targets should be broken down and implemented in an effective, just and acceptable manner. As it seems, though, the quest for transformation paths is currently gaining momentum and nations around the world are even

embarking on a global competition, not least, for the economic opportunities associated with transformation. The new environmental policy ambitions of the Biden Administration and the recent development of UK environmental policy in the wake of BREXIT – as depicted in the other contributions to this issue – can both be seen as expression of this new momentum. Perhaps even more so, this can be said of the European Union and, in particular its epochal “European Green Deal” policy programme.

This contribution displays – in a nutshell – how the European Union aspires to transform itself to environmental sustainability, especially through the Green Deal programme and with particular regard to the relevant legal framework. In order to set the scene it begins with a short recap of the concept of sustainability and its various ambiguities and interpretations (Section 2). It is then explained how these challenges and ambiguities are tackled under the Green Deal starting with an overview of its content (Section 3) before looking closer at key pillars of the policy programme: the financial framework (Section 4), the climate and energy strategy (Section 5), the strategy for industry and circular economy (Section 6) and the approaches to involving the public and ensuring just transition (Sections 7&8).

## **2. The Concept of sustainable development**

### **2.1 Origins**

The threat posed by climate change only recently has been commonly accepted as both “urgent” and of “common concern to humankind” (Paris Agreement 2015, Preamble) but the call for acknowledging also other “growing threats to the environment and the need to act in an ambitious and concerted manner at the global level” (draft Global Pact for the Environment, 2017, Preamble) has so far failed to reach consensus. This is the case despite the fact that there is growing evidence that environmental problems caused by human activity have had dramatic consequences for the quality of life and even for the very existence of many civilisations ever since humans started to have the capacity to destroy their environment (Pointing 1991 and 2007: *passim*). While already in ancient and medieval times some legal instruments, quite similar to the contemporary ones, started to be employed, the key problem has always been the fact that the need for environmental protection has usually been considered to be in a direct contradiction to the need for economic development and any efforts to combat ecological crisis have been often accused of being detrimental to economic and social progress (Jendroška 2021: 222). This view, while still quite strongly promoted by some politicians (as for example recently by those opposing measures to combat climate change because of alleged protection of

national interests related to maintaining coal-based energy mix), does not stand the test of time. In the 21<sup>st</sup> century it seems to be rather obsolete and is gradually replaced in modern societies by the concept of sustainable development. The roots of the concept of sustainable development can be traced back to the 17<sup>th</sup> century and the ideas promoted by John Evelyn in Britain and Jean Baptiste Colbert in France, which inspired Hans Carl von Carlowitz, (who was the Head of the Royal Mining Office in the Kingdom of Saxony) to introduce the concept of “sustainable use” of timber for the industrial purposes (Grober 2007: 7-8).

## 2.2 From Brundtland via Rio to the Sustainable Development Goals

The modern concept of sustainable development was developed however only in the 20<sup>th</sup> century, following some ideas presented at the UN Conference on the Human Development held in 1972 in Stockholm (Vogler 2007: 432). In 1983, by the General Assembly of the United Nations created the World Commission on Environment and Development chaired by the Prime Minister of Norway Ms Gro Harlem Brundtland. The Commission presented in 1987 the report entitled “Our Common Future” (Brundtland Report 1987). It does not include any comprehensive definition of sustainable development, but instead provides a number of its intrinsic features. The most commonly cited is reference to sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (Brundtland Report 1987: 41). It further defines sustainable development as “a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations” (pp. 17 and 43). The Report underlines that “environmental and economic problems are linked to many social and political factors (p. 37) and that “economy is not just about the production of wealth, and ecology is not just about the protection of nature; they are both equally relevant for improving the lot of humankind” (p. 36). Therefore “sustainable development requires that societies meet human needs both by increasing productive potential and by ensuring equitable opportunities for all (p. 42). It is a “development that integrates production with resource conservation and enhancement, and that links both to the provision for all of an adequate livelihood base and equitable access to resources” (p. 38).

To this end sustainable development “provides a framework for the integration of environment policies and development strategies” (p. 38), in which “economics and ecology must be completely integrated in decision making and law-making processes not just to protect the environment, but also to protect and promote development” (p. 36). In this context the Report underlines the

role of public involvement and especially public participation in decision-making (pp. 9-10, 25).

According to the Brundtland Report “the greatest threat to the Earth’s environment, to sustainable human progress, and indeed to survival, is the possibility of a nuclear war, increased daily by the continuing arms race and its spread to outer space” (pp. 35 and also 14) . It mentions also other threats to the environment, paying special attention to poverty (pp. 29-31,) and lack of equity (pp. 43-45).

The Brundtland Report heralded a shift in the political debate related to environmental issues from focusing solely on developing instruments of environmental policy, which was characteristic of the 1970s, to putting firmly on the international agenda the concept of sustainable development with its shared focus on environmental, economic and social aspects. This shift heavily influenced the UN Conference on the Environment and Development held in Rio de Janeiro in 1992 and its key outputs, including Rio Declaration (Paul 2008: 578-579). By referring to the concept of sustainable development in its Principles 3 and 4, the Rio Declaration somehow upgraded sustainable development to the status of “principle of environmental law” and to some extent further defined it.

– Principle 3 reads: The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

– Principle 4 reads: In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

Since the Rio de Janeiro Conference in 1992 the concept of sustainable development has been internationally recognised, though over the time the emphasis has been put on various issues. After the collapse of the Soviet Union, the threat of a nuclear war breaking out seemed to be of lesser concern and the primary emphasis shifted to poverty alleviation. This was reflected at the Millennium Summit in 2000 and at the Johannesburg World Summit in 2002 (Paul 2008: 579). The shift resulted in establishing, following the Millennium Summit in 2000, the Millennium Development Goals (MDGs) which aimed at tackling the indignity of poverty.

A further shift can be associated with the United Nations Conference on Sustainable Development in Rio de Janeiro in 2012, which laid foundations for establishing the Sustainable Development Goals (SDGs) in the Resolution of the UN General Assembly called the 2030 Agenda for Sustainable development (Agenda 2030). The SDGs replaced MDGs and established a set of universal goals that meet the urgent environmental, political and economic challenges facing the world.

