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The volume dedicated to
the Late Dr Jan Jerzmański

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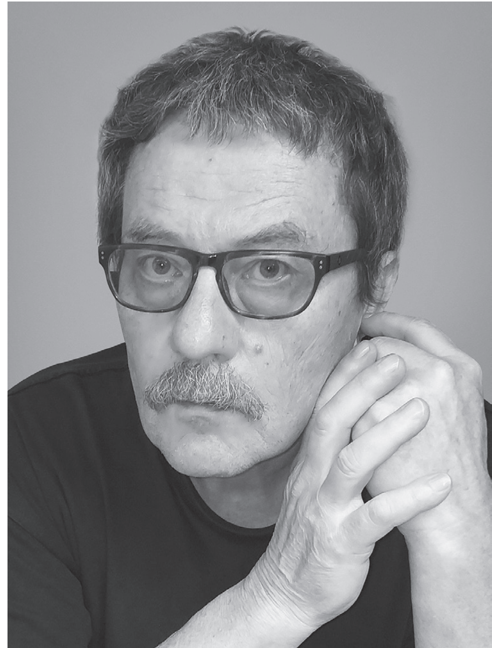


Dr Jan Jerzmański (1957-2021)

On 21 March 2021, Dr Jan Jerzmański passed away, an outstanding expert in the environmental law, specializing in particular in regulation of waste management, noise protection and protection of nature resources.

Dr Jerzmański completed his legal studies in 1979, graduating from the Department of Law of Wrocław University and in 1987 earned the Doctor's degree in the field of legal sciences from the Institute of Legal Sciences of the Polish Academy of Sciences, upon successfully defending his dissertation under the title "Współpraca regionalna Polski w dziedzinie ochrony i kształtowania środowiska" [Poland's regional cooperation in the domain of protection and formation of the environment].

Between 1979 and 1999 he was a researcher at the Institute of Legal Sciences of the Polish academy of Sciences – Section of Law of Environmental Protection.

Dr Jerzmański's contacts with the Faculty of Law and Administration of Opole University began in 2000, when he started lecturing on, among others, the law of environmental protection and also the Polish and European administrative law. In the years 2001-2002, he held the post of Director in charge of didactics in the Inter-Faculty Institute of Law and Administration at the University. For many years he also lectured at the Post-Diploma Chair of Law of Environmental Protection of the Faculty of Law and Administration of Wrocław University. As a lecturer he was reputed to be demanding, but fair and kind to students.

He was a co-founder, partner and board member in the law office *Jendrośka Jerzmański Bar i Wspólnicy. Prawo gospodarcze i ochrony środowiska* [*Jendrośka Jerzmański Bar and Partners. Environmental Lawyers*], where he advised clients on waste management, regulations dealing with reclamation of grounds and other questions pertaining to environmental law. He was responsible for preparation of legal opinions, procedural documents, as well as elaboration

of strategies of conducting business activity compliant with law. Among his clients there were both entrepreneurs and public authorities of all levels as well as environmental organizations. He was highly esteemed not only for his extensive legal knowledge and professional expertise, but also for his personal engagement in solving clients' difficult legal problems. Also the partners in the office could always depend on him and his kind opinion, penetrating observations and valuable advice.

Dr Jerzmański was the editor of the first commentary to the Act on Waste of 2001 and prior to this – a co-author of several editions of commentaries to the Act on Waste of 1997.

He was also the author and a co-author of a few dozen publications and expert's opinions dealing with the law of environmental protection, including a commentary to the Environmental Protection Law Act of 2001 and a commentary to the regulations on packaging and the product and deposit fee. He prepared a number of legal opinions commissioned by the Sejm and the Senate of the Republic of Poland.

In the years 1994-2000, Dr Jerzmański was a legal expert in a few teams realizing projects connected with adaptation of the Polish law to the requirements of the EU (within the Phare programmes) and a consultant of the Polish National Committee UNESCO-MAB. In the years 2000-2001, he worked as an expert for the Sejm Commission of Environmental Protection. He was also a member of the Scientific Society of Law of Environmental Protection in Wrocław, the Committee of Legal and Economic Sciences of the Polish Academy of Sciences – Branch in Katowice and the Board of Karkonoski National Park. From 1999 he was the Vice-President of the Wrocław-based all-Polish association of Centre of Ecological Law.

Dr Jerzmański was a man of extensive, almost encyclopedic, knowledge on various subjects not only connected with law. He was, at the same time, a man of great sense of humour, with a healthy distance towards himself and the world, owing to which each conversation with him was a real pleasure. He was a most honest man who adhered to the principle of demanding a lot from himself, but being tolerant enough of imperfections in others.

Worth mentioning is Dr Jan Jerzmański's involvement in the democratic opposition, in particular his significant services to the Fighting Solidarity Organization in the days of the martial law imposed in Poland, that is at the time when it took a lot of courage to do so. For his merits at that time he was awarded the Fighting Solidarity Cross in 2005 and in 2021 – the Independence Service Cross. Dr Jerzmański himself never boasted about his involvement in the democratic opposition during the martial law; neither did he deem it proper to claim any profits for his activity, because he was always opposed to any opportunism. He was a strong believer in liberal democracy and European

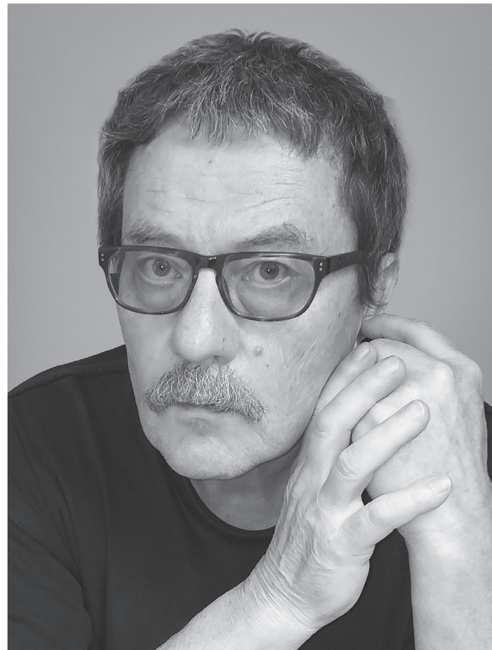
integration, fiercely opposing any authoritarian practices and violations of the rule of law.

An expression of appreciation of his merits was the participation of Prime Minister Mateusz Morawiecki in the funeral of Dr Jerzmański. The Prime Minister underlined that, "Thanks to such people who – without heeding the consequences of repression on the part of the authority – got involved in helping the Opposition, it was possible to carry on fighting against the communist system." He added, too, that "They were silent Heroes and caused the system of evil to collapse. Such people as Mr Jan Jerzmański should have the word HEART carved on their tombstones." (https://www.wnp.pl/parlamentarny/spoleczenstwo/premier-o-janie-jerzmanskim-dzieki-takim-ludziom-byla-mozliwosc-walki-z-systemem-komunistycznym,132861.html).

To the undersigned, Dr Jan Jerzmański (to us "Janek") was not only a partner in the firm and a colleague, but also a many-year trusty friend who offered reliable support and this not only regarding professional matters. We will miss him deeply.

Attoney-at-law Magdalena Bar,
Partner in the Law Firm *Jendrośka Jerzmański Bar i Wspólnicy. Prawo gospodarcze i ochrony środowiska*

Dr hab. Jerzy Jendrośka,
Professor of Opole University and Managing Partner in the Law Firm *Jendrośka Jerzmański Bar i Wspólnicy. Prawo gospodarcze i ochrony środowiska*



Dr Jan Jerzmański
(1957–2021)

21 marca 2021 r. zmarł dr Jan Jerzmański, wybitny specjalista prawa ochrony środowiska, specjalizujący się zwłaszcza w zagadnieniach regulacji gospodarki odpadami, ochrony przed hałasem i ochrony przyrody.

Dr Jerzmański ukończył studia prawnicze w roku 1979 na Wydziale Prawa Uniwersytetu Wrocławskiego, a w roku 1987 uzyskał stopień doktora nauk prawnych w Instytucie Nauk Prawnych Polskiej Akademii Nauk po obronie pracy doktorskiej pt. „Współpraca regionalna Polski w dziedzinie ochrony i kształtowania środowiska".

W latach 1979–1999 był pracownikiem naukowym Instytutu Nauk Prawnych PAN – Zespołu Prawa Ochrony Środowiska.

Z Wydziałem Prawa i Administracji Uniwersytetu Opolskiego związany był od roku 2000; wykładał m.in. prawo ochrony środowiska, a także polskie i europejskie prawo administracyjne. W latach 2001-2002 pełnił funkcję dyrektora ds. dydaktyki w Międzywydziałowym Instytucie Prawa i Administracji. Dr Jerzmański przez wiele lat wykładał także na Podyplomowym Studium Prawa Ochrony Środowiska, na Wydziale Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego. Jako wykładowca był bardzo wymagający, ale sprawiedliwy i życzliwy studentom.

Od 2001 roku był współzałożycielem, wspólnikiem i członkiem zarządu kancelarii prawnej *Jendrośka Jerzmański Bar i Wspólnicy. Prawo gospodarcze i ochrony środowiska*, gdzie doradzał klientom w zakresie regulacji gospodarki odpadami, przepisów dotyczących rekultywacji terenów i innych zagadnień prawa ochrony środowiska – przygotowując opinie prawne, pisma procesowe, a także opracowując strategie zgodnego z prawem prowadzenia działalności. Wśród jego klientów byli zarówno przedsiębiorcy, jak też organy administracji wszystkich szczebli oraz organizacje ekologiczne. Był bardzo ceniony nie tyko

za olbrzymią wiedzę prawniczą i fachowe umiejętności, ale też za bardzo osobiste zaangażowanie w rozwiązywanie trudnych problemów prawnych klientów. Również wspólnicy kancelarii zawsze mogli liczyć na jego życzliwą uwagę, wnikliwe spostrzeżenia oraz cenne rady.

Dr Jerzmański był redaktorem pierwszego komentarza do ustawy o odpadach z 2001 r., a wcześniej współautorem kilku wydań komentarzy do ustawy o odpadach z 1997 r.

Był też autorem i współautorem kilkudziesięciu publikacji i ekspertyz z zakresu prawa ochrony środowiska, w tym komentarza do ustawy – Prawo ochrony środowiska z 2001 r. oraz komentarza do przepisów o opakowaniach oraz o opłacie produktowej i depozytowej.

Przygotował też wiele opinii prawnych na zlecenie Sejmu i Senatu RP.

W latach 1994 - 2000 był ekspertem prawnym w kilku zespołach realizujących projekty związane z dostosowywaniem prawa polskiego do wymogów WE (w ramach Phare) oraz konsultantem Polskiego Narodowego Komitetu UNESCO--MAB. W latach 2000–2001 pracował jako ekspert Sejmowej Komisji Ochrony Środowiska. Był też członkiem Towarzystwa Naukowego Prawa Ochrony Środowiska we Wrocławiu, Komisji Nauk Prawnych i Ekonomicznych PAN – Oddział w Katowicach oraz Rady Karkonoskiego Parku Narodowego. Od 1999 r. pełnił również funkcję wiceprezesa mającego siedzibę we Wrocławiu ogólnopolskiego stowarzyszenia Centrum Prawa Ekologicznego.

Dr Jerzmański był człowiekiem o rozległej, wręcz encyklopedycznej wiedzy na bardzo różne tematy związane nie tylko z prawem. Obdarzony był przy tym ogromnym poczuciem humoru i dystansem do siebie oraz świata, dzięki czemu każda rozmowa z nim była prawdziwą przyjemnością. Był człowiekiem niezwykle uczciwym i kierującym się w życiu zasadami, wymagającym wiele od siebie, ale dość tolerancyjnym wobec niedoskonałości innych osób.

Wspomnieć trzeba o zaangażowaniu doktora Jana Jerzmańskiego w działalność opozycyjną i istotne zasługi dla demokratycznej opozycji, w tym zwłaszcza dla Solidarności Walczącej, w okresie stanu wojennego – czyli w momencie, gdy wymagało to sporej odwagi. Za zasługi w tym czasie otrzymał w 2005 roku Krzyż Solidarności Walczącej oraz w 2021 roku pośmiertnie Krzyż Służby Niepodległości. Wyrazem docenienia jego zasług w tym okresie był udział Premiera RP Mateusza Morawieckiego w jego pogrzebie. Premier podkreślił, że „dzięki takim ludziom, którzy nie zważając na konsekwencje represji ze strony władz, angażowali się w pomoc opozycji, była możliwość prowadzenia walki z systemem komunistycznym". Dodał też, że „to byli cisi Bohaterowie i sprawcy obalenia systemu zła. Takim ludziom, jak Pan Jan Jerzmański, należałoby na płycie nagrobnej wyryć słowo: SERCE" (https://www.wnp.pl/parlamentarny/spoleczenstwo/premier-o-janie-jerzmanskim-dzieki-takim-ludziom-byla-mozliwosc-walki-z-systemem-komunistycznym,132861.html).

On sam działalnością opozycyjną w okresie stanu wojennego nigdy się nie chwalił ani też nie uważał za stosowne domagać się jakichkolwiek profitów z tego tytułu, bo zawsze był przeciwny koniunkturalizmowi. Był zdecydowanym zwolennikiem demokracji liberalnej oraz integracji europejskiej i niezmiennie sprzeciwiał się wszelkim przejawom autorytaryzmu i łamania zasad państwa prawnego.

Dla niżej podpisanych doktor Jan Jerzmański (dla nas: „Janek") był nie tylko wspólnikiem w kancelarii i kolegą z uczelni, ale też wieloletnim wypróbowanym przyjacielem i niezawodnym wsparciem w wielu sprawach nie tylko zawodowych. Będzie nam Go bardzo brakowało.

Radca prawny Magdalena Bar
Kancelaria *Jendrośka Jerzmański Bar i Wspólnicy. Prawo gospodarcze i ochrony środowiska*

Dr hab. Jerzy Jendrośka
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Articles

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Access to justice on EU level: the long road to implement the Aarhus Convention

Dostępność systemu sprawiedliwości na szczeblu Unii Europejskiej: długa droga do wdrożenia Konwencji z Aarhus

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Abstract: More than 15 years after the EU's accession to the Aarhus Convention, EU legislation does not yet ensure that members of the public have access to justice as envisaged by the Convention. Specifically, the possibilities to judicially challenge contraventions of EU environmental law by EU institutions and bodies remain very limited. The result is a lack of accountability to EU law, which undermines the rule of law and the protection of the environment and human health. This article describes the EU's long road to implement the Convention. It analyses the EU's current legislative proposal to amend the Aarhus Regulation and explains why it would not, in this form, suffice to ensure compliance with the Convention, leaving the Council and European Parliament to ensure that international law is respected. More broadly, the lengthy process reflects wider issues of the EU legal framework, related to the institutional balance and the overconstitutionalisation of the EU's standing regime.

Keywords: access to justice, Aarhus Convention, rule of law, environment, EU Aarhus Regulation

Abstrakt: Po ponad 15 latach przystąpienia UE do Konwencji z Aarhus, prawodawstwo Unii wciąż jeszcze nie zapewnia swoim obywatelom dostępu do sprawiedliwości jak określone

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[1] Sebastian D. Bechtel, LL.M. (Cantab) works as Environmental Democracy Lawyer at ClientEarth, an environmental non-governmental organization using the power of the law to protect people and the planet, www.clientearth.org.

jest to w w/w Konwencji. Szczególnie ograniczone pozostają możliwości sądowego sprzeciwu wobec naruszeń prawa ochrony środowiska Unii Europejskiej przez unijne instytucje czy organy. W efekcie występuje brak odpowiedzialności wobec prawa Unii, co z kolei podważa idee praworządności oraz ochrony środowiska i zdrowia ludzi. Niniejszy artykuł opisuje długą drogę jaką UE przechodzi w procesie wdrażania Konwencji z Aarhus. Autor analizuje bieżącą propozycję wysuniętą przez EU w sprawie wniesienia poprawek do tej Regulacji oraz wyjaśnia dlaczego w takiej formie nie byłyby one wystarczające do zapewnienia zgodności z Konwencją, pozostawiając w gestii Rady oraz Parlamentu Europejskiego konieczność dopilnowania aby prawo międzynarodowe było respektowane. Z szerszej perspektywy, wydłużający się proces odzwierciedla istotne kwestie unijnej ramy prawnej, jakie związane są z instytucjonalną równowagą i 'przekonstytucjonalizowaniem' systemu obowiązującego w Unii Europejskiej.

Słowa kluczowe: dostęp do sprawiedliwości, Konwencja z Aarhus, rządy prawa, środowisko, Rozporządzenie EU w sprawie Konwencji z Aarhus

Introduction

Article 2 of the Treaty on the European Union ('TEU') lists the rule of law as one of the values of the European Union (the 'EU'). The World Justice Project considers the rule of law to consist of four universal principles: Accountability, Just Laws, Open Government and Accessible Justice.[2] Accountability requires that government (and private actors) are accountable under the law. Related to this principle, persons must be able to access the courts to ensure this accountability in practice.