### 2.3 Sustainable development in the EU primary law

The concept of sustainable development was originally introduced to the EU primary law in 1992 by the Maastricht Treaty. The amended Article 2 of the EC Treaty stipulated to be the tasks of the Community “to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment”. Thus it referred to “sustainable growth” (not development) but “respecting the environment”. The formulation was criticised as being a departure from the usual formulation “sustainable development” and being “marginally weaker” than the latter – nevertheless inclusion of the environmental aspect was considered of “great political significance” (Jans and Vedder 2012: 7).

The Amsterdam Treaty amended Article 2 of the EC Treaty as follows:

“The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree „of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.”

The new formulation of Article 2 introduced by the Amsterdam Treaty was considered to be more in line with international concept of sustainable development and considerable improvement – although “not entirely satisfactory, because there is still a link in Article 2 EC between the use of the terms ‘sustainable development’ and ‘economic activities’ (Jans and Vedder 2012: 7). The opposite view underlines that the link between economic activities and environmental protection is characteristic of the international concept of sustainable development and that – while this link was clear in the version of Article 2 introduced by the Maastricht Treaty – it was somehow lost in the version of Article 2 introduced by the Amsterdam Treaty (Jendroška 2020: 997).

Regardless of the above different views relating to the formulation of Article 2 under the Amsterdam Treaty, it otherwise significantly strengthened the concept of sustainable development in the EC Treaty by introducing the principle of integration (newly added Article 3c /Article 6) which required that “Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.” Furthermore, while the EU Treaty under both Maastricht and Amsterdam Treaties

in its Article 2 referred to the concept of sustainability only in relation to its economic and social aspects, the Amsterdam Treaty included in the newly added seventh recital to the EU Treaty a clear reference to sustainable development covering not only economic and social aspects, but also environmental ones.

The concept of sustainable development was finally firmly embedded into the EU primary law by the Lisbon Treaty. The revised Treaty on the European Union (TEU) provides now in its Article 3.2 a solid legal basis for sustainable development. It clearly refers to all three aspects of sustainable development by merging somehow the content of its old Article 2 with the content of Article 2 of the EC Treaty discussed above.

According to Article 3.2 of the TEU, the Union “shall work for the sustainable development of Europe based on balanced 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.”

Furthermore, the reference to sustainable development remains in the Preamble to the TEU and in the article dealing with the integration principle (currently Article 11 of the TFEU), as well as in the provisions of the TEU dealing with the relations of the EU with the external world (Article 3.5 and 21.2f). It is included also into Article 37 of the Charter of Fundamental Rights of the European Union.

## 2.4 Legal implications and hitherto practice in the EU

The implications of including the concept of sustainable development into the primary law of the EU are still a matter of some debate. The Lisbon Treaty seems to have not solved it finally, in particular the key question whether it is a “principle” or just an idea of political significance (Winter 2004: 21). Some commentators doubt whether it has any legal significance in concrete cases (Epiney 2006: 26-27; Krämer 2011: 10-11), while some other consider it a “principle” of the EU law (Bukowski 2009: 340). There seems to be no doubt, however, that it is of important political significance and sustainable development “continues to occupy a prominent place in the objectives of the European Union” (Jans and Vedder 2012: 11).

While after Lisbon there is no doubt as to the proper reflection of the concept of sustainable development in the primary law of the EU, the fundamental issue remained unresolved: “the basic difficulty of knowing which economic development is sustainable” (Krämer 2011: 10). The concept of sustainable development was still insufficiently defined in the secondary legislation which sometimes provided “contradictory and confusing use of the word ‘sustainability’” (Krämer 2011: 11). The new initiatives under the European Green Deal and following

it pieces of the secondary legislation described in this article are meant to fill in the gap and provide a new legal framework for sustainability in the UE.

### 3. The European Green Deal – Europe’s generation agenda for environmental sustainability

In December 2019, the then newly appointed EU Commission proclaimed the European Green Deal as its leading policy agenda and, above all, as a long-termed fundamental policy shift towards environmental sustainability (Green Deal). With the Green Deal the Commission pledges to “reset its commitment to tackling climate and environmental-related challenges that is this generation’s defining task” (p. 2), and to pursue “a new growth strategy that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases (GHG) in 2050 and where economic growth is decoupled from resource use” (p. 2). Moreover, the Green Deal is aimed to preserve and enhance the EU’s natural capital, and protect the health and well-being of citizens from environment-related impacts. To these ends, the Commission proclaimed “a set of deeply transformative policies” (p. 4) focussing on the following priority fields of action:

- **Stepping up climate and energy policy:** With the aim of reducing the EU’s GHG emissions to at least 50% by 2030 and achieving climate neutrality by 2050 the Commission pledged to revise and reinforce all relevant climate-related policy instruments within the framework of a new climate law. In September 2020, it published a more detailed strategy on how it intends to accomplish these enhanced decarbonisation targets (Climate ambition strategy).

- **Industrial strategy for a carbon-free circular economy:** In order to foster resource efficiency and climate neutrality in industrial production chains, the Commission intends to double the recycling rate by 2030 and to foster sustainable product design, reuse and recycling with a particular focus on resource-intensive sectors such as textiles, construction, electronics and plastic. It has presented further details with “A New Industrial Strategy for Europe” (Industrial Strategy) and a “Circular Economy Action Plan” (Circular Action Plan) in March 2020.

- **Building and renovating in an energy and resource efficient way:** In order to reach the EU’s energy efficiency objectives in the buildings sector, the Commission announces to: foster a green “renovation wave” of public and private buildings; rigorously enforce legislation related to the energy performance of buildings; review the Union’s standards on construction products; work to lift national regulatory barriers to energy efficiency investments and assess the possibility of including emissions from buildings in the EU’s emission trading



scheme. A detailed strategy for the European renovation wave was published by the Commission in October 2020 (Renovation Strategy).

- **Sustainable and smart mobility:** With the aim of greening transport and reducing sector GHG-emissions by 90% and 2050 the Commission pledges to: support technology and infrastructure development for multimodal transport systems; take action to abolish subsidies and increase prices for fossil fuels; include shipping in the emissions trading scheme; propose more stringent air pollutant emissions standards as well as CO<sub>2</sub> emission performance standards for vehicles. A detailed “Sustainable and Smart Mobility Strategy” (Mobility Strategy) was published in December 2021.

- **Greening Common Agricultural Policy – from farm to fork:** As a main objective of its “farm-to-fork” strategy the Commission intends to: work with Member States to ensure that at least 40% of the common agricultural policy’s overall budget and at least 30% of the Maritime Fisheries Fund should clearly contribute to climate action; take further action, including legislative measures to reduce significantly the use and risk of chemical pesticides, fertilisers and antibiotics; propose measures to enhance transparency about the ecologic performance of agricultural and food products. In the meantime, more details were presented with the Commission’s “Farm to Fork Strategy” Communication of May 2020 (Farm to Fork Strategy).

- **Preserving and protecting biodiversity.** In order to amplify protection of ecosystems and biodiversity, the Commission aims to: strongly expand the area covered by the European Natura 2000 network of nature protected areas; better align agricultural practice with requirements of ecosystem health; foster sustainable re- and afforestation to increase absorption of CO<sub>2</sub>, protect biodiversity and promote wood-based bio-economy. A corresponding “EU Biodiversity strategy for 2030” (Biodiversity Strategy) was presented in May 2020.

- **A zero pollution vision for toxic free environment.** In order to better protect Europe’s citizens and ecosystems against pollution from air, water, soil and consumer products, the Commission intends to initiate: a revision of the Union’s air quality standards; measures to reduce pollution from urban runoff and particularly harmful sources such as micro-plastics and pharmaceuticals; a review and upgrade of the Union’s chemicals regulation with regard to the assessment and management of environmental risks. A more detailed account of the envisaged policy paths and measures was provided with the “Chemicals Strategy for Sustainability toward a Toxic-Free Environment” (Chemicals Strategy) in October 2020.

- **Sustainable finance, budgeting and spending:** The Commission acknowledges the essential role of finance and envisages a wide array of measures to streamline the EU and national budgets as well as tax systems, public procurement, state aid and private finance towards sustainability transformation (see

Section 4 below). EU budgets and funding sources shall also be used to manage the structural and social impacts of the Green Deal transition. The Commission has concretized its budgetary plans with a “European Green Deal Investment Plan and a Just Transition Mechanism” published in January 2020.

- **Public participation and active stakeholder engagement (Pact):** The Commission puts a strong emphasis on the engagement of citizens and stakeholders and announced to foster active participation primarily by a new “European Climate Pact” (Climate Pact) designed to boost information sharing, collaboration and grassroots activities.

- **The EU as a global leader:** The Commission also pledges strong efforts to promote global transition by further greening its external policies. In this regard it puts a high emphasis on the EU’s proactive role in the Paris Agreement and in the G20 and G7 fora and it plans to make substantial green commitments – not least to the Paris Agreement – a key requirement for future trade agreements.

All in all, the European Green Deal comprises a highly ambitious, far-reaching and nearly all-encompassing policy programme that is likely to meet with considerable challenges and resistance when approaching implementation stages (Sikora 2021: 681). Considering the wide gaps yawning in the enforcement of present policy targets and existing environmental regulations – as regards, for example, bio-diversity, water quality, air-quality and GHG sector targets<sup>1</sup> – it appears rather doubtful that the Commission will manage to realize its ambitious transformation programme to a full extent (Krämer 2020). The COVID crisis certainly bears risks of drawbacks but it also brings opportunities and additional leverage if recovery funds are stringently tied to sustainability criteria and the Green Deal’s objectives (see Section 4 below). However, even if the Green Deal succeeds only in part, it will certainly bring about manifold challenges in the making and enforcement of European environmental law. In the following, we present some of the most eminent regulatory ambitions and challenges of the Green Deal programme and we begin with the huge financial commitments under the Green Deal Investment Plan and the accompanying efforts to steer public and private spending towards sustainable investment.

## 4. Framework for Sustainable Spending, Finance & Investment

### 4.1 Aims and development of the framework

As it is clearly stipulated by the European Commission in its Communication regarding the Green Deal, it is meant to be “an integral part of the strategy to

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<sup>1</sup> According to the European Environment Agency (EEA 2018a) analysis, 23 of the 30 environmental goals contained in the 7<sup>th</sup> Environment Action Programme of the European Union (EAP) will not be met by 2020.

implement the United Nation's 2030 Agenda and the sustainable development goals“ with the aim of putting “the sustainable development goals at the heart of the EU's policymaking and action” (Green Deal, p. 3).

Already in 2018 the High-Level Expert Group on sustainable finance (HLEG) considered it useful to create a technically robust classification system at the Union level to establish clarity on which activities qualify as “green” or “sustainable” (HLEG 2018). The Commission followed this view by recognising that the necessary shift of capital flows towards more sustainable activities has to be underpinned by a shared, holistic understanding of the environmental sustainability of activities and investments. In order to remove barriers to the functioning of the internal market with regard to raising funds for sustainability projects, and to prevent the future emergence of barriers to such projects, it was considered necessary to harmonise the criteria for determining whether an economic activity qualifies as environmentally sustainable at the Union level (Action Plan 2018).

For this purpose, in 2019, the Union issued a number of binding and non-binding instruments, including the Regulation (EU) 2019/2088 (Regulation 2019/2088) which established some sustainability-related disclosure obligations, as well as a number of definitions. While there is no definition of “sustainable development”, these definitions, in particular the definitions of “sustainable investment”,<sup>2</sup> “sustainability risk”,<sup>3</sup> and “sustainability factors”<sup>4</sup> shed some light on the approach to “sustainable development” which covers not only environmental objectives but also social and governance objectives. Worth mentioning is the fact that the definition of “sustainable investment” includes the requirement of “no significant harm” to any of the above objectives – without however further developing it in the body of this Regulation.