Ostensibly in line with these principles, the Court of Justice of the European Union (CJEU) has consistently held that the EU Treaties provide a "complete system of remedies" (see for example, Judgement of the CJEU in Case C-72/2, paragraphs 66-68 and case law cited; Judgement of the CJEU in Case C-384/16, paragraphs 112-114 and case law cited). However, on closer inspection, access to the CJEU is rather limited, in particular for applicants seeking to enforce EU laws meant to protect public interests. Due to this lack of accessible justice, accountability to these EU laws is also weakened. The result is an enforcement deficit of laws meant to protect public goods, such as environment and health protection, and an imbalance with the protection of private interests.

This phenomenon is in no way unique to the EU. In fact, the international community already recognized the lack of enforcement of environmental law as one of the core issues preventing sustainable development more than 50 years ago. Principle 1 of the 1972 Stockholm Declaration and Principle 10 of the

[2] The World Justice Project is an independent non-profit organisation originally founded by the American Bar Association. For more information, see: <https://worldjusticeproject.org/about-us/overview/what-rule-law>.

1992 Rio Declaration therefore recognize that effective environmental protection requires active participation of citizens.

Based on these principles, States of Europe and Central Asia have adopted the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, commonly referred to as the Aarhus Convention (the 'AC')[3] (see principles 1 and 2 in relation to the Stockholm and Rio Declarations; see also Jendroska 2020: 5-8) The AC entered into force on 30 October 2001. It establishes three pillars of procedural rights, as set out in its title, in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being (Art. 1 AC).

The right of the public to access to justice constitutes the third pillar of the Convention. Specifically, Art. 9 AC requires access review procedures to challenge refusals of access to environmental information requests (Art. 9(1)), to challenge decisions, acts and omissions on specific activities preceded by public participation (Art. 9(2) as well as a to challenge acts and omissions of private persons and public authorities that contravene national law related to the environment (Art. 9(3)) (for a detailed analysis of the different elements of Art. 9 AC, see Jendroska (2020: 16 onwards).

This article describes and discusses the EU's long road to implement the latter provision, Art. 9(3) AC, in relation to acts of EU bodies and institutions.[4] The body charged with overseeing compliance with the AC, the Aarhus Convention Compliance Committee (the 'ACCC'), has found that the EU's current legal system does not ensure compliance with this provision (Findings and recommendations of the ACCC with regard to communication ACCC/C/2008/32 (parts I and II), as further discussed below). This eventually resulted in a request from the Council to the Commission to prepare a Study, and if necessary, a legislative proposal to amend Regulation (EC) 1367/2006 (the 'Aarhus Regulation').[5] The Commission published this proposal in October last year.

Section I describes the long process and international negotiations that led to this amendment. The second section analyses the EU's legislative proposal

[3] 2161 UNTS 447, 38 ILM 517 (1999). See recitals 1 and 2 in relation to the Stockholm and Rio Declarations.

[4] In relation to access to justice to challenge acts of the EU Member States, see ClientEarth Legal Guide on Access to Justice in European Union Law: A Legal Guide on Access to Justice in environmental matters, 2021 edition, available at: <https://www.clientearth.org/latest/documents/access-to-justice-in-european-union-law-a-legal-guide-on-access-to-justice-in-environmental-matters-edition-2021/>.

[5] 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, 2006 OJ L 264/13. See COM(2020) 642 final for the proposal to amend this Regulation.

in light of the Aarhus Convention. As will be shown, the proposal would, if adopted in this form, not yet ensure compliance with Art. 9(3) AC. Section III includes some observations on some wider issues in the EU legal framework that are exemplified by this case study, before concluding.

1. The long and winding road to implement the Aarhus Convention

1.1. The European Union's accession to the Aarhus Convention

The EU[6] approved the AC on 17 February 2005. It is thereby a Party to the Convention in its own right, separately from its Member States which are all also individually Parties to the Convention.[7] Prior to approval, the European Commission made a number of legislative proposals to implement the provisions of the Convention (see Jendroska 2012). Most importantly for the present article, the Commission proposed a Regulation to apply the provisions of the Convention to the European Union institutions and bodies.[8]

The Aarhus Regulation includes obligations of the EU institutions and bodies related to all three pillars of the AC supplementing the obligations that already existed prior to accession (Aarhus Regulation, recital 5). As regards access to justice, Article 10 Aarhus Regulation permits non-governmental organizations ('NGOs'), which meet certain criteria as per Article 11 Aarhus Regulation, to request an internal review of administrative acts and omissions of EU institutions and bodies.

The internal review mechanism was meant to supplement the existing access to justice avenues under Article 263 and 267 TFEU. Article 267 TFEU provides for the obligation for national courts to make a preliminary reference to the Court of Justice if, during a national dispute, a question as to the validity of an EU act arises. As further discussed below, this avenue is fraught with challenges because it presupposes national implementation of the act in question as well as a genuine national dispute. In order to prevent that an applicant needs to violate the law in order to obtain access to the Court, the Treaties therefore provide for Art. 263 TFEU as a direct means to challenge EU acts (Judgement of the CJEU in Case C-622/16 P, paragraph 58 and case law cited).

Based on Article 263(4) TFEU, an applicant can challenge an EU act directly before the EU General Court if they can show to be individually and

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[6] The term European Union is used throughout the text to refer to both the current European Union, in the proper sense of the term, as well as its predecessor organisations, such as the European Community.

[7] Some Member States acceeded to the Convention only after the European Union. The last EU Member State to ratify the Convention was Ireland, on 20 June 2012.

[8] COM/2003/0622 final.

directly concerned or, in the case of a regulatory act not requiring implementing measures, to be directly concerned by the measure.[9] To this date, no member of the public has been able to fulfil this criteria in a case intended to enforce EU environmental law in the public interest. By way of illustration, the CJEU recently ruled inadmissible applications alleging contraventions of environmental law of a legislative act in Case C-565/19 P (the "People's Climate Case") and of a regulatory act in Case T-600/15 *PAN Europe*.

The internal review mechanism leaves this restrictive standing criteria under Art. 263 TFEU intact but gives the applicant a possibility to challenge the reply received on the internal review request.[10] The reply of the EU institution or body is addressed to the applicant and constitutes, in line with Art. 12(1) Aarhus Regulation, an act that can be challenged under Art. 263(4) TFEU with an application to the EU General Court.[11]

However, the internal review mechanism is limited by stringent rules related to its scope of application and its own standing criteria. The internal review mechanism is, on the one hand, limited to NGOs that fulfil the requirements of Art. 11 Aarhus Regulation, thus excluding individuals. Moreover, the definition of a challengeable, "administrative" act or omission is so narrow that the mechanism becomes only available for a very limited number of acts. While the exact criteria are further discussed below, suffice to say here that to date only internal review requests that have been found admissible by the European Commission related to authorisations for a specific company to use a chemical substance of very high concern;[12] authorisations for a specific company to place on the market products containing genetically modified organisms (GMOs) and one decision recognising an entity as a monitoring organisation, pursuant to Regulation 995/2010, which lays down the obligations of operators who place timber and timber products on the market.[13] Requests to other EU institutions or bodies, if any have been made, are not made publicly available. The only case known to the author led to a judgment of the EU General Court that the European Investment Bank (EIB) was wrong to refuse an internal review

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[9] Art. 265 TFEU provides for the possibility to challenge omissions under the same conditions.

[10] An internal review request must be submitted within 6 weeks from the adoption of the act or, in the case of an omission, after the date when the administrative act was required (Art. 10(1)). The EU body or institution must then reply within 12 weeks to the internal review request (Art. 10(2)) or, in exceptional circumstances, within 18 weeks (Art. 10(3)).

[11] The same applies to a failure by the EU institution or body to reply, which is of direct concern to the applicant, in accordance with Art. 12(2) Aarhus Regulation.

[12] For example, the requests addressed to the Commission to review its decisions granting authorisations for some uses of substances under the REACH Regulation were deemed admissible. See reply from the Commission to ClientEarth request, 2 May 2017, C(2017)2914.

[13] See reply of the Commission of 12 October 2015 to the request for internal review from Greenpeace, Ref Ares (2015)4274787.

request related to a financing decision (Judgement of the EU General Court in Case T-9/19; currently under appeal in Case C-212/21 P and Case C-223/21 P).

1.2. Communication to the AC Compliance Committee (ACCC)

Due to these limited access to justice avenues, on 1 December 2008 the NGO ClientEarth submitted a communication to the ACCC alleging that the EU failed to comply with its obligations under Art. 3(1) and 9(3)-(5) AC. The ACCC consists of 9 independent experts with recognized expertise in the Convention, which are elected by the Meeting of the Parties.[14] The possibility to submit a communication alleging non-compliance with the Convention is open to all natural and legal persons (for a more detailed analysis of the ACCC and its procedures, see Koester: 2005; Kravchenko 2007 and Jendroska 2011(1))

The core allegation of ClientEarth's communication, ACCC/C/2008/32 (European Union, referred to hereafter as'C32'), was that the EU did not provide for sufficient access to justice to challenge the acts and omissions of its institutions and bodies. Following written exchanges and a hearing before the Committee, the Committee adopted the first part of its findings on 14 April 2011 (Findings and recommendations of the ACCC with regard to communication ACCC/C/2008/32, part I (hereafter 'C32 findings, part I')). The Committee concluded that the preliminary reference procedure under Article 267 TFEU was in itself insufficient to provide for sufficient access to justice (C32 findings, part I, paragraph 90). However, it did not conclude that the EU failed to comply with the Convention because, at this point in time, the case *Stichting Milieu* was pending before the CJEU, which alleged that the Aarhus Regulation failed to comply with the AC (Case T-338/08). The Committee therefore concluded that, "if the jurisprudence of the EU Courts, as evidenced by the cases examined, were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Convention" (C32 findings, part I, paragraph 94; for a more detailed analysis, see Jendroska: 2011(2))

On 14 June 2012, the EU General Court rendered its judgement on *Stichting Milieu*. It held that the Aarhus Regulation failed to comply with Art. 9(3) AC, in so far as it permits internal review only in respect of "measures of individual scope" (Judgement of the EU General Court in Case T-338/08, paragraphs 83-84). However, on 13 January 2015, the Court of Justice overturned this judgement on appeal (Judgement of the CJEU in Joined Cases C-404/12 P and C-405/12 P). Importantly, the Court of Justice did not decide that the Aarhus Regulation complied with the Convention. However, it considered that it was

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[14] See the website of the UNECE Aarhus Convention secretariat for more information: < https://unece.org/env/pp/cc/committee-members>.

not competent to rule on the compliance with the provision because Art. 9(3) AC did not contain an unconditional and sufficiently precise obligation to be directly effective in the EU legal order (ibid, paragraph 47). More recently, the Court of Justice has also rejected the contention that the Aarhus Regulation could, on this point, be interpreted consistently with the Convention (indirect effect), as this would lead to a *contra legem* interpretation (Judgement of the EU General Court in Case T-12/17, paragraph 87; cited without opposition on appeal in Judgement of the CJEU in Case C-784/18 P, paragraph 78).

Following the Court of Justice judgement in *Stichting Milieu*, ClientEarth applied to continue the C32 proceedings before the ACCC. Following additional written exchanges and a second hearing with the participation of the European Commission representing the EU, the ACCC adopted the second part of its findings on 17 March 2017 (Findings and recommendations of the ACCC with regard to communication ACCC/C/2008/32, part II, (hereafter 'C32 findings, part II'). The ACCC considered the jurisprudence of the CJEU and concluded that there had been no new direction in the jurisprudence that would ensure compliance with Art. 9(3) AC. Specifically, the Committee referred to its findings on part I to the effect that Art. 267 TFEU is in itself insufficient to ensure adequate access to justice (C32 findings, part II, paras 56-57) and added that the case law did not indicate that members of the public would have direct access to the Courts under Art. 263 TFEU (ibid, paragraphs 58-78).

This only left the internal review mechanism under the Aarhus Regulation to the EU to demonstrate compliance with Art. 9(3) AC. The Committee firstly considered that the Regulation's limitation to only NGOs did not comply with the Art. 9(3) AC, which gives access to justice rights to "members of the public" more broadly (ibid, pargaraph 93). After considering the applicable criteria in depth, the Committee concluded that the requirements that an act be of individual scope, adopted under environmental law and having legally binding and external effect narrowed the definition of a challengeable act beyond the extent permitted by the AC (ibid, paragraphs 94, 100 and 104, respectively). The Committee therefore concluded that the EU failed to comply with Art. 9(3) and (4) AC (ibid, paragraph 122).[15]

1.3. 2017 Meeting of the Parties to the AC

All ACCC findings are submitted to the Meeting of the Parties ('MOP') to the AC for endorsement. To this date, all findings of the ACCC have been endorsed by the Meeting of the Parties by consensus, i.e. including by the Party concerned by the findings. Breaking with this established practice, the

[15] The breach of Art. 9(4) AC is based on the failure to provide effective remedies. It follows from the fact that not standing is provided under Art. 9(3) AC.

EU travelled to the 2017 MOP with the position that the MOP should only "take note" of the Committee's findings. This would have resulted in the findings neither being accepted by the Party concerned, meaning the Party would not be bound to implement them due to their own agreement, nor would the findings become a subsequent agreement or practice between the Parties, and hence not a means of interpretation of the Convention (Art. 31(3)(a) and (b) Vienna Convention on the Law of Treaties; for a discussion about the legal status of ACCC finding, see Fasoli and McGlone: 2018).

As also reflected in the report to the Meeting of the Parties, the EU's proposal met with resistance from non-EU Parties to the Convention, in particular Georgia, Norway, Switzerland and Ukraine, as well as from NGOs present as observers (Report of the sixth session of the Meeting of the Parties, ECE/MP.PP/2017/2, paragraphs 56-61 and 64). Finally, a compromise was reached. The matter was not put to a vote, which would have in itself broken with the established practice of consensus-based decision-making. Instead, the decision was postponed based on "exceptional circumstances" to the next Meeting of the Parties, which will take place in October 2021 (ibid, paragraphs 62 and 65).

The EU moreover committed to "continue to exploring ways and means to comply with the Convention in a way that was compatible with the fundamental principles of the European Union legal order and with its system of judicial review" (ibid, paragraph 62). Based on this statement and the explicit request of the Meeting of the Parties (ibid, paragraph 63), the ACCC also conducts a follow-up procedure to assess the extent the EU implements the C32 findings.[16]

1.4. The EU's follow-up

In June 2018, the Council resorted, for the first time in environmental matters, to a request to the European Commission under Art. 241 TFEU. The Council requested the Commission to prepare a study on the EU's compliance with Art. 9(3) AC and, "if appropriate in view of the outcomes of the study", a legislative amendment.[17] On 10 October 2019, the Commission reported back to the Council[18] and submitted the study, which had been prepared by

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[16] All related information can be found under: <https://unece.org/env/pp/cc/accc.m.2017.3_european-union>.

[17] Art. 2 of Council Decision (EU) 2018/881 of 18 June 2018 requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006, 2018 OJ L 155/6.

[18] Commission Staff Working Document, Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters, SWD(2019) 378 final.

an external consultancy (hereafter, the 'Milieu Study').[19] On 6 March 2020, the Commission then presented a roadmap in which it announced its intention to publish a legislative proposal to amend the Aarhus Regulation.[20]

The proposal to amend the Aarhus Regulation was finally published on 14 October 2020 (hereafter, 'the Commission proposal'),[21] jointly with a non-binding communication on access to justice to the Member State courts.[22] The Commission proposed to widen the definition of what constitutes a challengeable act or omission by removing the requirement that an act be of individual scope and adopted under environmental law. It also proposed to extend the timeline for an applicant to bring a challenge and for the EU institution or body to respond, each time by 2 weeks. A more detailed analysis of the proposal follows in section II.

1.5. The ACCC's advice on the Commission's legislative proposal

Once the Commission had published its legislative proposal, it decided to request advice from the ACCC as to whether its proposal was adequate to achieve compliance with the Convention. The ACCC held a hearing with the communicant (ClientEarth) and the Commission representing the EU on 25 November 2020. Following a round of comments on a draft, the ACCC adopted its final advice on 12 February 2021 (Advice by the ACCC on the implementation of request ACCC/M/2017/3, available at: < https://unece.org/sites/default/files/2021-02/M3_EU_advice_12.02.2021.pdf> (It should be: "(hereafter, the 'ACCC Advice'). The ACCC Advice commended the Commission's proposal for permitting internal review for acts of general scope and acts not adopted under environmental law. However, it concluded that three aspects of the legislative proposal prevent the proposal from ensuring compliance with Art. 9(3) AC: (1) exclusion of acts that entail national implementing measures, (2) limitation to acts with legally and binding effects and (3) the continued exclusion of individuals from using the internal review mechanism. Additionally, the ACCC advice refers the EU to the parallel findings on communication ACCC/C/2015/128 (EU) ('C128')

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[19] Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters, September 2019, 07.0203/2018/786407/SER/ENV.E.4, available at: <https://ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implemention_environmental_matters_2019.pdf>.

[20] Ref. Ares(2020)1406501 - 06/03/2020.

[21] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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 final.

[22] Communication from the Commission on Improving access to justice in environmental matters in the EU and its Member States, COM(2020) 643 final.

discussed next, which were at that stage still in draft form, and recommends that the EU take them into account in the legislative procedure.

1.6. Additional ACCC findings on communication ACCC/C/2015/128 (EU): State Aid decisions

In parallel to the preparing its advice, the ACCC also finalized a new set of findings concerning access to justice on EU level. Communication C128 had been filed by the Austrian NGOs Ökobüro and Global 2000 in 2015.[23] The communicants wanted to challenge a Commission decision to approve State aid from the United Kingdom, at that time still a member of the EU, to the Hinkley Point C nuclear power plant. However, Art. 2(2) Aarhus Regulation explicitly excludes acts adopted in an administrative review capacity, including under Arts 86 and 87 EC (now Arts 106 and 107 TFEU), from the internal review mechanism.