The Regulation (EU) 2019/2088 was supplemented and significantly amended by the Regulation (EU) 2020/852 of 18 June 2020, which indeed – following

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<sup>2</sup> According to Article 2 point (17) in the Regulation: ‘sustainable investment’ means an investment in an economic activity that contributes to an environmental objective, as measured, for example, by key resource efficiency indicators on the use of energy, renewable energy, raw materials, water and land, on the production of waste, and greenhouse gas emissions, or on its impact on biodiversity and the circular economy, or an investment in an economic activity that contributes to a social objective, in particular an investment that contributes to tackling inequality or that fosters social cohesion, social integration and labour relations, or an investment in human capital or economically or socially disadvantaged communities, provided that such investments do not significantly harm any of those objectives and that the investee companies follow good governance practices, in particular with respect to sound management structures, employee relations, remuneration of staff and tax compliance;

<sup>3</sup> According to Article 2 point (23) in the Regulation: ‘sustainability risk’ means an environmental, social or governance event or condition that, if it occurs, could cause an actual or a potential material negative impact on the value of the investment;

<sup>4</sup> According to Article 2 point (24) in the Regulation: ‘sustainability factors’ means environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters.

its name – established a EU framework to facilitate sustainable investment (Regulation 2020/852). This Regulation, unlike the Regulation 2019/2088, is focused on environmental aspects of sustainability, while the social and governance aspects are addressed only marginally. The Regulation (EU) 2020/852 establishes in Article 3 certain criteria which according to Article 4 shall be applied by Member States and the Union in order to determine whether an economic activity qualifies as environmentally sustainable for the purposes of any measure setting out requirements for financial market participants or issuers in respect of financial products or corporate bonds that are made available as environmentally sustainable. Worth mentioning is the fact that the Regulation is firmly based on the existing environmental acquis and provides in Article 2 a very useful set of definitions either taken from – or based on – the definitions existing in the various pieces of the EU secondary legislation in the environmental field.

#### **4.2 Criteria for an economic activity to qualify as environmentally sustainable**

Article 3 of Regulation 2020/852 provides for that an economic activity shall qualify as environmentally sustainable if it meets the following criteria:

- a) contributes substantially to one or more of the environmental objectives set out in Article 9 in accordance with Articles 10 to 16;
- b) does not significantly harm any of the environmental objectives set out in Article 9 in accordance with Article 17;
- c) is carried out in compliance with the minimum safeguards laid down in Article 18; and
- d) complies with technical screening criteria that have been established by the Commission.

The above criteria, are further elaborated in details in the body of Regulation 2020/852. While the officially proclaimed aim is to establish “Union-wide standards for environmentally sustainable financial products” (Regulation 2020/852: Recital no. 16), the impact of such standards may and probably will apply well beyond the scope of application of Regulation 2020/852. In fact it provides a rather comprehensive and detailed benchmark for evaluating environmental sustainability of any specific economic activity which perhaps may be applied not only for the purpose of financing but maybe also for planning or regulatory purposes.

#### **4.3 Environmental objectives**

The environmental objectives set out in Article 9 of Regulation 2020/852 are as follows:

- a) climate change mitigation;
- b) climate change adaptation;
- c) the sustainable use and protection of water and marine resources;
- d) the transition to a circular economy;
- e) pollution prevention and control;
- f) the protection and restoration of biodiversity and ecosystems.

The detailed requirements that an activity must meet in order to determine whether it “contributes substantially” to each of the above environmental objectives are set out in Articles 10-15, respectively. Furthermore, according to Article 16, an activity shall qualify also as contributing substantially to one or more of the environmental objectives set out in Article 9 if – under the conditions provided in Article 16 – it directly enables other activities to make a substantial contribution to one or more of the environmental objectives.

#### **4.4 Significant harm to environmental objectives**

As mentioned earlier, the criteria for an economic activity to qualify as environmentally sustainable include not only substantial contribution to environmental objectives, but also a requirement that an activity “does not harm” any the environmental objectives. In this respect it elaborates and develops the principle of “no significant harm” mentioned in the definition of “sustainable investment” in the Regulation (EU) 2019/2088 and a promise made by the European Commission in its Communication regarding the Green Deal that all “EU initiatives live up to a green oath to ‘do no harm’” (Green Deal, p. 19).

To this end Article 17 of Regulation 2020/852 provides in paragraph 1 detailed criteria in relation to each of the environmental objectives to ascertain whether a particular economic activity shall be considered to make a significant harm to these environmental objectives.

Furthermore, Article 17 makes it clear in paragraph 2 that when assessing an economic activity against the criteria set out in paragraph 1, both the environmental impact of the activity itself and the environmental impact of the products and services provided by that activity throughout their life cycle shall be taken into account, in particular by considering the production, use and end of life of those products and services.

Finally, it must be mentioned that “do no significant harm” principle has been included into the Recovery and Resilience Facility (RRF) Regulation, which is the main instrument to allocate money to the Member States under the Next Generation EU Recovery Package meant to address the consequences of corona-virus Covid-19 pandemic. In the inter-institutional provisional agreement reached on 18 December – after 9 trilogues of particularly tough negotiations – by the European Commission, the Council and the European Parliament, it was

finally agreed, among other modifications, to add to the Commission's proposal for a Regulation of the European Parliament and of the Council establishing a Recovery and Resilience Facility (RRF) also a clear provision (paragraph 2 in the newly added Article 4a on Horizontal principles) that the Facility shall only support measures respecting the “do no significant harm” principle.

#### **4.5 Minimum safeguards**

Article 18 of Regulation 2020/852 provides some details regarding the requirement in point (c) of Article 3 that an economic activity in order to qualify as environmentally sustainable must be carried out in compliance with the minimum safeguards. According to Article 18 paragraph 1, the minimum safeguards shall be procedures implemented by an undertaking that is carrying out an economic activity to ensure the alignment with the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, including the principles and rights set out in the eight fundamental conventions identified in the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work and the International Bill of Human Rights.