In its findings on C32, part II, mentioned above, the ACCC held that the AC does not allow a general exclusion for acts adopted by EU institutions acting as administrative review bodies (C32 findings, part II, paragraphs 108-110). However, at the same time the Committee decided that it had not been informed of a specific act that would fall under Art. 2(2) Aarhus Regulation, which had the potential of contravening environmental law and thus fall under Art. 9(3) Aarhus Convention (C32 findings, part II, paragraph 111). Therefore, the ACCC concluded it had insufficient evidence to find non-compliance.

On 17 March 2021, the ACCC adopted its findings on communication C128 (Findings and recommendations of the ACCC with regard to communication ACCC/C/2015/128, advance unedited version available at: <https://unece.org/sites/default/files/2021-03/C128_EU_findings_advance%20unedited.pdf> (hereafter 'C128 findings'). The ACCC had awaited the judgement of the CJEU in Case C-594/18 P *Austria v Commission* of 22 September 2020, which incidentally concerned the same decision the Austrian NGOs had sought to challenge. In this judgement, the CJEU confirmed that when the Commission checks compliance of State aid within the nuclear sector with the requirements of Art. 107(3)(c) TFEU, it must "check that the activity does not infringe rules of EU law on the environment" (Judgement of the CJEU in Case C-594/18 P, paragraph 100). While the specific case concerned the nuclear sector, the Court's conclusion is based on the general applicability of Treaty rules, secondary EU law on the environment and general principles of EU law (ibid, paragraphs 42-45). The conclusion of the Court is therefore applicable also to State aid rendered in other sectors.

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[23] All information about the communication can be found under: < https://unece.org/env/pp/cc/accc.c.2015.128_european-union>.

Based on the CJEU's clear statements, the ACCC concluded that Commission State aid decisions have the potential to contravene environmental law and, therefore, it must be possible for members of the public to challenge them based on Art. 9(3) AC. Given that there is no other route to challenge State aid decisions violating environmental that would be available to members of the public in comparison to other EU acts,[24] the ACCC reached a very similar finding and recommendation as under case C32. The findings therefore added to the EU's non-compliance with Art. 9(3) AC (C128 findings, paragraphs 131-132).

2. Analysis: The legislative proposal's compliance with the Aarhus Convention

The Commission's legislative proposal defines an administrative act as "any non-legislative act adopted by a Union institution or body, which has legally binding and external effects and contains provisions that may, because of their effects, contravene environmental law within the meaning of point (f) of Article 2(1), excepting those provisions of this act for which Union law explicitly requires implementing measures at Union or national level" (Art. 2(1)(g) Aarhus Regulation, emphasis added). The elements of this definition, as well as some further crucial aspects, are considered one-by-one below.

"... any non-legislative act adopted by a Union institution or body ..."

Based on the Commission proposal, internal review would become available for all non-legislative acts. In accordance with the case law, non-legislative acts are those "adopted by a procedure other than a legislative procedure"; the legislative procedures being defined exhaustively in Art. 289(3) TFEU (Judgement of the CJEU in Joined Cases C-643/15 and C-647/15, paragraph 58). Accordingly, both acts of individual and general scope are captured by this definition. The Commission's proposal thereby removes the limitation to acts of individual scope, which has in the past proven to be the ground based on which most internal review requests have been rejected. This is positive as at the time of writing 27 out of the 47 internal review request processed by the Commission were rejected only, or *inter alia*, based on this criterion. This change was therefore also recommended by the Milieu Study (p. 198). As confirmed by the ACCC Advice (paragraph 43), this change addresses also one of the main grounds of non-compliance observed in the C32 findings.

Given that Art. 2(2), last sentence, AC excludes bodies or institutions acting in a legislative capacity from the definition of public authorities, this arguably

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[24] There is the possibility to submit complaints to the Commission but, besides the fact that NGOs and individuals will not usually be considered interested parties, it is not a mechanism to challenge a decision by way of an administrative or judicial review. It is rather a mechanism to inform the Commission of a possible breach. Compare C128 findings, paras 116-119.

concords with Art. 9(3) AC, which only demands that acts and omissions of public authorities be subject to challenge. It is also consistent with the separation of powers, given that the internal review mechanism is inherently a form of administrative review, which is not easily transposed to the legislative context. This is, however, not to say that access to justice for legislative acts is not desirable, nor that it may be required on different legal grounds than the Aarhus Convention (see further below).

"... which has legally binding and external effects ..."

The Commission proposal would retain the current limitation to acts with legally binding and external effects. This is surprising, considering that it was one of the grounds for which the current wording of the Aarhus Regulation was found to be non-compliant in the C32 findings (C32 findings, part II, paragraphs 101 and 104). The finding was based on a number of examples of internal review requests that had been declared inadmissible on this basis, including regard the Operational Programme Transport of the Czech Republic.[25]

The Commission proposal justifies the continued inclusion of these terms on the basis 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" (page 8). In its advice, the ACCC agreed that an act needs to have some "effect" to contravene environmental law and considered therefore that the term "external effect" may be unproblematic if it was interpreted to not entail any further consequences than that. However, the ACCC considered that a contravention of law presupposed legally "binding" effects. It therefore recommended to amend the wording to "legal and external effects" (ACCC advice, paragraphs 51-55).

This is certainly correct in the view of compliance with the Aarhus Convention. However, there is also a consideration concerning the structure of the EU legal system. As AG Szpunar observed, the internal review mechanism is "meant to facilitate" access to justice that entities would not have when relying on Art. 263(4) TFEU directly (Opinion of AG Szupnar on Case C-82/17, pargagraph 36). While the internal review is directed at the reply to the internal review request, rather than the underlying act, the applicant will advance arguments in order to challenge the act that allegedly contravenes environmental law. In order to make the review based on these arguments meaningful, it must be conducted under the same standards as direct challenges under Art. 263 TFEU.

[25] C32 findings, part II, para. 103 citing to the examples in the communicant's comments of 23 February 2015, paras 62-68, as possible examples that should be reviewable under the Convention. See the comments here: < https://unece.org/DAM/env/pp/compliance/C2008-32/communication/frCommC32_23.02.2015/frCommC32_comments_on_CJEUs_ruling_of_15.01.15.pdf>.

Thi is in particular because Art. 263 TFEU arguably establishes the standard of whether an act is to be considered compliant with EU law or not.

It would therefore be only logical to align the wording of the Aarhus Regulation with the wording of the Art. 263(1) TFEU, which uses "legal effects vis-à-vis third parties". The Commission proposal appears to acknowledge this idea in principle but claims, "although the terminology is not identical, the scope of this exclusion in the Regulation is consistent with the scope of Article 263(1) TFEU, as interpreted by CJEU case law" (page 8). This statement is given without any supporting case law from the CJEU and therefore constitutes a mere assertion, considering that the CJEU is the final arbiter of the meaning to be given to terms of EU law.

Only after the legislative proposal was published, the EU General Court ruled for the first time on this question in Case T-9/19 *ClientEarth v EIB*. The Court held that, indeed, "[i]n view of the link that thus exists between the concept of an act having 'legally binding and external effects', within the meaning of Article 2(1)(g) of the Aarhus Regulation, and that of an act producing legal effects vis-à-vis third parties, within the meaning of Article 263 TFEU, it is reasonable, in the interests of general consistency, to interpret the former in accordance with the latter" (Judgement of the EU General Court in Case T-9/19, paragraph 149).

While this conclusion supports the Commission's position to some extent, for the sake of legal certainty and considering that the judgement on Case T-9/19 is currently under appeal, using the same legal terms as Art. 263(1) TFEU would better ensure compliance with the Convention. This is not least to comply with Art. 3(1) Aarhus Convention, which requires that Parties to the Convention "establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention."

"... and contains provisions that may, because of their effects, contravene environmental law within the meaning of point (f) of Article 2(1) ..."

The Commission proposal would remove the requirement that an act be "adopted under environmental law"; which was the third point that the ACCC considered to stand in the way of the Aarhus Regulation ensuring the EU's compliance with the AC (C32 findings, part II, para. 100. See also the Milieu Study, p. 198). In the past the requirement had led to some confusion, for instance resulting in a Commission decision that the list of Projects of Common Interests was adopted under energy, as opposed to environmental law, and could therefore not be reviewed.

The wording "contravene environmental law" is very close to the Convention's wording, given that the Art. 2(1)(f) Aarhus Regulation adopts a wide definition of what constitutes environmental law and this is also reflected in the Court's case law (Judgement of the EU General Court on Case T-9/19,

paragraphs 117-126 and case law cited). As confirmed by the ACCC Advice, it appears that this wording would on this point ensure compliance with Art. 9(3) AC (ACCC advice, paragraph 44).

"... excepting those provisions of this act for which Union law explicitly requires implementing measures at Union or national level"

The most problematic aspect of the Commission proposed definition of a challengeable act is its final part. The Commission Proposal would introduce a new exception for provisions for which Union law explicitly requires implementing measures. The Proposal's explanation of this exemption is far from clear. The Commission suggests that this exception is modelled on Art. 263(4) TFEU and that for the provision that entail implementing measures, it is possible to seek remedy before the national jurisdiction, with further access to the CJEU under Article 267 TFEU (Commission proposal, pages 16-17).

The Proposal does not address the fact that environmental NGOs will often not have standing to challenge national measures implementing provisions of EU law. Generally, the Milieu Study confirmed that "broad legal standing is granted by law and in practice in less than half of the Member States (13 out of then 28)" (Milieu Study, pp. 106-107). More specifically, national measures implementing EU acts, such as an authorization of a plant protection product based on an EU level REACH authorization, are acts for which the legal system of many Member States does not accord standing rights to environmental NGOs. On this point, the proposal simply states that "the NGOs (much like any other individual or organisation) would need to wait for the adoption of the EU-level implementing measure and challenge the implementing measure before the General Court, if they succeed in demonstrating that they have standing" (Commission proposal, footnote 56). Considering that the proposal thereby accepts that national standing may not be granted in practice, this aspect of the proposal disregards the whole purpose of amending the Aarhus Regulation in a way that ensures compliance with Art. 9(3) Aarhus Convention.

Not surprisingly then, the ACCC concluded in its advice that this exclusion would prevent compliance with Art. 9(3) AC. The ACCC emphasized that it had already established that the preliminary review mechanism was in itself insufficient to ensure access to justice. It therefore considered that EU provisions should be immediately open to review at EU level, regardless of whether they entailed implementing measures (ACCC Advice, paragraphs 67-68).

Additionally, to this clear failure to comply with the Convention, the Commission's proposal does also not concord with the underlying logic of Art. 263 TFEU. In accordance with established case law, whether an act entails implementing measures is supposed to be assessed with regard to an individual applicant (Judgement of the CJEU in Case C-622/16 P, paragraph 61). This ensures that there is indeed a possibility for the applicant to rely on Art. 267 TFEU. As

an example, in *Montessori* it was considered that there were no implementing measures in relation to the applicant because the applicant did not satisfy the conditions to apply for the contested aid (ibid, paragraphs 65-66).

In the context of the Aarhus Regulation, it is very difficult to imagine a situation where an EU measure that could contravene environmental law is implemented in relation to an environmental NGO. These national measures would be intended to regulate the behaviour of companies or public authorities, they would not regulate NGOs. Thus, to introduce this exemption into the Regulation would either be without any effect, if it was applied the same way as under Article 263(4) TFEU or, and this appears more likely, it would be applied in a way that would exclude NGO applicants altogether from access to justice. Ironically, ENGOs would usually not even be able to break the law in order to obtain access to courts, the very thing Art. 263 TFEU seeks to prevent according to the CJEU (ibid, paragraph 58 and case law cited).

Even assuming that none of the above issues would exist and an applicant would have standing to challenge national implementing measures in national court, practical issues prevent this from being an adequate remedy. First, it is fundamentally unclear which acts entail national implementing measures. In the preparation of its Study, Milieu Ltd. consulted the relevant DGs of the Commission as to whether EU acts adopted based on 481 legal bases would result in implementing measures. The Commission services only replied for 107 of the legal bases, i.e. less than 22%. For the remaining 78%, the Commission services left the question unanswered or replied with "don't know" (Milieu Study, footnote 275 on page 120). Moreover, the adoption of implementing measures will often be a possibility but not required by EU law (ibid, page 122). This would make the identification of the correct legal avenue for NGOs extremely challenging. As also confirmed by the Milieu Study, this is in addition to the fact that national legal proceedings will often be prohibitively expensive (ibid, pages 170-171 and 175), take many years to complete (ibid, pages 131 and 171) and are often prevented by the failures of national judges to refer questions (ibid, pages 132-133).[26]

Additionally, the proposal would apply the same rules for implementing measures at EU level. On this point the proposal provides for a possibility to request an internal review of this EU implementing act in order to challenge the overarching act, which makes this aspect less problematic. Nonetheless, it still leads to a situation where the applicant needs to wait that an act that contravenes EU law needs to be implemented first before it can be challenged.

[26] According to the Study, nearly 80% of preliminary references originate from only 7 of the 28 Member States, one of which has since then left the EU.

For this reason, the ACCC advice did not conclude that this aspect prevents compliance with Art. 9(3) AC (ACCC advice, para. 58). Nonetheless, this contradicts the prevention principle, which entails that environmental damage should be prevented before it occurs, and stands in the way of the efficient use of EU resources. It would therefore appear recommendable to remove this limitation altogether.

Exclusion of State aid decisions: Arts 106 and 107 TFEU under Art. 2(2) Aarhus Regulation

The Commission's proposal would maintain the current exclusion of Commission State Aid decisions under Art. 2(2) Aarhus Regulation. It may be argued that the findings of the ACCC in C128 were only published after the publication of the legislative proposal, which gives the Commission a form of excuse as to why it did not cover this in their original proposal. However, the obligation that State aid decisions need to comply with environmental law is not new and had, as discussed above, only been confirmed one month prior to the publication of the proposal in the judgement in *Austria v Commission* based on the Treaty (Judgement of the CJEU in Case C-594/18 P, paragraphs 42-45 and 100). Moreover, the Commission has not since made a supplementary proposal, as it has for instance recently done in the context of the EU Climate Law.[27]

The findings on C128 unequivocally establish the reason for which this continued exclusion fails to comply with the Aarhus Convention. Given that the Aarhus Regulation is amended right now, now would be the moment to remedy this non-compliance. Otherwise, the ACCC will have to continue its follow-up procedure after the MOP and the EU would need to amend the Aarhus Regulation another time. It is for this reason that the ACCC Advice calls on the EU to bear these findings in mind in the context of the current legislative procedure (ACCC advice, paragraph 70).

Admissible claimants: Other members of the public but NGOs

Finally, the Commission's proposal opts to not change the currently admissible applicants, maintaining the admissibility criteria as they are currently reflected in Art. 11 Aarhus Regulation. The proposal seeks to justify this based on the available remedies, the privileged role for NGO access to justice envisaged by the AC, the fact that NGOs are best placed to challenge acts of general scope and because access to individuals would result in a situation "similar to" *actio popularis* (Commission proposal, pp. 7-8.).

None of these arguments are particularly convincing. It is not clear why the existing avenues for an individual to challenge a contravention of environmental

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[27] Amendment Proposal, COM(2020) 563 final of 17 September 2020.

law in the public interst are broader than those available to NGOs. Moreover, the fact that the AC recognizes the special role of NGOs (Art. 3(5) AC; for the recognized special role of NGOs, see also Jendroska: 2020, pages 14-15) is not to be understood as meaning that individuals should not have access to justice, whether or not NGOs may be better qualified. Finally, without having discussed the criteria that individuals would have to fulfil, it cannot be said that giving individuals access to justice would amount to a situation similar to *actio popularis*.

Clearly, the formulation of satisfactory criteria is not an easy task. However, by simply refusing to engage in the discussion, the Commission stands on very weak ground, not only legally but also politically. The ACCC advice is unequivocal that there needs to be a possibility for members of the public other than NGOs to have access to justice. It is therefore difficult to imagine a scenario where the EU makes no proposal to that end, whatever its form, and the ACCC nonetheless considers the requirements of the Convention fulfilled. If the Aarhus Regulation does not address this issue, it will likely lead to similar problems as at the previous 2017 MOP.

Prohibitive costs

A final point may appear out of place in this section because it is not featured in the C32 findings nor in the ACCC advice, nor in the Commission's Proposal: prohibitive costs. It is nonetheless of crucial importance for compliance with the Convention. Art. 9(4) AC states that proceedings under Art. 9 AC may not be prohibitively expensive. In the first part of its C32 findings, the ACCC concluded that it not been provided with case law proving that this provision is not respected at EU level (C32 findings, part I, paragraph 93). However, recent developments suggest quite the contrary. There are essentially two issues in CJEU proceedings that may lead to a violation of this principle.

Proceedings before the CJEU are principally governed by the loser pays principle (Article 134(1) of the Rules of Procedure of the General Court, 2015 OJ L 105/1). Therefore, if an applicant appeals an internal review decision to the CJEU and loses, either before the General Court or on appeal, the Court will usually order the applicant to pay the costs of the defendant EU institution or body and of any intervening parties.

First, certain EU institutions, such as the European Commission, usually rely on internal counsel, which means that the costs will in practice be low (accommodation and travel to Luxembourg etc). However, other EU bodies have a tendency to rely on external counsel to represent them in the courts.[28]

[28] See for instance, Case T-9/19 *ClientEarth v EIB*, where the EIB is represented by external counsel.

The potential effect of this can be demonstrated at hand of the recent access to information cases, where the defendant (EU agency Frontex) requested the applicants to pay close to € 24,000 for instance. The Court finally fixed these costs at € 10,520.76 (Order of the EU General Court on Case T-31/18 DEP). While significantly lower, as a cost for one instance litigation, this costs would be prohibitive for smaller NGOs (as well as, potentially, individuals). Moreover, the Court did not consider relevant that the applicants had made use of their fundamental right to access to documents (Art. 42 Charter of Fundamental Rights). There was accordingly also no consideration of whether apportioning these costs would serve as an effective deterrence (or chilling effect) for applicants seeking to defend this fundamental right in Court and obtaining an effective remedy, in line with Art. 47 Charter of Fundamental Rights, in case it is violated. After all, an applicant applying to the Court needs to base this decision on possible cost exposure, as opposed to the assumption that he/she will win the case. Rather, the Court exclusively ruled based on whether the costs were proportional to the work incurred, which is not foreseeable for the applicant. The Court's approach makes advance cost calculation very difficult and is in itself a deterrent factor.

Secondly, the fact that the Court orders the applicant to pay the costs of intervening parties can lead to a potentially catastrophic explosion in costs. In a recent case concerning environmental information, the EU General Court ordered the applicants to pay the costs of 7(!) intervening industry associations (Judgement of the EU General Court in Case T-545/11 RENV, paragraph 118). This clearly opens the door to abuse, given that companies could intervene to discourage litigation altogether.

A real remedy for this issue would require an amendment of rules of procedure of the Court. However, as part of the Aarhus Regulation, a clarification could at least be made that the EU institutions or bodies shall not requests costs related to their legal representation and, in any event, none that are unreasonable.

Summary

To summarise, there are a number of strong points in the Commission proposal, specifically the deletion of the "individual scope" and "adopted under "environmental law" criteria. However, the proposal would not ensure compliance with Art. 9(3) AC, thus not fulfilling the objective of the amendment. Specifically, the exclusion of acts that entail implementing measures, the exclusion of State aid decisions, the lack of clarity concerning "legally binding and external effects" and the complete exclusion of individuals prevent the Aarhus Regulation's compliance with the Convention. Moreover, if not addressed, the issue of prohibitive costs may well lead to non-compliance with Art. 9(4) AC in the future.

3. Some further observations in relation to the EU legal order

While this article is mostly a descriptive account of the EU's difficult process towards implementing the Aarhus Convention's access to justice obligations, based on the example of this process a few observations can be made in relation to the EU legal order.

3.1. The EU's struggle with international law

First, the difficult process described above reflects the EU's continued struggle with international law, both legally and politically. Legally, the CJEU judgement in *Stichting Milieu* demonstrated once more the highly restrictive standard that the Court applies when assessing the compliance of EU acts with international law (Judgement of the CJEU in Joined Cases C-405/12 P and C-405/12 P). The Court's insistence that it could not review the Aarhus Regulation, as it had done in some cases related to the GATT and WTO, because it was not clear that the Regulation was meant to implement Art. 9(3) AC is a difficult position to defend. In any event, it is an expression of the Court's reluctance to accept the supremacy of international law except in very limited instances.

Politically, the position that the EU defended at the 2017 Meeting of the Parties, in particular as represented by the Commission, demonstrates a disregard for the bloc's international obligations vis-à-vis the other Parties to the Convention. The ACCC mechanism had been successful so far because of the consensus-based decision-making process. The EU's stance called this practice into question and opened the door to other Parties to equally refuse to endorse findings directed at them, thus undermining the mechanism as a whole. This stance of purported exceptionalism is very dangerous in the international arena, which is based on the idea that all contracting Parties assume equal obligations.

Due to both this legal and political approach, the Court and the European Commission has manoeuvred the EU in a corner. The Aarhus Regulation amendment is now the only means to rectify the issue before the MOP in October and it will be difficult to finalize the legislative procedure by then. It certainly does not represent the leading role that would be expected from the EU in international processes.

3.2. The consequences of overconstitutionalisation

One issue at the heart of the problem is that the standing rules are regulated in the TFEU, i.e. in primary as opposed to secondary law. Arguably, this is an example of what Grimm terms overconstitutionalisation of the EU (Grimm: 2015), which results in de-politicization of fundamentally political questions.

Since it has to operate within the constraints of Art. 263 TFEU, the Aarhus Regulation is an imperfect replacement mechanism. In the EU Member States, the rules regulating standing in administrative disputes are usually defined in legislation, as opposed to the Constitution. They can therefore be comparatively easily amended. In the EU, such a change requires the amendment of the Treaties.

The internal review mechanism is a clever way to circumvent the issue but it is by design limited. As the CJEU confirmed, an applicant is not able to contest the validity of the underlying act that contravenes environmental law. First, this has an impact on remedies because the CJEU cannot annul the actually contested act, only the internal review decision. The EU institution or body will, in accordance with Article 266 TFEU, be required to take the necessary measures to implement the Court's judgement. This should factually result in the withdrawal of an act, where necessary. Nonetheless, it is a significant legal difference.

Perhaps even more importantly, the distinction has an impact on the scope of review applied by the Court. Based on the Court's case law, an applicant is limited in his/her arguments to those raised in the internal review request (Judgement of the CJEU in Case C-82/17 P, paragraph 39) and may in Court only challenge the response to the internal review request for failing to recognize the alleged contravention of EU environmental law (Judgement of the EU General Court in Case T-33/16, paragraph 49. This is considerably different from a direct action, in which an applicant can challenge the actual decision based on any grounds available at the time when the court application is lodged.

Finally, this overconstitutionalisation limits the political options as regards the scope of access to justice. As discussed above, being an administrative review, it is very difficult to expand internal review to legislative acts. Nonetheless, judicial review of legislative acts is an established feature of EU law. Recently inadmissible cases moreover demonstrate that there are certainly grounds to challenge existing EU legislation on environmental grounds (see for instance, the arguments raised in the inadmissible CJEU Cases C-565/19 P and C-297/20 P). While this is not required by the Aarhus Convention, it would certainly contribute to bringing the Union closer to its citizens and improve enforcement of EU environmental legislation, if such a possibility to challenge EU legislative acts was provided.

The internal review mechanism is certainly a good solution within the remits of Art. 263 TFEU and, if amended along the lines envisaged by the ACCC advice, it will bring a significant improvement for access to justice and, by extension, for environmental protection and human health in Europe. Nonetheless, with a view to the future, sight should not be lost of the overarching issue of limited standing under the Treaties. The question must be asked

how standing should be regulated under the Treaties and whether the Treaties should regulate standing at all.

3.3. An unusual dynamic: Council vs Commission

As mentioned above, the Council's request to the Commission to prepare a study, and where necessary, a legislative amendment, was the first time Art. 241 TFEU was used in environmental matters. The reason it was used at all is likely connected to the realization by the Member States that the position prepared and defended by the Commission for the 2017 MOP was not in fact tenable.

One reason for this special dynamic lies perhaps in the fact that the Commission's own decisions are concerned. Internal review concerns non-legislative acts, such as those adopted by the Commission, and the majority of requests are submitted to the Commission. To leave the question whether Commission decisions shall be challengeable to the Commission entails a certain conflict of interest.

The special dynamic did not end when the Art. 241 TFEU decision was rendered. As discussed above, the Commission's proposal fails to ensure compliance with the AC. To ensure compliance with the AC was the explicit goal of the Art. 241 Council Decision. It is therefore again on the Member States, together with the Parliament, to decide whether they wish to ensure compliance with the AC or not. This puts the Member States in an unusual position, given that there usually tends to be a large amount of congruence between the positions of the Commission and the Council.

4. Conclusion

More than 15 years after the EU's accession to the Aarhus Convention, the implementation of Art. 9(3) AC in relation to acts and omissions of the EU bodies and institutions remains unresolved. The recent legislative proposal to amend the internal review mechanism under the Aarhus Regulation is a big step in the right direction. However, important amendments from the Council and European Parliament are needed to ensure compliance with the AC.

More broadly the process is interesting because it exemplifies the EUs continuous struggle to implement international law, the effects of the overconstitutionalisation of certain aspects of the EU legal framework and unusual dynamics in the institutional framework. These points could perhaps be the basis for further research.

When one takes a step back, it may appear surprising that the implementation of access to justice rights to challenge contraventions of environmental law is such a contested issue. One would assume that the legislative institutions

are interested that the laws that they adopt are respected by the EU institutions and bodies in practice. While the substance of laws meant to protect the environment is notoriously contested, one may assume that their enforcement, once agreed, should be much less controversial.

Whatever the reason, the real loss accrues to the environment and human health because laws meant to protect them can be bent or disregarded. In light of the European Green Deal, it is high time that accountability and accessible justice are guaranteed. This will be not only a win for the environment and human health, but also for the rule of law.

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Biden's Burden: cleaning up Trump's environmental mess

Brzemię Bidena: sprzątanie środowiskowego bałaganu po Trumpie

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Abstract: Before the US can make progress on climate policy or environmental policy more generally, the new administration of President Joseph R. Biden must first undo the damage created by his predecessor in office, who dismantled existing US climate policy, pulled the US from the Paris Agreement, and sought to disable the Environmental Protection Agency (EPA) from regulating polluters. The courts blocked some of the Trump Administration's more egregious anti-environmental protection policies for violating the 1946 Administrative Procedures Act and/or the express terms of an environmental protection statute (such as the Clean Air Act or Clean Water Act), but the Biden Administration still has a great deal of work to do. Already, Biden has announced that the US will rejoin the Paris Agreement as part of its plans not just to reinstate but to expand on climate policies adopted during the Obama Administration. This essay explains how the Biden Administration plans to achieve these climate policy goals, using mostly the very same administrative tools that the Trump Administration used to undo Obama era climate policies. Inter alia, advantages and disadvantages of pursuing policy goals administratively, rather than through legislative processes, will be addressed.

Key words: Administrative Procedure, Executive Orders, Climate Change

Abstrakt: Zanim Stany Zjednoczone będą w stanie zrobić postęp w dziedzinie polityki klimatycznej czy, mówiąc ogólniej, polityce środowiskowej, nowa administracja Josepha R. Bidena musi najpierw naprawić zniszczenia dokonane przez jego poprzednika na urzędzie prezydenckim, który rozmontował działającą do tej pory politykę klimatyczną USA, wyprowadził kraj z Porozumienia Paryskiego i rozpoczął proces odbierania Agen-

cji Ochrony Środowiska (EPA) możliwości przeciwdziałania trucicielom. Sądy blokowały niektóre z bardziej jawnych antyśrodowiskowych polityk forsowanych przez Administrację Trumpa z uwagi na naruszenia Ustawy o Procedurach Administracyjnych z roku 1946 i/lub wyraźnych postanowień zawartych w statutach o ochronie środowiska (takich jak Ustawa od Czystym Powietrzu lub Ustawa o Czystej Wodzie), ale Administracja Bidena wciąż ma wiele pracy do wykonania w tej kwestii. Do tej pory Biden już ogłosił, że USA powrócą do Porozumienia Paryskiego, jako część swoich planów nie tylko odbudowania lecz także rozszerzenia polityki klimatycznej przyjętej wcześniej przez Administrację Obamy. Niniejszy esej wyjaśnia jak Administracja Bidena planuje osiągnąć cele polityki klimatycznej, stosując w większości te same narzędzia administracyjne jakie Administracja Trumpa wykorzystała ażeby zdemontować politykę klimatyczną z czasów prezydentury Obamy. Autorzy koncentrują się, między innymi, na zaletach i wadach jakie niesie ze sobą administracyjne realizowanie celów raczej niż omawiają procesy prawne typowe dla tego obszaru.

Słowa kluczowe: procedura administracyjna, dekret prezydencki, zmiana klimatu

1. Introduction

On January 20, 2021, Joseph R. Biden was inaugurated as the 46th president of the United States, replacing Donald J. Trump. As Biden took office: (1) the COVID pandemic was raging in the US, in no small part due to the absence of federal leadership; (2) the economy (not to be confused with the stock markets) was in crisis; (3) America's international reputation was largely in tatters; and (4) the American public seemed more politically polarized than ever before. Climate policy was just one of many items on Biden's agenda for quick action. After Trump's hostility toward and willful neglect of the issue of climate change, Biden was no only intent on resurrecting preexisting climate policies but on positioning the United States, for the first time, to be a global leader.

On the issue of climate change, the transition from Trump to Biden could not be more stark. But this is hardly the first time a change in presidential administrations has led to major changes in climate policy. Since the beginning of this century, US climate policy has swung like a pendulum as Democratic presidents have given way to Republican president, and vice versa. Interestingly, none of the changes in climate policy has taken the form of legislative enactments. Since 1980, Congress has enacted only two major sets of amendments to pollution-control laws: the 1990 Clean Air Act Amendments (amending 42 USC §7401 *et seq*) and the 2016 Lautenberg Act amendments to the Toxic Substances Control Act (amending 53 USC §2601 *et seq*), neither of which directly concerned climate change. All of the pendulum swings in policy since the presidency of Bill Clinton in the 1990s have occurred despite a stable statutory equilibrium. One main reason for this is increasing political gridlock in Congress (particularly the Senate) has made the legislative process more

and more difficult to use for creating policy. Instead, presidents have resorted to policy-making by Executive Order (EO) directing federal agencies within the Executive Branch of government, including the Environmental Protection Agency (EPA), to issue, revoke or amend regulations. This shift in the mode of environmental governance must be understood to appreciate the problems Biden confronts, as well as his ability to effectively deal with them.

For that reason, the next part of this essay addresses the changing nature of environmental governance in the US, which has contributed directly to the chronic instability of US climate policy over the past 30 years. It will be followed by a section describing the pendulum swings of climate policy from Clinton to Bush (Jr.), from Bush (Jr.) to Obama, and from Obama to Trump. The final section concludes with a description of the Biden Administration's plans (to the extent they are known at the time this essay is written) not only to resurrect US climate policy after four years of Trump but also to stop the policy pendulum swinging back again by pushing climate legislation through Congress. Policies embedded in legislation will be far more difficult to repeal than any set of regulations Biden's EPA might promulgate.

2. Environmental governance by executive order and regulation v. legislation

President Trump managed to do a great deal of harm to US climate and environmental policy without Congress enacting a single piece of legislation. This was nothing new. Since before the start of the twenty-first century, environmental policy in the US has been made almost exclusively through administrative, rather than legislative, mechanisms (Steele 2020: 305).[1] Specifically, presidents enact policy by Executive Orders (EOs) that are binding on Executive Branch agencies, including the EPA. The agencies are obligated to issue rules and regulations that implement the policies referenced in EOs, unless doing so would violate the constitution, substantive statutory requirements (e.g., under the Clean Air Act, Clean Water Act, or Endangered Species Act).

Since the country's founding, all US presidents have relied to some extent on Executive Orders. George Washington issued eight of them, and up to the middle of the nineteenth century, they were used sparingly. No president before Franklin Pierce (who served from 1853 to 1857) issued as many as twenty EOs. Ulysses S. Grant (president from 1869 to 1877) was the first chief executive to issue more than 100 of them. During his eight years in office he

[1] The Lautenberg Act of 2016 is a singular exception.

issued 217 EOs. Grant's presidency was the "high water mark" for EOs in the nineteenth century. But at the turn of the twentieth century, the use of EOs exploded under Theodore Roosevelt ("TDR," president from 1901 to 1909). TDR signed more than 1,000 of them. President Herbert Hoover (serving from 1929 to 1933) issued 968 EOs, setting a record that still stands for one-term presidents. The record holder for presidents serving more than one term is held by TDR's cousin, Franklin Roosevelt ("FDR," president from 1933 to 1945), who signed a whopping 3,721 EOs.[2] No president since has come anywhere close to that number. In fact, contrary to the conventional wisdom, the use of EOs has declined sharply since the era of the "New Deal," World War II, and the Korean War. Dwight D. Eisenhower ("Ike," president from 1953 to 1961) issued just 484 of them during his two terms in office. Since Ike, no president has signed as many EOs. Indeed, the only presidents since 1960 who have issued more than 300 EOs are Richard Nixon (president from 1969 to 1974), Jimmy Carter (a one-term president from 1977 to 1981), Ronald Reagan (president from 1981-1989) and Bill Clinton (president from 1993-2001). Barrack Obama issued 276 EOs in his eight years as president. His successor Donald Trump issued 220 in just four years.[3]

Focusing on the use of EOs in environmental policy since the "environmental decade" of the 1970s, scholars observe a decline in legislative enactments and corresponding increase in substantive EOs since 1990:

Since the passage of the Clean Air Act Amendments of 1990 . . . Congress has had extremely limited success in enacting or amending any nationally significant environmental laws, making the unilateral, administrative action of the president one of the primary means of implementing environmental reform and advancing new policies (Jones 2019: 174, footnotes omitted).