Furthermore, paragraph 2 in Article 18 requires that when implementing the procedures referred to in paragraph 1 of this Article, undertakings shall adhere to the principle of “do no significant harm” referred to in point (17) of Article 2 of Regulation (EU) 2019/2088. It is not quite clear though how the above minimum safeguards are related to ‘sustainability factors’ referred to in point (24) of Article 2 of Regulation (EU) 2019/2088 which include “environmental, social and employee matters, respect for human rights, anti-corruption and anti-bribery matters”.

#### **4.6 Technical screening**

Article 19 of Regulation 2020/852 provides for some details regarding the technical screening criteria to be established by the Commission by way of delegated acts adopted under Articles 10(3), 11(3), 12(2), 13(2), 14(2) and 15(2) in accordance with the requirements stipulated in Article 23. These technical criteria include criteria for determining if an economic activity could qualify as contributing substantially to given objective or as causing a significant harm to one or more such objectives..

The criteria contained in Article 19 shall apply to each and every of the specific 6 environmental objectives listed in Article 9 and, according to paragraph 5 in this Article, shall be regularly reviewed and – if appropriate – amended in line with scientific and technological developments.

## 5. Perspectives in Climate and Energy Regulation

With the European Green Deal, the European Union has sharpened its CO<sub>2</sub>-reduction targets for 2030 and 2050. The Green Deal refers to a reduction target of between 50 and 55 per cent in 2030, compared to 1990 (Green Deal, p. 4). A Commission Communication from 2020 (the so-called Climate Ambition Communication) choose for 55 per cent reduction to be achieved by 2030, a target uphold with a provisional agreement reached in April 2021 by the legislative bodies working on the EU Climate Law (Climate Law proposal). By 2050, the European Union shall be energy neutral. To achieve these goals, a series of legislative reforms have been proposed, in terms of both governance framework (Section 5.1) and substantive standards (Section 5.2). It will also require substantive financial investments (Section 5.3).

### 5.1. Governance framework

In March 2020, concerning the reform of the governance framework, the European Commission presented a proposal for a climate law (Climate Law proposal). It has revised this proposal in September 2020 to include the heightened climate ambitions mentioned above (Climate Law amended proposal). This proposal represents an example of framework legislation which only sets out the general targets and the governance framework necessary to monitor, assess and steer the EU and Member States actions adopted to achieve the indicated targets. In conjunction with the existing “Governance Regulation on the Energy Union and Climate Action” the proposed climate law will thus provide a regulatory framework that replaces those existing under the various pieces of legislation adopted by the EU to reduce climate change so far. Considering that the sharpened targets indicated in the Green Deal and 2020 Climate Ambition Communication will require substantive amendments of the EU and national plans and strategies in the context of climate change and energy policy, the adoption of a harmonized framework for managing such an operation is understandable.

The climate law and the governance framework which it develops further have been criticized by NGOs for the fact that it sets out only targets and planning and review schemes but no effective mitigation measures. Indeed, the concrete legislative measures to implement the targets will have to be adopted in a second step and in accordance with the trajectories and implementation programs to be adopted under the governance framework. Moreover, it is also true that in many respects it is clear what measures are needed and the Union does not have to delay action until after a complex planning process is completed. In so far, the inaction and hesitance of the Commission can well be criticized.

However, this does not in any instance depreciate the necessity and importance of the governance framework currently developed with the abovementioned Governance Regulation and the proposed Climate Law. Binding targets and obligations to adopt, implement and review adequate implementation measures, both on the EU and national levels, are indispensable means to enforce targets and trajectories not only by the Commission, but also by the judiciary and the public. Hence, the governance framework should be welcome not as a sufficient means but an indispensable conveyor to climate neutrality (Reese 2020: 1).

## 5.2. Substantive reforms

As far as the substantive legislative reforms are concerned, the Green Deal refers firstly to amendments to the Emission Trading System Directive (ETS Directive), the Efforts Sharing Regulation (Effort Sharing Regulation), the Land Use Land Use Change and Forestry Regulation (LULUCF Regulation), the Energy Efficiency Directive (EED), the Renewable Energy Sources Directive (RES Directive), and the regulation on the performance of cars and vans (Persons and Light Commercial Vehicles Regulation). In this context, the Green Deal and the 2020 Climate Ambition Communication pays particular attention to reductions coming from buildings, power generation and transport. The Commission estimates that buildings and power generation can contribute the most to the achievement of the 2030 goals. In this regard, buildings, as well as transport, shall be added to the scope of the EU emission trading system (Climate Ambition Communication, p. 14). Also aviation and naval transport shall be covered by the emission trading system, although potentially limited to the EU domestic flights and naval transport. Decarbonization of the cooling and heating sector is also part of the Commission strategy, although at the moment this focus is only at the level of study (the EU Strategy for Energy System Integration).

Another pillar of the EU action to achieve the goals set out under the Green Deal and the proposed climate law is the improvement of the action about energy efficiency. In this regard, a new dimension to the already ongoing EU action in this field concerns the adoption of the forthcoming Sustainable Product Legislative initiative (Climate Ambition Communication, p. 20), further outlined below in Section 6. Additional reduction of CO<sub>2</sub> emissions should come from the LULUCF sectors, thus by means, for example, of sustainable forest management and re- and afforestation (Climate Ambition Communication, p. 12).