According to William Rodgers (2001: 20), "[t]he full flowering of the executive order as an instrument of environmental policy occurred in . . . the Clinton Administration." Since Rodgers wrote that in 2001, three more presidents (G.W. Bush, B. Obama and D.J. Trump) have held office and there is, as yet, no sign that the flower is wilting. But why? Empirical scholars have offered

[2] Of course, FDR was president 50 percent longer than any one else, serving for just over 12 years. Still, his record is impressive. He averaged 310 EOs per year in office, which far outstrips any of his predecessors and successors in office. The president with the next highest annual rate of EOs is Wilson at 225 per year. Among one-term presidents, Herbert Hoover signed the most EOs (968), followed by Taft (724), Harding, who signed 522 in only 2.4 years, Jimmy Carter (320) and Donald Trump (220). (Author's calculations based on *The American Presidency Project*, UC Santa Barbara https://www.presidency.ucsb.edu/statistics/data/executive-orders#eotable.

[3] EO numbers per president are from The American Presidency Project at UC Santa Barbara, at https://www.presidency.ucsb.edu/statistics/data/executive-orders#eotable.

a plausible explanation that "policy is more likely to be enacted through executive orders when polarization is higher, control of the government is divided between parties, and certain salient policy issues are being debated" (Byers, Carson, and Williamson 2020: 18). In the US, since 1990, divided government has been the rule. One party or the other has held both houses of Congress and the White House for only 10 of the last 30 years (not including the results of the 2020 election, when the Democrats held the House and took back the Senate and the White House at least until 2023) (see, e.g., Ansolabehere, Palmer and Schneer 2017). How much divided government alone has affected the extent of legislative action on environmental protection is questionable, however, because divided government also prevailed for the first seven years of the 1970s, covering the most fruitful period of environmental law-making in American history. However, when issue saliency and political polarization are factored in, along with divided government, the propensity for rule by Executive Order, rather than legislation, increases. In the US, few issues are more salient at the national level than environmental policies, generally, and climate change, in particular. Meanwhile, political polarization in the US has increased dramatically since at least the turn of the twenty-first century, reaching levels in the waning days of the Trump Administration that threaten the stability of constitutional governance (see Cillizza 2020).

Not only does environmental policymaking by EO become more likely in political circumstances of divided government and high political polarization, it becomes more attractive to presidents than messy and lengthy legislative procedures. Creating policy by Executive Order has the virtue of not requiring an Act of Congress, a co-equal branch of American government that has become so dysfunctional that legislative processes have ground nearly to a halt. Even when it does function, Congress's legislative processes are undeniably cumbersome and time-consuming. The overwhelming majority of legislative proposals never become law, although those backed by the president may have a better than average chance. It can take well over a year for a piece of legislation to arrive on the president's desk for signature, and it might look very different from what the president originally proposed. EOs are a simple, though limited, alternative to the legislative process.

That said, creating environmental policy by Executive Order also has important limitations. Among them: (1) Most obviously, they must be in compliance with the US constitution; (2) they are only binding on executive branch agencies; (3) although EOs carry the force of law for those agencies, EOs are not laws, which is to say, they cannot contravene or amend existing statutory rules; (4) they have less permanence than legislative enactments. An EO signed by one president can be countermanded by an EO of the next. Thus, the relative

ease of ruling by EO also becomes its major weakness, while the cumbersome nature of legislative processes provide protection against casual amendment or revocation.

As for regulations promulgated under EOs, they are somewhat more difficult to change because every regulation must be in compliance with (a) the US constitution,[4] (b) "enabling" legislation (specific grants of rule-making authority from Congress, such as the Clean Air Act (42 USC §7401 *et. seq.*) provides to the EPA), and (c) the 1946 Administrative Procedures Act (5 USC §500 *et. seq.*), which requires that federal agency are supported by "substantial evidence" and are not otherwise arbitrary or capricious (see Cole 2016). Each of these requirements provide a handle for aggrieved parties to seek judicial review of regulations, giving federal courts much more authority to overturn regulations than they possess to overturn legislation, which they can only do on constitutional grounds. Even if regulations are more difficult to change than EOs, they remain far easier to change than legislation, which can only be amended or repealed upon approval by both houses of Congress and the president (unless congressional majorities are sufficient to override a presidential veto).

In 1996, Congress enacted the Contract with America Advancement Act (5 USC §§801-808), which included a section that become known separately as the "Congressional Review Act" (CRA) (5 USC §§801-804). Under the CRA, new "major" rules remain ineffective for at least 60 "session days" (i.e., days when Congress is in session) to give Congress a chance to disapprove them by joint resolution, which has the effect of a statute overruling the agency's regulation. As a practical matter, 60 session days can encompass more than three months. According to the US Senate's 2019 calendar, it took until mid-April to get to 60 session days.[5] A side-effect of delaying the effective date of new regulations under the CRA is that new presidents can simply suspend from becoming effective regulations still within the 60-session-day period at the end of the preceding administration (Shapiro 2015). When Trump took office in January 2017, he was able to suspend 180 rules issued by the Obama Administration dating back as May 2016 (Bellini 2017).

Despite the CRA, because it has become so difficult to enact legislation that, despite the disadvantages, presidents since the start of this century have relied more heavily on EOs and regulations for making environmental policy than statutory enactments.

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[4] Of course, failure to comply with the US constitution is also grounds for judicial invalidation of statutes and executive orders.

[5] Based on author's own calculations from Senate of the United States, One Hundred Sixteenth Congress, Calendar of Business, Final Issue, First Session, archived at https://www.govinfo.gov/content/pkg/CCAL-116scal-S1/pdf/CCAL-116scal-S1-pt0.pdf.

3. Making, reversing, and remaking US climate policy by executive order and regulation from Bill Clinton through Donald Trump

The history of climate change policy in the US is as idiosyncratic as the country's system of governance. Its overall approach to climate policy has shifted with every change in presidential administration. When Jimmy Carter was president in the second half of the 1970s, the US became the first country in the world to enact a statute requiring the development of an actual climate policy. The 1978 National Climate Program Act (15 U.S.C. §2901 *et. seq.*) found, as a matter of law, that climate change affects "food production, energy use, land use, water resources and other factors vital to national security and human welfare." The declared purpose of the Act was to "assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications (42 U.S.C. §2902). The statute provided for creation of a National Climate Program, across various governmental agencies, with a central office in the Department of Commerce, to plan, fund and undertake research into climate change and its effects on "agricultural production, water resources, energy needs, and other critical sectors of the economy" (15 U.S.C. 2904(d)(1)). Although the statute added support to ongoing scientific and social-scientific studies of climate change, and some preliminary planning was done, it became a dead letter when Ronald Reagan became president in 1981.

The Reagan Administration's sole action on climate change was to defund ongoing scientific research (Meyer 2018), which had the effect of transferring the center of scientific research from the US to the UK, where Margaret Thatcher (who was genuinely interested in scientific research) continued to fund climate research (Thatcher 1988). In fact, from 1981 to 1989, the US had no climate policy. However, the US did sign and ratify the 1985 Vienna Convention for the Protection of the Ozone Layer (U.N.T.S. vol. 1513, p. 293) and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (UN, Treaty Series, vol. 1522: 3), which unintentionally became the first treaty to mitigate climate change because ozone depleting substances (ODSs) also are powerful GHGs. As of 2010, "the decrease of annual ODS emissions under the Montreal Protocol [was] estimated to be about 10 gigatonnes of avoided CO2-equivalent emissions per year, about five times larger than the annual emissions reduction target [which was not met] for the first commitment period (2008-2012) of the Kyoto Protocol" (WMO 2010: ES.2) According to recent assessments, in the Artic region, avoided warming of 1.1˚C is attributable to the effects of the Montreal Protocol (Goyal et al., 2019).

When Reagan's Vice President, George H.W. Bush moved into the Oval Office in 1989, hostility to environmental policy generally and climate policy

in particular abated. During his first year in office, Bush created the U.S. Global Change Research Program, restoring some of the funding that the Reagan Administration had cut from scientific study of climate change. In 1990, he signed into law the Global Climate Research Act (15 U.S.C. §2921 *et. seq.*), which established a new National Climate Assessment to study the impact of climate change on the US. Bush also signed important amendments to the Clean Air Act (Public Law No: 101-549, amending 421 USC §7401 *et. seq.*) that had been held up in the Reagan Administration throughout the 1980s. Those amendments added an entirely new section to the Act designed to meet America's obligations under the Ozone Accords, which, as noted above, mitigated climate change as they phased-out ODSs. In fact, if actual reductions in GHG emissions is the litmus test, the 1990 Amendments to the Clean Air Act were perhaps the single most significant occurrence for US climate policy during the 1990s. To this day, it remains the only US statute to actually regulate emissions of GHGs, though only those that are also ODSs. In addition to new legislation, President Bush also signed the United Nation's Framework Convention on Climate Change (UNFCCC, 1771 U.N.T.S., 1771: 107), agreed to in 1992 at the "Earth Summit" in Rio de Janeiro. The US was the fourth country to sign and ratify the convention (Agrawala and Andresen 1999: 461), in part because it did not include mandatory emissions reductions, which was a necessary condition for the US to agree to the treaty – President Bush was not prepared to commit the US to reduce or even stabilize GHG emissions. Early ratification of the UNFCCC also put the US in a strong position to influence, i.e., slow down, the development of future, substantive protocols at annual meetings of parties (COPs).[6] The Bush Administration, did however, being the process of scrupulously implementing the UNFCCC's few actual requirements, including creation of a national inventory of greenhouse gases (GHGs) (UNFCCC, Art. 4.1.(a))When Bill Clinton took office in 1993, his Administration, for the most part, picked up where the Bush administration had left off. During his first year in office, the US created its first national "Climate Change Action Plan," as required under the UNFCCC, which included the goal of reducing GHG emissions to 1990 levels by 2000 via 44 action steps based on *voluntary* industry participation.[7] Of course, relying on voluntary industry efforts made a mockery of the action plan. The fact of the matter was that Clinton, despite Vice President Al Gore's influence, was not especially interested in using politi-

[6] It was not that the US wanted to push hard for GHG reductions; in fact, it was primarily responsible for the failure to agree on binding reduction commitments for five years (Kuyper, Schroeder, and Linner 2018: 345).

[7] Climate change action plan : Clinton, Bill, 1946- : Free Download, Borrow, and Streaming : Internet Archive.

cal capital on climate change. That said, Clinton did display some backbone in refusing to bow to pressure from the US Senate not to sign the Kyoto Protocol (KP) (U.N.T.S. 2303: 162) to the UNFCCC in 1997. In July 1997, just months before the Kyoto COP, the Senate voted unanimously (95-0) in favor of a resolution stating that the US should not sign any protocol that imposed emission reduction requirements on developed countries but not developing countries (S.Res.98, 105th Congress, 1st Session 1997).[8] Everyone knew, at that time, that the document being negotiated for signature in Kyoto later that year would impose binding emission reduction requirements only on developed countries. The Senate's resolution did not stop President Clinton from signing the Kyoto Protocol, though he (and everyone else) knew the Senate would not ratify it. In fact, he did not even bother submitting the protocol for Senate ratification. Consequently, the US did not become a full member of the parties to the Kyoto Protocol (CMP); and President Clinton took no steps to alter US policy in accordance with the Kyoto Protocol.

Clinton was followed into office by George W. Bush (Bush Jr), son of the previous President Bush. Unlike his father, Bush Jr did not claim to be an environmentalist. He had worked in the oil and gas industry, which would strongly influence his administration's environmental policy during his eight years as president. Among his first acts after taking office in January 2001 was to denounce the Kyoto Protocol and renounce America's commitment to it (Borger 2001).[9] Bush Jr's declaration was gratuitous because everyone already knew that the US Senate was not going to ratify the treaty; so the US was not going to be a treaty-member regardless. He need not have said a word about it, yet he so gratuitously, much to the annoyance of American allies in Europe. Was it simply a diplomatic blunder? Perhaps he was hoping that his denunciation would so demoralize the EU, its member states and other countries, that the treaty would simply collapse. Pursuant to the treaty's "entry into force" requirements, without US ratification, the treaty could only take legal effect if the EU, its member states, Russia and Japan all ratified it. As it happened, the US denunciation might have contributed directly to Russia's decision to ratify the KP in order to demonstrate to the EU and other countries that it was a more reliable partner than the US (Henry and McIntosh Sundstrom 2007: 58). If Bush Jr. was trying to prevent the KP from taking legal effect, it appears his effort backfired. "Instead of burying the Kyoto Protocol, the US announcement had

[8] A "resolution" passed by one house of Congress has no legal effect; it is a non-binding proclamation.

[9] Importantly, George W. Bush did not withdraw the US signature from the Kyoto Protocol; nor did he disavow or withdraw the US from the UNFCCC. This allowed the US to continue participating in COPs, where it could influence future developments.

the opposite effect, galvanizing the rest of the world into a much more positive and conciliatory negotiating attitude" (Depledge 2005: 20).

During Bush Jr's term in office, environmental groups petitioned the EPA Administrator to make an "endangerment finding" for carbon dioxide under Title II of the CAA. The Act allows members of the public to petition for a finding that some as-yet unregulated pollutant endangers public health and welfare. When the petition arrives at EPA, the Administrator has a nondiscretionary obligation to find that the alleged pollutant either does or does not endanger public health and welfare. Such endangerment findings are provided for in both Article I of the statute, dealing with stationary sources of pollution, and in Article II, which concerns motor-vehicle emissions. On this occasion, the environmental groups petitioned for an endangerment finding under Title II for complex strategic reasons relating to the differing consequences of endangerment findings under Titles I and II. An endangerment finding under Title I requires the EPA to develop criteria document for setting national ambient air quality standards (NAAQS) for the pollutant at levels that would protect public health with an adequate margin of safety. But with a global diffused pollutant like carbon dioxide, emitted from sources all over the world, setting NAAQS would be extraordinarily difficult, if not impossible. An endangerment finding under Title II would avoid that problem, though initial emission standards would be imposed only upon motor vehicles. But, as we shall see, provisions in Title I of the Act provides for stationary-source regulation of some pollutants under Title II, providing a backdoor into Title I without an endangerment finding under Title I.

When EPA received the petition, Administrator Stephen Johnson refused to make a finding, one way or the other, claiming that carbon dioxide was not contemplated as a possible pollutant when the CAA's legislative drafters enacted the statute (in 1970). He argued that to regulate carbon dioxide as an air pollutant would require a legislative amendment to the Act. The petitioning environmental groups, along with several states, sued the EPA for refusing to make a finding, arguing that nothing in the Act ruled out the possible treatment of carbon dioxide as an air pollutant. The case made it all the way to the US Supreme Court, which ruled 5-4 in favor of the plaintiffs (*Massachusetts v. EPA,* 549 US 497 (2007)). The Court rule that Administrator Johnson could not avoid his nondiscretionary duty under the CAA by claiming that carbon dioxide was outside of the purview of the statute. The administrator had to make a finding that carbon dioxide (from mobile sources) either endangered or did not endanger public health and welfare. With the science stacked against him, Johnson made the requisite endangerment finding under Title II, which would trigger regulation of carbon dioxide from mobile sources. But the Bush Jr Administration ran out the clock all the way to January 2009, when President

Obama took office, without issuing any such regulations. In fact, the White House petulantly refused even to accept delivery of Administrator Johnson's endangerment finding.

As a candidate for the White House, Barack Obama campaigned on three policy priorities: (1) putting an end to the economic depression that followed the 2008 financial industry crisis; (2) increasing the availability of health care to the working poor and jobless; and (3) climate change. During his first term in office (2009-2014), he successfully accomplished the first two, but failed on the third.

In 2010, the House of Representatives actually passed climate legislation, but it never even came to a vote in the Senate. Some have suggested that Obama lacked "political courage," and might have been able to push the legislation through the Senate had he tried (Pooley 2010; Revkin 2010). They have a point. The bill did not fail solely because Republicans opposed it; some Democrats did so as well, and the question is whether President Obama could have changed their minds. However, Obama doubted prospects for Senate passage, even though his party held enough seats that closing debate and bringing the bill to a final vote was entirely feasible.[10] And chances for passage vanished completely, in his view, after the April 2010 British Petroleum oil spill in the Gulf of Mexico, which left environmentalists in no mood to make the kind of compromises necessary to attract Republican votes (see Osaka 2020). In any case, 2010 was the last time before 2021 when the Democratic Party controlled both houses of Congress as well as the White House. However difficult it might have been to pass climate legislation through the Senate at that time, chances fell to nil after the 2010 midterm elections, in which Republicans gained control of the House.

Obama continued to pressure Congress to enact climate legislation after the disastrous 2010 midterm elections, but that pressure just took the form of an assurance that, if Congress did not act on climate change, he would use his executive authority to regulate greenhouse gases under the CAA (Lehmann and Massey 2013), an approach that almost assuredly would be more cumbersome and expensive for regulated entities. This was not only a threat but an acknowledgement of a legal obligation to act. At the very start of his first term in office, Obama's EPA Administrator Lisa Jackson, dusted off the Bush Jr EPA's belated endangerment finding for carbon dioxide, put her own signature on it, and sent it to the White House, which this time accepted delivery. The endangerment finding took effect on 15 December 2009. It had the legal effect of obligating the Obama EPA to regulate carbon dioxide as an air pollutant under

[10] For an explanation of Senate rules for cutting off debate and calling a vote, see *infra* the section on President Biden's plans for climate legislation.

Title II of the CAA. The only way to avoid that obligation would have been for Congress to enact legislation to remove carbon dioxide from the ambit of the CAA. Even before Congress failed to enact climate legislation before the end of his first term, Obama's EPA was already working to fulfill its obligation under the endangerment finding for carbon dioxide, promulgating several regulations, in a specific order, to make the most of its authority under the CAA.

Even before Congress took up climate legislation in 2010, the Obama Administration was beginning to implement climate policies via regulations. First, the Obama EPA issued a waiver to the State of California, allowing that state to adopt its own emission standards for carbon dioxide. Under the CAA, states must all follow federal auto emission standards, except California, which can apply to EPA for a waiver to set its own, more stringent standards. During the Bush Jr Administration, California had applied for such a waiver from (nonexistent) federal auto-emission standards. The EPA denied the request. But during Obama's his first week in office, he instructed EPA to reconsider California's waiver request. EPA responded quickly, approving the waiver in July 2009. Consequently, the State of California had carbon emission standards for light duty motor vehicles before any national standards were in place.

In October 2009, Obama's EPA acted to fulfill an obligation under the UNFCCC, establishing a Mandatory Greenhouse Gas Reporting Rule (40 CFR Part 98). Aside from complying with international legal obligations, another express purpose of this rule was to provide a better understanding of the sources of GHG emissions to guide development of policies and programs to reduce emissions. The rule required large emitters of GHGs, defined as those emitting 25 thousand metric tons or more each year of carbon dioxide equivalents, to collect data and report annually on GHG emissions under a new recording system. All told, the rule covered between 85 and 90 percent of total US GHG emissions from approximately ten thousand facilities. The rest of President Obama's climate policies were designed to meet a pledge he made at the 2009 COP in Copenhagen that the US would reduce GHG emissions 17 percent from 2005 levels by 2020 (Broder 2009).

A spate of climate regulations followed, in accordance with the 2009 Endangerment Finding for greenhouse gases. In May 2010, EPA and the National Highway Traffic Safety Administration issued a joint rule regulating GHG emissions from automobiles (measured in grams per mile) and imposing more stringent fuel-economy standards for automakers (measured in miles per gallon). This combined "Tailpipe Rule" applied to new model cars sold between 2012 and 2016 (75 Fed. Reg. 25324).[11] In addition to regulating carbon dioxide, the

[11] In 2016, the Obama Administration issued more stringent combined emission and fuel-economy standards for the 2017-2025 model years (77 Fed. Reg. 62624). That same year, it imposed

standards included limits on emissions of two other greenhouse gases, nitrous oxide and methane. The following year, EPA created the first GHG regulation for larger vehicles, including trucks and busses (76 Fed. Reg. 57106).

Once the mobile source regulations were in place, the CAA provided a "back-door" for the agency to start regulating stationary-source emissions even in the absence of a separate endangerment finding under Title I.[12] Specifically, under Title I, Part 4 of the Act, any new "major" source of emissions subject to permitting requirements (under Title V of the CAA) under Title I could also be subject to controls for "any air pollutant," including those not otherwise regulated under Title I (42 USC §7479(1)). A "major" source is defined as one that is among 28 classified (heavy industrial) sources with the potential to emit 100 tons per year (tpy) or more of "any air pollutant," or is a non-classified source with the potential to emit 250 tpy of such pollutants. (42 U.S.C. §7479(1)). The purpose of the two regulatory "floors" was to exclude from PSD regulation relatively small-scale emitters from the burdensome PSD rules. But they presented special problems with respect to regulating carbon dioxide, which is emitted in vastly greater quantities than other pollutants and by a vastly larger number of sources. Following the strict limits set in the CAA, EPA foresaw that it might have to regulated tens of thousands of sources under PSD rules, which was both impracticable and undesirable. EPA tried unsuccessfully to created alternative regulatory floors for carbon dioxide, but the US Supreme Court would not allow the agency to deviate from standards expressly imposed in the statute (Utility Air Regulatory Group v. EPA, 134 S .Ct. 2427 (2014)). But the Court upheld the rest of EPA's efforts to subject large, new stationary sources to GHG emission standards under a preexisting EPA regulation defining pollutants to which PSD rules apply to include "any pollutant otherwise … subject to regulation under the Act" (except for toxic air pollutants regulated under § 112) (40 CFR 52.21(b)(50)(iv)).

Finally, and most controversially, in August 2015 the Obama EPA finalized the "Clean Power Plan" (CPP) (80 Fed. Reg.: 64719) , one of the (if not *the*) most mind-bogglingly complex regulatory programs ever created under the CAA. The CPP focused on the single largest source of GHG emissions in the US: fossil fuel-fired power plants. The first part of the CPP focused on new plants, and the second part regulated emissions from existing power plants. The first part was fairly simple. Taking advantage of the fact that no new coal-fired power plants had been built in the US for several years because the price of natural

"Phase II" rules for carbon emission standards on heavy-duty vehicles, including trucks and busses (76 Fed. Reg. 57106).

[12] Recall the earlier discussion of the problems an endangerment finding under Title I would have created for EPA with respect to carbon dioxide emissions from stationary sources.

gas was significantly lower than the price of coal, the EPA imposed regulations (under 42 USC §7411(b)) that would apply only to new coal-fired plants, not to gas-fired plants,[13] should the price of coal ever again fall below the price of natural gas. Specifically, new coal-fired power plants would be required to install technology for complete capture and storage of all GHG emissions. For existing plants, the EPA would establish standards (under 42 USC §7411(d)) to require existing power plants to engage in fuel-switching (from coal to natural gas and eventually to renewables) or install carbon capture and sequestration technology. Any further description of the CPP would involve the reader in a Byzantine set of rules, guidelines and choices for individual states to make, either alone or in combination.[14] Republicans in the House and Senate tried to use the Congressional Review Act (discussed earlier) to overturn the CPP. Both bodies passed resolutions by majority vote, but President Obama vetoed them (Cama 2015), and Republicans apparently did not votes enough to override the veto. Meanwhile, like all other Obama-era climate change regulations, the CPP was challenged in court by states and power companies on a wide variety of grounds. While it was before the DC Circuit US Court of Appeals on judicial review, the US Supreme took the unprecedented step of halting implementation and enforcement of the CPP until the litigation was resolved (*West Virginia v. EPA*, S.Ct. No. 15A773, 9 Feb. 2016).[15]

This was the state of US federal climate policy when Donald Trump took office in January 2017: Obama's "Tailpipe Rule" was in effect and new stationary sources subject to Title V permitting were undergoing New Source Review under the CAA's PSD program, but the Clean Power Plan was in abeyance, pending final judicial review. Ultimately, the Supreme Court's stay on the CPP remained in effect until the Trump EPA formally revoked it and finalized a set of regulations to replace it in 2019 (Shouse, Ramseur, and Tsang 2020: 4, n. 22).

President Trump's policies for climate change can be summarized succinctly: remove the US from the Paris Agreement and repeal or replace nearly every climate change regulation promulgated during the Obama Administration. This was no surprise. Trump campaigned, in part, on protecting the coal industry not just against government policies but from market forces that were closing down mines (Davenport 2016). Overturning Obama's climate policies was part

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[13] Some environmentalists considered this limitation short-sighted. After all, methane is four times more powerful a GHG than carbon dioxide. However, EPA considered the CPP as but a first step toward eliminating all GHGs emitted from power plants. Given the relatively huge quantity of carbon emissions compared to methane, the EPA determined that moving in the short-term from coal to natural gas was justified.

[14] To get just a taste of the complexities of CPP rules for existing power plants, see FACT SHEET: Overview of the Clean Power Plan | Clean Power Plan | US EPA.

[15] https://www.supremecourt.gov/orders/courtorders/020916zr_21p3.pdf.

of a larger obsession that Trump appeared to have to completely undo Obama's legacy (Baker 2017). But there was one glaring exception in Trump's climate policies: He did not seek to revoke the Obama Administration's Endangerment Finding for carbon dioxide. Indeed, in litigation before the US Court of Appeals for the DC Circuit, Trump's EPA attorneys "acknowledged its continued adherence to the 2015 endangerment finding" (*American Lung Association v. EPA*, 985 F.3d 914, at 935 (D.C. Cir. 2021)).

On 28 March 2017, President Trump issued EO 13783, "Promoting Energy Independence and Economic Growth," which among other things, expressly revoked Obama's 2013 EO 13653, "Preparing the United States for the Impacts of Climate Change," along with three related presidential memoranda and Obama's 2013 Report on his "Climate Action Plan." Section 4 of Trump's new EO ordered EPA to take "all steps necessary" to review all Obama-era climate regulations, with a view to revising or revoking them, including regulations of new stationary sources under the PSD program and the Clean Power Plan. The EO also abolished Interagency Working Group on Social Cost of Greenhouse Gases that had been established during the Obama Administration.

Three days later, the EPA formally proposed a new rule to replace Obama's "Tailpipe Rule" with its own "SAFE" rule ("Safer Affordable Fuel Efficient Vehicles" rule). The first part of SAFE, known as "The One National Program" rule revoked California's waiver under the CAA to regulated auto emissions of GHGs, was finalized on 19 Sept. 2019 (84 Fed.Reg. 51310). It was the first time any president had even claimed authority to revoke a previously granted California waiver. Part II of SAFE, finalized on 31 March 2020 (85 Fed. Reg. 24174), imposed new federal GHG emission standards and fuel-economy standards for cars built in model years 2021-6 that were far less stringent than under Obama's Tailpipe Rule. Obama's rule required a 5 percent annual reduction in auto emissions of GHGs. Under Trump's SAFE rule, automakers were required to reduce GHG emissions by only 1.5 percent per model year (which was a big improvement on the 0 percent reductions originally proposed for SAFE). The SAFE rule took an unusually long time to finalize, three full years. In part, this was because it lacked political support from many of the automakers that Trump presumed would benefit from the rule. In fact, before the SAFE rule was finalized, four automakers entered into an agreement with the State of California to meet that state's GHG emission standards, regardless of federal rules (Shepardson and Klayman 2019).

Shortly after the SAFE rule was initially proposed in 2017, President Trump announced that he intended to withdraw the US from the Paris Agreement at the earliest opportunity (Shear 2017). The Paris Agreement requires four years' notice for withdrawal. So, the US did not actually leave the Paris Agreement until the day after the Fall 2020 presidential election (Hersher 2020).

Finally, in August 2018, President Trump's EPA proposed to revoke and replace Obama's CPP, which was still in abeyance because of the Supreme Court's 2016 stay, with the "Affordable Clean Energy" (ACE) rule. The rule was finalized a year later (84 Fed. Reg. 32534). While the ACE rule purported to "replace" the CPP, it basically replaced Obama's federal program for controlling emissions from existing stationary sources with no federal program. Rather, the EPA simply instructed states to set emission standards to reduce carbon dioxide emissions from existing power plants, in accordance with minimal federal guidelines for coal-fired plants and virtually no guidelines for other fossil fuel-fired sources (Shouse, Ramseur and Tsang 2020: 5-6). Suffice it to say that estimates for carbon dioxide emission reductions from the ACE rule were minimal, less than 1 percent (Ibid. at 6). Importantly, the ACE rule applied only to existing power plants (under §111(d) of the CAA) and not to new plants (under §111(b)). Standards for new sources were dealt with in a separate rule-making that did not seek to repeal the Obama standards but only to weaken them. In December 2018, a half-year after proposing to repeal the CPP, the Trump EPA proposed a "Review of Standards for Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units." The final version of the rule was not completed until 13 Jan. 2021, little more than a week before Trump left office (86 Fed. Reg. 2542). The rule would have greatly reduced the number of electric power plants subject to GHG emission standards under §111(d) by imposing as a precondition for regulation that emissions from a specified plant exceeded three percent of total US GHG emissions.

All told, these efforts by the Trump Administration to overturn Obama's climate policy legacy have been largely unsuccessful. Each was challenged in court for allegedly violating the CAA and/or the 1946 Administrative Procedures Act. As noted earlier, every federal executive agency rule, including *deregulatory* rules, must comply with the constitution, its "enabling" statute (in this case, the CAA), and the APA. Twelve environmental NGOs along with several states sued to overturn Trump's SAFE rule for auto emissions and fuel efficiency, and California sued to stop Trump's attempted revocation of its waiver to set GHG emissions from automobiles. Both of those cases were still pending when President Trump's term ended. However, Trump's ACE Rule was already overturned and remanded to EPA one day before Biden took office. On 19 January 2021, the DC Circuit US Court of Appeals ruled that the ACE Rule was based on a fundamental misreading of the relevant provision of the CAA (*American Lung Association v. Environmental Protection Agency*, 985 F.3d 914 (D.C. Cir. 2021)). The court did not, however, reinstate Obama's CPP, leaving the incoming Biden Administration a free hand to construct a new regulatory scheme for regulating GHG emissions from existing fossil fuel-fired power plants.

4. President Biden's climate policy (to date)

As the time of this writing, Joseph Biden has been in the White House for just over two months. In that short period of time, he already has taken several affirmative steps indicating an intention not just to restore the Obama Administration's policies but to go far beyond them. Importantly, those plans include legislative proposals that could put an end to, or at least greatly reduce, the pendulum swings in climate policy, resulting from policy-making by EO and regulation.

On his first day in office, Biden put on hold nearly 50 Trump EPA rules for review (not all of which related to climate change) (Hale and Christian 2021), and announced, in a presidential statement,[16] that the US would rejoining the Paris Agreement (effective one month after the announcement). He asked the courts to stay judicial proceedings reviewing Trump's SAFE regulation, including the part that revoked California's waiver to regulate GHG emissions from mobile sources. At the same time, in EO 13990, Biden instructed the EPA and NHTSA to create a new, joint rule for mobile source emissions and gas mileage. That new rule is certain to more closely resemble Obama's "Tailpipe Rule" than Trump's SAFE rule. Although Biden has not yet formally withdrawn the Trump EPA's rule purporting to revoke California's waiver for GHG emissions limitations on mobile sources, it is a foregone conclusion that California will retain that authority.

Since taking office, President Biden has signed a half-dozen EOs relating to climate change. The most important of those is EO 14008 (Jan. 27, 2021), "Tackling the Climate Crisis at Home and Abroad." That EO:

- Makes climate change an "essential element" of US foreign policy and national security;
- Calls for an "enhanced climate ambition," using the terminology of the Paris Agreement;
- Instructs EPA to begin the process of setting a new Nationally Determined Commitment under the Paris Agreement;
- Announces a new "climate finance plan" to assist developing countries with mitigation and adaptation;
- Establishes a "government-wide approach" to reduce GHG emissions from every sector of the economy;
- Sets a goal of a "carbon pollution-free electricity sector by 2035;"
- Requires the achievement of zero-emission motor vehicle fleets for all federal, state, and tribal entities.

[16] Paris Climate Agreement | The White House

• Calls for the elimination of *all* federal fossil-fuel subsidies, starting with the 2022 fiscal year federal budget;

• Establishes a new “green infrastructure” program, including creation of a “Civilian Climate Corps;”

• And introduces a “Climate Justice” initiative to ensure that poor and minority communities in the US are not left to bear the brunt of the harm from climate change.

This is by far the most ambitious climate action plan of any US presidential administration to date, though it remains just a plan in the form of an EO. In addition, President Biden hopes to break the cycle of pendulum swings on climate policy between Democratic and Republican administrations by enacting legislation to implement several of the most important components of his plan. In fact, the Democratic leadership in the US House of Representatives already have introduced a bill, H.R. 1512, “The Clean Future Act,”[17] which would require attainment of Biden’s goal of zero GHG emissions (including methane) from electricity by 2035, with an interim target of a 50 percent reduction by 2030. Beyond the energy sector, Title III of the bill sets goals for improving energy efficiency in buildings, and Title IV seeks to reduce emissions from transportation, which is currently the largest source of GHG emissions in the US by developing cleaner fuels and promoting the deployment of zero-emission vehicle (including electric cars that obtain their power from power plants). Title VI would implement Biden’s plan to ensure that environmental justice considerations are taken into account at every stage of planning, implementation and enforcement. It is noteworthy that this new statute is not contemplated as a set of amendments to the CAA but as standalone legislation, although it is not yet clear what effect its enactment might have on regulation of GHGs under the CAA, e.g., whether it would remove GHGs from the ambit of the CAA.

In addition to the “Clean Future Act,” more progressive members of the Democratic caucus in Congress have proposed H.R. 794, “The Climate Emergency Act of 2021.” This bill would simply require President Biden to declare a national “climate emergency,” which would enable him to “’redirect military funds to build clean energy systems, marshal private industry for clean technology manufacturing, generate millions of high-quality jobs and finally put an end to dangerous crude oil exports” (Stracqualursi, Diaz, and Grayer 2021).

But can either of these legislative proposals, or any others dealing with climate change, actually succeed, given congressional gridlock and the extreme balkanization in American politics? President Biden has at least a short window of opportunity to enact climate legislation, just as Obama did in the first two

[17] A draft of the bill can be viewed here: https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/ CFA21_01.XML_.pdf.

years of his administration, when Democrats held the majorities in both the House and the Senate. Now, for the first time since the 2010 midterm elections, Democrats again hold both houses of Congress and the White House. However, so long as Senate rules requiring a supermajority vote of 60 Senators to close off debate and call the vote remain unchanged, the likely result would be that Biden's climate legislation would fail, just as in the Obama Administration.