Still, despite the breadth of the proposed reforms, the combined reduction effects of the above mentioned measures is estimated in 47 per cent by 2030, in comparison with 1990 (Climate Ambition Communication, p. 13). The Commission admits that further action is needed to fill the 8 per cent gap between the estimated reduction achievements and the envisaged target for 2030 (Cli-



mate Ambition Communication, p. 13). As written by Fleming and Mauger, this admission is mostly troublesome (2021: 164-180). Moreover, it is also in striking contrast with the lessons that could be learned from the *Urgenda* ruling (*Urgenda*; for literature, e.g. Backes and van der Veen 2020 with further references) and its progeny (*Föreningen Greenpeace Norden, Natur og Ungdom; Verein KlimaSeniorinnen Schweiz et al.; Friends of the Irish Environment CLG; Plan B Earth and Others; R on the application of Friends of the Earth Ltd and others*) with most recently the *Oxfam France* case (*Oxfam France*) and the decision of the German Constitutional Court in *Göppel and Others* (*Göppel et al.*). This line of cases highlights the importance of adopting a policy and legal framework that is, first of all capable of achieving the mitigation goals aimed at and necessary to halt climate change. What the European Union is doing with the Green Deal shows little consideration for the importance of this lesson. This is particularly pitiful considering that while at national level individuals and non-governmental organizations seem increasingly able to ask for judicial review of their States shortcomings in the field of climate law and policy, this is basically impossible at the EU level. The recent judgment of the Court of Justice in the *Carvalho* case confirms the restrictive standing for individuals and non-governmental organizations in the field of environmental matters under Article 263 TFEU (*Carvalho*). Of course, the validity of the EU law could be challenged via the national courts, yet, this is obviously a cumbersome route (e.g. Van Wolferen 2018 with further references), which will lead to undue delays, increasing the chance that the European Union will not be able to achieve its own targets.

Another remarkable element of the Green Deal is that it pays little attention to climate adaptation (Krämer 2020: 267-306). It only indicates that a new policy can be expected for 2020/2021. At the moment of writing this contribution, no initiative on this aspect has been presented. With time elapsing it is getting clearer and clearer that mitigatory measures will no longer be sufficient, it is frankly astonishing that we still have yet to see what mitigation strategy the European Union will follow.

### 5.3. Financial plan

To sustain the implementation of the above indicated amendments and actions, substantial financial resources are needed. Accordingly, it does not come as a surprise that it is the budget, including the content and scope of the Just Transition Mechanism (JTM), that is at the centre of the political debate between the Council (European Council Conclusions 2020) and the European Parliament (EP Amendments 2020), at the moment of writing this contribution.

To this extent the Commission indicated that at least 30 per cent of the EU's multiannual budget shall be reserved to expenditure relevant for reducing climate change (Climate Ambition Communication, p. 14). To which private investments will have to be added. More precisely, the European Green Deal Investment Plan indicates that at least 1 Trillion Euro of investments shall be mobilized until 2030, with half of the investments coming from the EU budget directly and the other half coming from the private sector, by means of the InvestEU Guarantee, the national co-financing structural fund, the EU Emission Trading System Funds, and the Just Transition Mechanism (JTM).

This latter instrument is meant to ensure that those EU regions and economic sectors that are most affected by the actions proposed under the Green Deal receive financial support to implement the EU climate action (JTM Regulation Proposal, p. 2-3). The JTM consists of at least 100 Billion Euro for 2021-2027 to finance economic diversification, social support and energy projects in those EU regions that are most affected by the EU climate action. In 2020, the Commission proposed to increase the JTM budget to 150 Billion Euro (JTM Regulation amended proposal).

Although the JTM clearly shows that the European Union will pose attention to the issue of energy poverty (e.g. Siksnyte-Butkiene and others 2021 with further references) and energy justice (e.g. Sovacool and Dworkin 2015: 435-444), it is remarkable that this instrument seems to focus only on certain societal groups, mostly workers and unemployed people, in certain regions, those in which decarbonization requires the greatest changes to the economic structure of the region (Fleming and Mauger 2021). The Commission has been silent so far about other categories of people that might be left behind during the EU climate action (Fleming and Mauger 2021). It is on the topic of equality that we will focus in Section 8, below.

## **6. Industry Strategy for Clean and Circular Economy**

The 'Industry Strategy for Clean and Circular Economy' (Industry Strategy) envisions a strong and sustainable European Industry that is highly competitive on the basis of a leading position in energy and resource efficiency. The Commission explains that industry – as the source of more than 20% of the EU's GHG emissions and various other types of pollution – has a key role to play on Europe's path to climate neutrality and environmental sustainability, and it outlines the approaches by which it expects to green the industrial cycle of production. As concerns the reduction of GHG emissions, the Strategy understandably relies, to considerable extent, on the above described instruments of the EU's climate and energy policy and, in particular, on the Emission Trading System (ETS) system. It announces further efforts to strengthen the ETS and to

propose a ‘Carbon Border Adjustment Mechanism’ in 2021 as a means to ensure a level playing field also with respect to external competitors and to reduce the risk of ‘carbon leakage’ (i.e. a migration of carbon intense production facilities to countries outside the ETS). However, the main focus of the Industrial Strategy is on improvement of resource efficiency and circular economy, respectively. The accompanying “New Circular Economy Action Plan” (Circular Economy Plan) puts forward the approaches and measures by which the Commission intends to advance circular economy. In particular, it announces:

- to tighten and extend the waste reduction targets for specific streams in the context of a review of the EU Waste Directive 2008/98/EC;
- to substantially expand the Ecodesign Directive 2009/125/EC so as to make it the centrepiece of a sustainable product legislative framework applicable to the broadest possible range of products, and to regulate aspects of product durability, reusability, reparability and recyclability and premature obsolescence;
  - to revise EU consumer law and labelling rules in order to ensure that consumers receive trustworthy and relevant information on products at the point of sale, including on their lifespan and on the availability of repair services, spare parts and repair manuals;
  - to propose mandatory green public procurement (minimum) criteria and targets in sectoral legislation;
  - to assess regulatory options for further promoting circularity in industrial processes in the context of the Industrial Emissions Directive 2010/75/EU by integration of circular economy practices in Best Available Techniques reference documents;
  - with regard to electronics, to examine, among others, the options of implementing a ‘right to repair’ and establishing a EU-wide take back scheme to return or sell back old mobile phones, tablets and chargers;
  - with regard to batteries, to propose new legislation building on the evaluation of the existing Batteries Directive 2007/66/EC to include rules on recycled content, measures to improve the collection and recycling rates of batteries, and potentially a phase-out of non-rechargeable batteries where alternatives exists;
  - with regard to plastics, to propose mandatory requirements for recycled content and waste reduction measures for key products such as packaging, construction materials and vehicles;
  - with regard to textiles, to apply the new sustainable product framework including eco-design measures to ensure that textile products are fit for circularity;
  - with regard to construction products, to revise the EU’s Construction Product Regulation (No. 305/11) in order to introduce sustainability performance requirements, including content requirements for certain construction product, and

- to revise the EU Waste Shipment Regulation (No. 1013/2006) so as to ensure that the EU does not any longer export its waste challenges to third countries.