Through its first century of existence, the US Senate operated pursuant to a system of unlimited debate. Senators would talk as long as any of them had something more to say, then they would vote. This was not a constitutional requirement. In fact, in Federalist Paper 22 (14 Dec. 1787) Alexander Hamilton described a minority veto as "a poison" (Hamilton [1787] 2020).[18] The manual of parliamentary practice Thomas Jefferson wrote for the Senate specified that "'No one is to speak impertinently or beside the question, superfluously or tediously'" (quoted in Jacobi & VanDam 2012: 273). However, the constitution authorized lawmakers in the House and Senate to make their own respective rules of procedure. Initially, both houses of Congress included among their rules a device to limit debate known as the "previous question" rule (McKeever 2021). However, it was hardly ever invoked in the Senate, where a contrary norm of unlimited debate developed quickly. With only 13 states at the outset, the Senate had just 26 senators, which made unlimited debate feasible, even if it was not always desirable. In 1806, on the recommendation of Vice President Aaron Burr, the Senate removed the previous question rule from its rule book. Though senators sometimes complained about abuse of the unlimited debate norm to forestall legislation (Ibid.), use of unlimited debate to forestall legislation remained rare. By the 1850s, however, the term "filibuster" came into use to describe the practice that was becoming increasingly common, often holding up legislation on civil rights and slavery (Ibid.). For the next 50 years, the Senate vainly attempted to create a "cloture" rule, *i.e.*, a rule to end debate and call the vote, but it was not until 1908 that a "cloture" rule was adopted, which allowed a two-thirds majority of Senators to end debate. That two-thirds supermajority requirement quickly proved such a high bar that cloture votes rarely succeeded. [19]

As the twentieth century progressed, use of the filibuster increased dramatically, most often in the service of obstructing civil rights legislation and maintaining white supremacist institutions. Southern senators, overwhelmingly Democratic

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[18] The "Federalist Papers," are a collection of 85 essays by Hamilton, James Madison, and John Jay that were published during the constitutional ratification debates in the US. They remain authoritative sources for purposes of constitutional interpretation.

[19] The last time either party held 60 or more seats in the US Senate was in the 95th Congress (1977-79), when the Democrats held 61 seats (Cillizza 2007).

(because of the Republican Party's association with Abraham Lincoln) became a formidable and durable "minority faction" that frequently mounted successful filibusters against bills designed to reduce discrimination on the basis of race, such as poll taxes used in the Southern US to prevent Black Americans from voting. The coalition of Southern Senators managed to delay a vote on the Civil Rights Act of 1964 (42 USC §§2000a *et. seq.*) for 60 "session" days (Ibid.). In the mid-70s, reformers managed to change the super-majority cloture requirement from two-thirds to three-fifths (Ibid.), but that reform made little practical difference.

More productively, in May 1974 Congress enacted (and President Richard Nixon signed into law) the "Congressional Budget and Impoundment Control Act" (a.k.a., the "Budget Act") (2 USC §§601-688), which was designed primarily as a mechanism to improve congressional oversight of government spending. Among other things, the statute authorized "omnibus reconciliation legislation to square Congress's spending targets with its policy proposals" (Jacoby and VanDam 2012: 294). "Reconciliation's main role in the overall operation of the Act was to provide an 'enforcement procedure' for the spending limits established in other parts of the legislation" (Ibid.: 295). Most importantly for present purposes, the reconciliation portion of the Budget Act specified that "[d]ebate in the Senate on any reconciliation bill … and all amendments thereto and debatable motions and appeals in connection therewith, shall be limited to not more than 20 hours" (2 USC §641(e)(2)). This meant (and still means) that budget reconciliation bills could not be filibustered. And it gave rise to high stakes question: What counts and does not count as budget reconciliation? Needless to say, proponents of legislation in the Senate will use budget reconciliation as often as possible to avoid potential filibusters. It is up to the Senate Parliamentarian to make judgment calls on what is and is not reconciliation, though the Parliamentarian (who is not an elected member of the Senate) can be overruled by the presiding officer of the Senate, otherwise known as the vice president. In any case, the Budget Act limits the number of reconciliation bills to three per year.

Two other, more recent, reforms have also made a significant dent in the ability to use the filibuster. First, in 2013, when the Democrats controlled the Senate, they unilaterally created a rule that federal judicial confirmations, other than to the Supreme Court, could proceed on a simple majority vote to close debate (Everett and Kim 2013). Four years later, Republicans returned the favor, when they added Supreme Court nominees to the list of federal judges that could not be filibustered (Tau and Hughes 2017).

While these filibuster reforms have been significant, it remains the case that the vast majority of legislative proposals remain subject to filibuster in the Senate, where cloture still requires a three-fifths majority vote. So, controversy

remains over the extent of minority party control of the process. Meanwhile, as more people become aware of the filibuster's historical use for racist purposes, defenders of the institution have been put on the defensive. For several years, "progressive" Democrats have advocated to abolish the filibuster. Increasingly, they have been joined by more "moderate" Democrats, though they might prefer additional reform of the institution rather than its outright eradication. President Biden, who served in the Senate for more than three decades, initially dismissed the idea of abolishing the filibuster (Barrón-López 2021). But when Senate Republicans early on gave a clear indication that they will filibuster as much of his legislative agenda as possible, the president very recently came out in support of amending the institution and possibly ending it (Segers 2021).

As Obama's Vice President, Biden surely recalls how Senate Republicans blocked every legislative proposal they could in order to render Obama, in Senator Mitch McConnell's words, a "one-term president" (Barr 2010). However, the Democrats held a decisive majority of 58 seats in the Senate for the first two years of his administration, and the two Independent members of the Senate at the time caucused with the Democrats. Thus, the majority party was capable of invoking cloture to end filibusters, as they did with respect to parts of the 2010 Affordable Care Act ("Obamacare") (42 USC §18001 *et. seq.*). The climate legislation that failed in the Senate in 2010 did not do so because of the filibuster; more than a few Democrats in the Senate did not support the legislation.

Unlike Obama, in his first two years, President Biden does not have enough Democratic senators to overcome the filibuster, which might explain his recently expressed willingness to amend or get rid of the filibuster rule. He knows that his window for enacting legislation of any kind, including climate legislation, may close as early as 2023 (after the 2022 midterm elections). If history is any guide, he is likely to suffer from the "presidential penalty" (Erikson 1988: 1012). Since 1876, the president's party has lost seats in both houses of Congress in all but three midterm elections (Folke and Snyder 2012: 931).[20] If Biden loses one (net) seat in the Senate, his party will go back into the minority, and Republicans will control the agenda. He will have lost the ability to establish climate (or any other) policy by legislation. Over in the House, the Democrats currently hold only nine more seats than the Republicans. In the 2020 election, Democrats actually dropped eight House seats on net. Meanwhile, the president's party loses an average of 30 seats in midterm elections (Murse 2020). The only rational basis for moving forward with his legislative agenda is to get as much done as possible before the start of 2023. If Biden fails to move with

[20] The exceptions are 1934, 1998, and 2002.

alacrity, he will soon become unable to move at all. All the more reason to change the filibuster rule in the Senate. But, as of this writing, he would still need to convince a couple of Democratic senators who have expressed reservations about changing the filibuster (Manchin of West Virginia and Sinema of Arizona) presumably because they believe doing so would threaten their own political futures.

Indeed, even if Senate Democrats vote to abolish the filibuster (or limit it sufficiently to achieve cloture on Biden's legislative package), Biden might still have a lot of work to do to convince members of his own party in the Senate, especially those who are up for reelection in 2022, to vote in favor his climate legislation. It is not a foregone conclusion that the Democratic caucus in the Senate will hang together on floor votes. Biden will have to work a lot harder than Obama did even to get members of his own party in the Senate to vote in favor of his climate legislation.

The end on a note of relative optimism, it is possible that some legislative proposals relating to climate change might be accomplished under the budget reconciliation exception to the cloture rule. For example, a carbon tax might qualify because it has direct budget implications (on the revenue side). In addition, Biden could likely end most, if not all, subsidies to fossil fuels as a budget reconciliation matter (e.g., as spending reduction). Other elements of his plan that might be accomplished using budget reconciliation include resurrecting the federal Social Cost of Carbon estimate, a new climate finance initiative, and possibly some green infrastructure spending. However, that still leaves very important parts of Biden's climate plan subject to filibuster, including his decarbonization targets.

Even in a best-case scenario, President Biden will not be able to achieve all of his climate goals through legislation. Frankly, for some of his goals, such as reestablishment of the Inter-Agency Working Group on Climate Change, legislation is not only unnecessary but makes little sense. The system of environmental policy-making by EO and regulations is not coming to an end. But we can hope for at least some legislative accomplishments that will be more durable than either EOs or regulations. After all, even if Republicans take back both houses of Congress in the 2022 midterm elections, President Biden will still be in office to veto legislative proposals to undo whatever legislative accomplishments he can muster in the next two years. It is extremely unlikely that Republicans will gain enough seats to have a veto-proof majority. Just like "Obamacare," which has survived dozens of legislative attacks by Republicans, once in place, climate legislation might prove very difficult to dislodge. Even if the current Congress passes a relatively weak climate change package, it would be a step in the right direction. Just as Biden is seeking now to improve and strengthen what survives of Obamacare, even relatively weak climate change

legislation might survive long enough to be improved and strengthen by a subsequent president, who appreciates the domestic, as well as global, dangers of climate change.

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The UK and Brexit – environmental opportunity or disaster?

Zjednoczone Królestwo i Brexit – szansa czy katastrofa dla środowiska?

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Abstract: The environmental implications of the UK leaving the EU have yet to be fully realized, but the picture is by no means all negative. Initially, as far as possible, all EU environmental legislation continues to apply in the interests of regulatory certainty but divergences are beginning to emerge. Brexit has led to the proposed establishment of a new independent environmental watchdog, and the Government has committed itself to ambitious environmental goals. The Common Agricultural Policy will be replaced by financial schemes that will pay farmers only for public benefits, mainly concerning the environment. At the same time, a consequence of Brexit is that that the UK will see increasing divergencies in environmental law and policy within its devolved administrations.

Key words: Brexit, Environmental divergence, UK environmental policy and law

Abstrakt: Trudno jeszcze wyrokować jakie będą implikacje wyjścia Zjednoczonego Królestwa z Unii Europejskiej, ale w żadnym razie obraz w całości nie jawi się jedynie negatywnie. Początkowo, jak tylko to możliwe, prawodawstwo unijne w kwestiach środowiskowych w całości jest stosowane w interesie odpowiednich regulacji, chociaż zaczynają pojawiać się też rozbieżności. Brexit doprowadził do zaproponowania ustanowienia nowego niezależnego ciała stojącego na straży środowiska, a Rząd Jej Królewskiej Mości zobowiązał się do osiągnięcia ambitnych celów w tym obszarze. Wspólna Polityka Rolna zostanie zastąpiona finansowymi programami, które będą gratyfikowały rolników za ich działania dla dobra wspólnego, szczególnie w sferze spraw związanych ze środowiskiem. Równocześnie, konsekwencją Brexitu

jest fakt, że Zjednoczone Królestwo zauważy w przyszłości pogłębiające się rozbieżności w prawie i polityce środowiskowej zdecentralizowanych administracji.

Słowa kluczowe: Brexit, rozbieżności w sferze środowiskowej, polityka i prawo środowiskowe Zjednoczonego Królestwa

1. Introduction

On 1 January 2021 the United Kingdom formally left the European Union. Since 1973, the EU has developed an impressive range of legislation concerning the environment which has clearly impacted on many areas of the UK environmental law, and has largely been beneficial to the environment. Before the UK joined the Community in 1973, it is true that the country had a well-developed system of laws on industrial emissions, pollution control and nature protection – but while the legislation tended to be detailed on procedural requirements (such as the need for licences or permits), it was deliberately far less specific as to precise environmental standards and goals, leaving this largely to the discretion of the government and public authorities. Two examples epitomise this characteristic. For many years, prior to EU membership, the legal standard for water supply for domestic consumers was simply one of providing 'wholesome' water, allowing water regulators to convert this term into operational specific standards (Water Act 1945, Third Schedule: 31). The second example concerns air pollution. For over one hundred years, the core legal obligation in the legislation concerning emissions into the air from major industries was to use the 'best practicable means' to prevent, minimize or render harmless such emissions, leaving it to the discretion of the enforcement authority to translate this broad-brushed concept into technical requirements to be contained in authorisations (Alkali etc. Works Regulation Act 1881; Ashby and Anderson 1981: 44-51). One of the main effects of the EU membership and the need to transpose EU environmental legislation into national law was to introduce far greater specificity into the body of legislation as to environmental standards and well as legally binding targets. Policy goals and targets which might previously have been contained in official circulars or advisory documents were increasingly transposed into detailed legislation. It is a change in the legislative style that started in the 1980s, has increased in intensity since then (Macrory 1991: 8-23; Jordan 2002: 19-43), and is now so embedded in the legal structure that it is unlikely to shift back post Brexit.

Brexit may be seen as heralding the abandonment of all the environmental gains secured by membership of the EU, and with Britain once again being viewed as the 'dirty old man of Europe' – an over-generalised characterization from the 1980s, which was never completely fair at the time. I want to

suggest that this is by no means an inevitable outcome, and give examples of developments currently taking place which suggest a rather more positive and nuanced picture.

2. Roll-over of EU law and future amendments

The Government's initial approach to Brexit was that all existing EU law, including environmental law, would as far as practicalable continue to have legal effect within the country after leaving the EU (Department for Exiting the European Union 2017: 13-19) The process, known as 'roll-over', was sensible to ensure a degree of regulatory certainty, but has required a myriad of technical amendments to national legislation implementing EU law to make it operational in a national context. References in regulations to requirements to notify the European Commission, for example, have been changed to refer to a national authority, usually the central government. Some EU environmental legislation was so intimately bound up with EU institutions that a simple roll-over proved impossible. The chemicals legislation, REACH (Regulation 1907/2006) was a good example, and the UK has now established a parallel system, UK REACH, which will apply to imports and chemical substances manufactured in England, Wales, and Scotland (under the Northern Ireland Protocol, at present the EU REACH system will continue to apply in Northern Ireland) (House of Commons Library 2021) Similarly, in the interests of legal stability, under s 6 European Union (Withdrawal Act) 2018 decisions of the Court of Justice of the European Union taken before Brexit, termed 'retained EU case law' will remain binding on the lower courts, although the highest courts, the Court of Appeal and the Supreme Court, are given power to depart from them.[1] Decisions of the European Court post Brexit are not binding on any national court, though courts are likely still at least to take note of them where relevant.

The powers under s 8 the European Union (Withdrawal Act) 2018 to amend existing EU regulations or national legislation implementing EU law were restricted to making them operational in a national post Brexit context, and could not be used to alter the substance of the provisions. New legislation, however, is now giving greater powers to government amend the substantive content of the law and REACH again provides a good example. The extent to which UK REACH will depart over time from the EU system is not yet easy to predict, but power has been given to Ministers in a new Environment Bill[2] to

[1] In 2020 the Government was given powers to extend by regulations the power of lower courts and tribunals to depart from existing decisions of the CJEU: s 26 European Union (Withdrawal Act) 2020.

[2] The Environment Bill 2021 has not at the time of writing completed its legislative process but is expected to do so by late 2021.

amend the existing rolled-over provisions. Unusually, though, the government has deliberately fettered the extent to which it can amend these provisions. Under Clause 131 of the Bill any amendment must be considered to be consistent with the overall aim of the EU REACH regulation contained in Article I ('to ensure a high level of protection of human health and the environment, including the promotion of alternative methods for assessment of hazards of substances, as well as free circulation on the internal market while enhancing competitiveness and innovation') and certain core provisions of the Regulation cannot be amended, including those relating to 'no data, no market', animal testing as a last resort, and communication to the public on risks. In other areas of environmental law, the powers given to the government to amend the existing legislation are not so legally constricted. For example, Clause 83 of the Environment Bill gives power to the government to amend provisions concerning chemicals and chemical standards in the legislation implementing various EU water directives, and although the government insisted these powers would be used primarily to deal with new and emerging harmful substances, the powers are legally broad enough to permit the lowering of existing standards.

The extent to which the government will in future will attempt to depart from the current body of the EU environmental legislation implemented within the UK will, though, be inhibited by a number of factors. First, there is a political constraint in that the present government has committed itself to an ambitious programme of environmental improvement, launching a 25-year plan in 2018 (HM Government 2018) and according to the foreword to the Plan by the then Prime Minister, 'By implementing the measures in this ambitious plan, ours will be the first generation to leave the environment in a better state than we found it.' Second, most environmental policy is now within the jurisdiction of the devolved administrations (Wales, Scotland, and Northern Ireland), and even if the UK Government wished to pursue a policy lowering of environmental standards in favour of greater deregulation, there is no guarantee that the devolved administrations would follow suit, and any such developments would be confined to England only. Finally, the Trade and Co-operation Agreement between the EU and the UK (European Union and United Kingdom 2020) contains a range of commitments on climate change and environmental protection. Article 7.2. in particular, though it gives a general right to both parties to determine their own environmental levels of protection in line with international commitments, then contains an obligation of non-regression on existing environmental standards which might affect trade and investment between the parties: 'A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its

environmental law or climate level of protection'. To take one example, in 2020 the Government indicated that, as part of reforms of the planning system, it intended to design a quicker and simpler framework for the environmental assessment of projects (Ministry of Housing, Communities and Local Government 2020: 57-58) though no details have yet been published. Proving a connection between a simplification of environmental assessment requirements and its effect on trade and investment between the UK and the EU may be challenging, but the obligation in Article 7.2. in the Trade and Cooperation Agreement provides some constraint of the extent of reforms that can be made.