In sum, the Commission is presenting a surge of regulatory measures to enforce sustainable production, consumption and material recovery. It has been rightly observed by *Ludwig Krämer* that this implies a “revolutionary” policy shift from a rather soft strategy relying mainly on voluntary schemes, technical support and economic incentives towards a framework of mandatory product design standards and a more regulated circular economy (Krämer 2020: 280). From a sustainability perspective this shift appears to be consistent in view of the fact that – according to the assessments of the European Environmental Agency – waste production is even increasing, again, in some Member States and most Member States are far from fulfilling their recycling targets (EEA 2018).

Some important approaches to fostering environmentally-friendly, circular economy are yet scarcely used both in the present framework and in the Green Deal Strategy. Firstly, this regards the admissibility and costs of waste disposal. The Union has neither considered a general ban on disposal of untreated waste as, for example, Germany introduced in 2005, nor has it considered pricing instruments to make disposal and other unfavourable waste management paths more expensive. Secondly, costs and “economic instruments” could also play a decisive role when it comes to reducing hazardous and non-reusable material in products or even non-essential and critical products as such. The existing Waste Directive (2008/98/EC) mentions these economic instruments only as options Member States may voluntarily include in their waste prevention policies (Article 29 and Annex IV WD). The first cautious step of mandatory EU action in this regard was taken in 2020 by adoption of a European plastic tax (EU Council 2020). This levy, however, is paid by the Member States to the EU on the basis of their plastic recycling rates and the States are not obliged to recover the money from producers and consumers through plastic taxes of their own.<sup>5</sup> Besides that, the path of economic steering is left rather uncharted, probably for fear of public disapproval and equality issues.

Nevertheless, the envisaged hard regulation is often far more incisive and will presumably meet with considerable opposition, too. It remains to be seen whether the Commission will manage to push through an effective framework.

## 7. Role of the public and NGOs

The Communication from the Commission makes it clear that the Green Deal is “for the European Union (EU) and its citizens” (Green Deal, p. 2).

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<sup>5</sup> It has been strongly criticised as merely symbolic and environmentally inefficient (Reichert et al. 2021).

Furthermore, it states that „active public participation and confidence in the transition is paramount if policies are to work and be accepted” (p. 2). Following this, the Commission claims that the “involvement and commitment of the public and of all stakeholders is crucial to the success of the European Green Deal” and that “game-changing policies only work if citizens are fully involved in designing them” therefore “Citizens are and should remain a driving force of the transition” (p. 22). The particular attention in this respect is focused on engaging with the public in climate action within a European Climate Pact (p. 22).

Role of the public is envisaged also generally in the enforcement. Bearing in mind that both the “Commission and the Member States must also ensure that policies and legislation are enforced and deliver effectively,” the Commission announced to “consider revising the Aarhus Regulation to improve access to administrative and judicial review at the EU level for citizens and NGOs who have concerns about the legality of decisions with effects on the environment” and taking “action to improve their access to justice before national courts in all Member States” (Green Deal, p. 23).

Following this, the Commission adopted Communication (2020)643 on improving access to justice (Improving Access to Justice COM 2020), in which it states that “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” (para 2) and that “Individuals and NGOs play a crucial role in identifying potential breaches of the EU law by submitting complaints to administrations or taking cases to courts” (p. 9). This Communication was accompanied by a Commission proposal to amend Regulation (EC) No. 1367/2006 (Aarhus Regulation) with the aim to improve the internal review of administrative acts (Proposal to amend Aarhus Regulation). The proposal was meant to improve environmental access to justice at the EU level in line with the requirements of the Aarhus Convention.

## 8. Non-marginalization of societal groups under the Green Deal

As mentioned in the previous section, as well as in Sections 2 and 4, the Climate Pact, the JTM and the Green Deal in general, focuses on the involvement of the public in the transition envisaged under the Green Deal. In so doing, the EU pays also attention to ensuring that marginalized people and regions can cope with the transition aimed at by the Green Deal.

As well known, equality and non-discrimination rank high among the values and norms composing the EU legal framework (most notably, Articles 2 and 3 TEU, 9 TEU and Articles 8, 10, 18 and 19 TFEU). Yet, the Treaties do not specify the meaning of these concepts and equality comes in various shapes and flavours. The mainstream approach in Western states is *formal* equality

(e.g. Bernard and Hepple 2000: 562; Fredman 1997: 575), largely resting on the idea that the state should not distort equality among individuals (Kapotas 2009: 28-29), thus spurring meritocracy. In practice, however, meritocracy could be impossible as competitors were never placed in the same conditions to compete with one another. The lack of a level playing field rests at the basis of *material* equality proponents and their plea for fostering active anti-discrimination policies (Kapotas 2009: 24). There are, as it is well known, different flavours of material equality, with the two opposite extremis of the spectrum being equality of *opportunities* and equality of *outcomes* (e.g. Squintani and Schoukens 2019: 22-52 with further references). While under the former approach, emphasis is placed on the starting position of individuals, the latter focuses on where they end up (e.g. Phillips 2004: 1-19).

Squintani and Schoukens showed that in the field of environmental law, and most notably under the Aarhus aquis, there seems to be room for material equality, albeit mostly in the form of equality of opportunities (Squintani and Schoukens 2019: 22-52). In this perspective, we welcome the fact that the Climate Pact of the Commission, introduced in Section 1 above when discussing public participation, explicitly states:

Diversity and inclusiveness. Anyone, from any background or profession, will be able to take part.<sup>29</sup> The Pact will aim to pull down barriers to climate action. This includes the barriers resulting from personal characteristics, such as gender, age and disabilities. It will help Pact participants to be at the centre of debates such as those on the future of Europe. In developing the Pact, the Commission will rely on the creativity and variety of views arising from democratic and participatory mechanisms.

Yet, it is disarming to see that the only reference to how to pursue this goal is limited to the Gender Equality Strategy of the Commission without clarifying how this document and the therein indicated strategy are relevant to tackling the marginalization of certain societal groups, such as low income people (Maastricht Recommendations 2015: 16), taking place in the field of environmental and energy decision-making (Squintani and Schoukens 2019: 22-52 with further references). Only in the Communication on Better Regulation, there is one mention of 'equality for all' without, however, providing further specifications (Better Regulation 2021: 15). Besides, the fact that the Strategy only mentions equality of opportunities, without engaging with equality of outcomes, reinforces our doubts that the noble goal mentioned in the Climate Pact can be effectively reached. In addition, the fact that, as expressed in Section 2, under the JTM the Commission has been silent so far on categories of people that might be left behind during the EU climate action, other than mostly workers and unemployed people in certain regions, shows that the road to address energy poverty and achieve energy justice is still a long one.

## 9. Outlook

As shown above, the Green Deal is designed to accelerate sustainable development in the EU with a particular focus on environmental sustainability and climate neutrality. It moves the cause of environmental sustainability further from the periphery to the centre of European economic and structural policy. To this end, the Green Deal relies on a new governance framework, multiple regulatory approaches and extensive financial commitments.

The proposed Climate Law (Climate Law proposal) is an important step to complete the governance framework for GHG mitigation that the EU has started to build by the Governance Regulation 2018/1999. The binding targets and the mandatory planning, reporting and review regimes are indispensable conditions for transparency and effective implementation on both European and national levels. However, the governance framework is not enough in itself, it needs to be filled with adequate legislative and executive measures. In this regard it has been rightly stated that the Commission and the Member States are yet to deliver ones, especially on the various regulatory and financial approaches envisaged under the Green Deal. On the regulatory part, the path to sustainability will – necessarily – entail tighter curbs for the entire economic cycle including diverse sectors and markets. If the Commission succeeds in implementing its prescriptive ambitions as proclaimed in the underlying sector strategies, Member States, agencies, enterprises and citizens will be subject to a multitude of new requirements and enhanced standards. They will need to depart from unsustainable products and practices in various contexts and adapt new technologies and consumption patterns. Of course, such a transformative regulation will not only imply further burdens but also induce innovation and manifold opportunities.

The financial part of the Deal will be equally decisive in facilitating the transition to environmental sustainability. When implemented to full extent, the Green Deal Investment Plan will fuel transition with huge amounts of public budget and by also directing private capital towards sustainable investment. However, huge challenges remain to be tackled when it comes to the details of distribution and to ensuring an efficient allocation of the investment streams. As shown above, considerable ambiguities and uncertainties are yet to be resolved on the way to a coherent green finance regime that effectively facilitates both sustainable transformation and just transition.

As it is indicated by the commentators, the Green Deal was proposed by the Commission before the corona-virus Covid-19 pandemic broke out and therefore it was considered uncertain whether the proposals under the Green deal will be maintained in the situation when the entire EU financial framework would need to be reconsidered (Krämer, 2020: 299). The above-mentioned debate

regarding the Recovery and Resilience Facility (RRF) Regulation showed clearly that indeed these doubts were quite legitimate. While the “do no significant harm” principle was finally included into the Next Generation EU Recovery Package, it is not clear how and to what extent the other criteria for environmental sustainability will apply to the respective funding.

In its Green Deal Communication the Commission pledges to assess all its future plans, programs and proposals against the objectives of the Green Deal. It also indicates that “the Commission and Member States should work to ensure that all available planning tools for the European Green Deal are used coherently” and the Commission “will ensure that they are fit for the purpose and that Member States are implementing them effectively” (Green Deal, p. 23). In this context, however, only the “Commission’s better regulation tools” are mentioned, including “impact assessments” which “contribute to making efficient policy choices at minimum costs” (Green Deal, p. 19). The reference to “impact assessments” means in this context the regulatory impact assessment under the Better Regulation Guidelines (Better Regulation Guidelines 2017). There is no mention, however, of the Strategic Environmental Assessment (SEA), which without a doubt is much more effective at evaluating environmental sustainability of proposed strategic decisions than regulatory impact assessment. It seems quite obvious that conducting SEA procedures at the Member States level would not assure comprehensive assessment of the various plans and programmes envisaged by the Green Deal to be undertaken at the EU level, and therefore – as required by the UNECE Protocol on SEA (to which the EU is also a Party) – these EU plans and programmes should be accompanied by respective SEA procedures. Lack of SEA procedures at the EU level has been criticized already quite some time ago in official meetings (Jendrośka 2018), and in some cases related to EU compliance with the Aarhus Convention. The new Communication on Better Regulation issued in 2021, while confirming application of the “do no significant harm” principle in all policies (Better Regulation 2021: 1 and 16) and promising to examine each new initiative from the point of view of compliance with SDGs (Better Regulation 2021: 15), also reiterates a firm belief in regulatory impact assessment as the main instrument for assessing environmental impact of new initiatives and does not envisage improving its “tool kit” by introducing any SEA procedures at the EU level (Better Regulation 2021: 15-17).

Regarding public involvement into the designing and implementing activities under the Green Deal, there may be some doubts if the existing mechanisms are sufficient to ensure effective participation of the public and NGOs in contributing to sustainable development (Jendrośka 2020: 2). Worth mentioning in this context is also the debate whether indeed the Proposal to amend the



Aarhus Regulation, mentioned above, is sufficient for the purpose and assures compliance with the Aarhus Convention (Bechtel 2021).

In addition, although we welcome the fact that under the Green Deal the EU shows awareness that actions are needed to avoid the marginalisation of (certain) societal groups and regions, this awareness is far from being translated into a concrete action plan.

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