3. A new environmental watchdog

Much of the Government's initial work on Brexit was concerned with ensuring the operational roll-over of existing EU legislation but this was criticized as being wholly concerned with the black letter of the law, and failed to reflect institutional aspects of EU membership which would be lost on post Brexit. In particular, the European Commission would no longer have power to bring infringement proceedings against the UK for failure to comply with EU law, an area where it has been especially active in the environmental field (House of Lords 2017: 83-85). There were calls for a new public body that could hold the government and other public bodies accountable for failures in environmental law and replicate as far as possible the Commission's infringement procedures. Initially, the then Secretary of State, heading the Department for Environment, Food and Rural Affairs, resisted the need for a new body, arguing that it was politically accountable to Parliament for any failures, and that the government and other public bodies were legally accountable through the courts because environmental non-governmental organizations and other parties could always bring judicial review actions against the government and other public bodies for breaches of pubic law duties concerning the environment. It is true that NGOs have won some notable successes in the courts in recent years, but actions in the courts remain an expensive process, NGOs do not cover all areas of environmental protection, and are not set up to provide a systematic review of compliance. In response to the negative reaction of the Secretary of State, the UK Environmental Law Association produced an important report which argued that while judicial review would remain a significant backstop, there was still a powerful case for a new independent watchdog to replace the role of the European Commission post-Brexit (UK Environmental Law Association 2017).

The personalities of Secretaries of State are immensely important in setting policy agendas, and in 2017 there was an unexpected change with Michael Gove becoming the new Environment Secretary of State. Michael Gove had been one of leading Brexiteer politicians, and clearly wanted to demonstrate

that after Brexit the UK could still be an environmentally progressive country. He immediately understood the need for a new independent watchdog to fill the role of the European Commission, and set about a period of extensive consultation to establish a body to be known as the Office for Environmental Protection (OEP). The Environment Bill establishes the body and its functions, and it is expected to be operational by the end of 2021, although will operate in a shadow form considerably earlier (Macrory 2019).

Under Clause 21 of the Environment Bill the OEP is to be set up as what is known in the UK as a non-departmental public body. This means that it operates as an independent entity from the government, and its staff are employees of the OEP rather than ordinary government civil servants. In that its chair and board members are appointed by the Secretary of State, it is funded by the government, and its duties and powers are defined in legislation promoted by the government, it can never be seen as independent as the European Commission. Nevertheless, in practice, it will have considerable freedom to act as it wishes. The Environment Bill provides that in exercising any functions relation to the OEP, the Secretary of State must have regard to its independence, and the government has no legal powers to give it binding directions on any matter, though there are provisions for issuing non-binding guidance. The OEP, in common with all non-department bodies, must provide annual accounts to Parliament, but in doing so it (and the provision is not replicated in other laws concerning non-departmental public bodies) the Bill provides that it must include an assessment of whether the funding providing by the government is sufficient for its tasks – an unusual provision that is not replicated in other legislation concerning non-departmental bodies. If the OEP considers funding inadequate, Parliament and the government are not bound by its assessment, but there will be considerable political pressure to respond.

The OEP will have four key functions. First, under Clause 27 of the Environment Bill, one of independent auditing of the government. The Government is obliged to provide an annual assessment to Parliament on its progress in meeting the 25-year environmental improvement plan and long-term environmental targets to be established under the Environment Bill. The OEP is required to provide to Parliament its own annual evaluation of progress, including recommendation for improvement, and although its reports are not binding on the government, the latter is obliged to issue and publish a response. Next, under Clause 29 of the Bill, on request from the government, the OEP will be obliged to give advice on proposed changes to environmental law or any other matters relating to the natural environment. The advice must be published, though is not binding and the government is not obliged to respond or publish its response.

The third function, under Clause 28 of the Bill, is a duty on the OEP to monitor and report on the implementation of environmental law, and this could

in the longer term prove to be one of its most important roles. Systematic monitoring of implementation has rarely been a feature of the UK environmental law, and often only if some scandal emerges will there been an investigation on the issue by a parliamentary or other official body. There are few instances of legal provisions in national environmental legislation that require regular reporting on implementation. In contrast, most EU environmental directives have required the European Commission to produce regular reports on their implementation within Member States (Directive 91/692). The term 'implementation' is not defined in the legislation and while it would include the enforcement of environmental law (ensuring that the law is complied with) it clearly goes wider and could include, say, the design of the legislation in question if that is proving problematic, training of regulators, staffing levels and the funding provided for regulatory bodies. Although this general function of monitoring and review is expressed as a duty, the OEP will have a discretion in its choice of environmental laws to investigate, and how it goes about the task. The way it does so and the reception given to its reports will be an important test of its credibility and authority. The reports by the OEP on implementation will not be legally binding on the government, but must be laid before Parliament, and under the Bill the government is obliged to issue a response within 3 months.

The one constraint is that the subject matter must fall within the definition of environmental law contained in Clause 45 of the Environment Bill. To provide absolute clarity the Bill could have listed all the specific pieces of environmental legislation included with the scope of environmental law, but such an approach could have rapidly become out of date, and needed constant revision. Instead, there is a more flexible but inevitably rather more ambiguous definition which refers to legislation 'mainly' concerned with environmental protection. What is clear is that the OEP is not established to investigate all areas of law, even where these may have significant impacts of the environment, and the same constraint applies to its enforcement powers considered below. For instance, a planning decision to authorize a new industrial plant may have potentially harmful environmental impacts, but this in itself is not sufficient to bring it within the Bill's definition of environmental law. On the other hand, if that decision involves a breach of specific environmental assessment legislation or will lead to a breach of legally binding air quality standards, both of which are clearly examples of laws mainly concerned with environmental protection, then the 'environmental law' as defined in the Bill is engaged. While there may be some examples of law where there will be conflicting views on whether or not they are 'mainly' concerned with environmental protection, in practice this is likely to be marginal, and the main substantive areas of law such as those relating nature protection, waste, water quality, contaminated land, environmental assessment all clearly fall with the definition of environmental law.

Finally, under Clauses 30-37 of the Environment Bill, the OEP is to be given specific enforcement powers to deal with breaches of environmental law and it is here that one sees most clearly the intention of replicating as far as possible the infringement proceedings of the European Commission. As with the European Commission infringement procedures, the focus is on the state rather than the private sector – i.e. the government, public bodies such as the Environment Agency (one of the key national environmental regulators) and local government authorities, and whether they have failed to comply with their legal obligations. Mirroring the Commission procedures, there is a formal three-stage process – the service of an Information Notice describing the alleged breach and providing an opportunity for the authority concerned to respond. This is followed by a Decision Notice (equivalent to a Reasoned Opinion from the European Commission) again describing the failure, and at this stage the OEP is entitled to set out steps which it considers the authority should take in relation to the failure, such as remediation or internal changes to prevent any repetition. Finally, the OEP may take the matter before a court. The European Commission is able to resolve the vast majority of infringement cases without taking a Member State to the Court of Justice of the European Union, and it is clear that the provisions for the OEP enforcement are similarly designed to encourage resolution without the need for court action if at all possible. Some environmental NGOs have argued that the Information and Decision Notices are weak enforcement provisions because there is no formal sanction if they are not complied with (Greener UK 2018: 11-12). But as with the European Commission initial infringement steps, they have to be treated with seriousness by the bodies on the receiving end because, even if not formally binding in law, they essentially take the form of a one-way ratchet, which may eventually lead to court action.

The legislation establishes a public complaint system, equivalent to that operated by the European Commission, allowing any member of the public, NGOs, or industry to complain to the OEP about alleged breaches of environmental law by public bodies, and since the OEP will be a small body (probably about 80 in staff) this will provide an important source of information both for possible enforcement action. Complaints may also indicate that a particular area of law would be suitable for an investigation and report on its implementation and enforcement, even if no enforcement proceedings are initiated. Although enforcement actions, in practice, may be often taken in response to a complaint, the OEP is also empowered to initiate proceedings where it has other sources of information about potential breaches.

If matters cannot be resolved at these initial stages, the OEP is entitled to take the issue before the High Court in an action termed an 'Environmental

Review', but in practice it is a specialized form of judicial review. The Environment Bill provides that in dealing with a case, the court must apply ordinary principles of judicial review which essentially involves three questions: Was the relevant law misinterpreted? Was there a procedural irregularity? or Could the decision taken by the authority be described as totally unreasonable? In judicial reviews, the courts regularly stress that they provide a supervisory jurisdiction, it is not their role to take substantive decisions in place of the authority concerned, and that the focus is on whether the authority has acted contrary to these public law principles. Besides, in judicial reviews the courts regularly find that the law has been misinterpreted or that procedures have not been properly followed, but when it comes to judging the unreasonableness of decisions, British courts have tended to be fairly deferential to public bodies, especially those such as the Environment Agency or Natural England who have extensive specialist expertise in relation to their functions. The intensity of review is probably rather less intrusive than that of the Court of Justice of the European Union, where it has been noted that in environmental infringement cases, "it quickly becomes obvious that [the Court] has not been deferential in its approach, but in fact applied a quite stringent review of legality" (Wenneras 2007: 123), though even the CJEU has acknowledged in many areas the margin of discretion that should be afforded to decision-making by both the European Commission and Member States (Zglinski: 2018) This deferential approach by the British courts to the substance of decisions is perhaps understandable in a judicial review that is brought by an individual or a small organization against an expert public body. But where, as here, the action is being brought by another specialized public agency, the OEP, it is quite likely the courts will feel rather more inclined to question the reasonableness of the decisions being taken by the body concerned if that is the basis of the case.

In environmental infringement cases, the Court of Justice of the European Union has used its powers under Article 260 TFEU to impose financial penalties on Member States, many of which have been of a considerable size (Kramer 2015: 25-26). Although in an environmental review brought by the OEP, the High Court has no immediate power of imposing fines on the public body concerned, it is arguable that the national courts have greater powers than the CJEU. Article 260 penalty payments are made where a Member State fails to comply with an order of the Court, and the equivalent in a national context would be contempt of court proceedings. If an authority, whether a government department or public authority, failed to comply with an order of the court, the OEP could bring proceedings for contempt of court, and the courts have inherent powers of sanctioning, including unlimited financial penalties, imprisonment of the relevant Minister or civil servants directly engaged in not

obeying the court order, and a power to require other bodies to carry out the order of the court, imposing the costs of doing so on the authority concerned. The powers have sometimes been threatened, but in practice it appears to be very rare that a government department or public authority will deliberately flout an order of the court.

Despite these extensive powers of enforcement, it is clear that in practice the OEP, like the European Commission, will not be able to act on every complaint made to it, and will have to engage in what has sometimes been described as strategic litigation. The Environment Bill reinforces this approach by requiring, under Clause 23, the OEP to publish an enforcement policy setting out its strategic priorities, and by providing that enforcement action is only taken in respect of 'serious' breaches. It is left to the OEP to define in its policy how it interprets what is or is not serious in this context. The Government has no legal powers to direct the OEP whether to take or withhold particular cases, but it does have the power under Clause 24 to issue guidance to the OEP on its enforcement policy, a particularly controversial power introduced at a late stage in Parliamentary debate on the Environment Bill and betraying a degree of nervousness by the government that the OEP might become too intrusive on too many public decisions. The guidance, though, is not legally binding on the OEP, though they must consider it carefully – the legislation uses the phrase that the OEP 'must have regard to the guidance', a familiar phase in British legislation where the government wishes to influence but not dictate the policy of an independent body.

A body such as the OEP could have been established if the UK had remained within the EU, but without the demands of Brexit it is unlikely that this would have occurred. Its underlying purpose is to improve Parliamentary and public confidence that the Government is serious in its commitments to maintain and improve the environmental standards, and time will only tell whether it succeeds in this role. Certainly, there are many expectations - some of them fairly unrealistic - on the new body, and one of its initial tasks will be to explain with clarity to Parliament and the wider community what it can do and what it cannot. There may also be a degree of competitiveness within the United Kingdom on the impact of such watchdogs. The OEP's functions will largely be confined to England because most environmental matters are devolved, with a small number of exceptions such as chemicals policy. Scotland has already established a similar body, Environmental Standards Scotland, and Wales is in the process of doing so. Because of its small size, it is unlike that Northern Ireland will set up its own watchdog body, but the Environment Bill provides that the OEP can extend its jurisdiction to Northern Ireland, provided there is agreement of the Northern Ireland Assembly.

4. New development in environment law

The Environment Bill 2021 contains extensive new provisions dealing with various aspects of environmental law, although most of these are aimed at strengthening existing laws rather than rewriting them completely. For example, they include strengthened duties on local authorities in drawing up air quality plans, and requirements of greater cooperation from other authorities such as government departments or the Environment Agency with responsibilities in the field of air pollution. In the field of waste and resource efficiency, there are new powers for manufactures to provide information about resource efficiency of their products and to provide repair services, powers to establish a drinks container deposit return scheme, and the strengthening of existing provisions on hazardous waste. In the field of water, there will be new duties of privatized authorities to produce long-term sewerage plans, and extended powers on government to revoke water abstraction licences without compensation where they have been underused or are causing potential environmental damage. The most developed section of the Environment Bill, contained in Part 6, concerns nature and biodiversity where there is a much greater emphasis on the production of nature recovery strategies, at both a local and national level. The provision with probably the most far-reaching implications is a requirement under Clause 92 that in future planning permission for any new development cannot be granted unless the developer can demonstrate there will be a minimum of a 10% gain in biodiversity compared to the pre-development state of the site. Preferably this gain will be secured on site, but could also be achieved locally, and as a last resort, where this is not possible, by the purchase of biodiversity credits from the government, the revenue then being used for biodiversity enhancement.

Another recent strengthening of environmental law with significant implications concerns climate change, where the Climate Change Act 1998 introduced a binding target on the government to achieve an overall reduction of greenhouse gas emissions by 80% by 2050, and with provisions for regular 5-year carbon budgets to ensure a smooth trajectory towards the long-term goal. Following recommendations from the Climate Change Committee, an independent body established under the Climate Change Act, this figure was amended in 2019 to 100%, a net zero target (Climate Change Act 2008 (2050 Target Amendment) Order). The UK greenhouse emissions are now 51% below 1990 levels, though with a boost in reduction due to the coronavirus and largely achieved by shifts away from coal production for electricity and cleaner industrial processes (Carbon Brief 2021). Little substantive progress has yet been made in transport and home heating and insultation, and reaching the net zero figure in less than 30 years is clearly going to be especially challenging. But the influence of the new overall legal requirement on the government is apparent in

many policy initiatives currently being considered by government departments (HM Treasury 2020; Department of Transport 2020; Department of Business, Energy and Industrial Strategy 2021). The pressure to produce and implement credible policies will increase because the Government, following advice from the Climate Change Committee, has recently agreed an ambitious Sixth Carbon Budget for the period 2033-2037, requiring a 78% reduction from the 1990 levels, and which will for the first time include the UK's share of international aviation and shipping emissions (UK Government 2021). The Climate Change Act requires the Government to publish proposals and policies to enable the carbon budgets to be met.

Many of these new provisions in domestic environmental law could have been introduced by the government without the UK leaving the EU, and indeed some, such as those concerning resource efficiency of products and the right to repair have clearly been inspired by the 2019 regulations made by the European Commission under the Eco-Design Directive 2009/125/EC. But there are also examples which could only have been made now that Brexit has occurred.

The first concerns the use of forest risk commodities in commercial activity, where new controls have been introduced under Clause 107 of the Environment Bill. In many ways, they are modelled on the controls of timber from illegal sources introduced in the EU in 2010 (Regulation 995/2010) but go much wider, and since they concern external trade could not have been made unilaterally by the UK when it was a member of the EU. The current national legislation implementing the 2010 EU Timber Regulation is preserved under roll-over provisions, but the new controls will extend to all commodities produced from living organisms, including animals and plants, on overseas agricultural land which had been converted from forestry. Current estimates are that almost 80% of global deforestation is driven by agricultural expansion, with some half of tropical forest loss arising from illegal conversion to agricultural land, with far higher proportions in some areas (Department of Environment, Food and Rural Affairs 2020).

Much of the detail of the new controls will be developed in subsidiary regulations and initially will only apply to larger companies. Companies will be prohibited from using forest risk commodities or products made from such commodities where they were produced on agricultural land unless local laws were complied with. Companies must also establish a due diligence system for identifying information about the commodity in question, which must include assessing the risk that local laws were not followed, and they will also be obliged to publish annual reports on the operation of their due diligence system. Interestingly, this is one of the few examples in the UK national environmental law providing for a regular review of the implementation of the system. The Bill provides that the Secretary of State must publish an annual report to be laid

before Parliament, describing the impact of the new controls, and including any steps proposed to improve their effectiveness.

Another highly significant change in the law, which may lead to profound environmental gains, concerns support for agriculture and has been introduced under the Agricultural Act 2020. On Brexit, the UK is no longer subject to the Common Agricultural Policy (CAP), and the provisions are designed to replace the CAP financial support mechanisms. Under CAP, around 81% of the budget takes the form of direct payments, with about 30% of these payments directed towards various sorts of agri-environment schemes. The remainder under Pillar 2 supports various environmental and rural other socio-economic outcomes (House of Commons Library, 2020). Under the Agricultural Act 2020 direct payments, based mainly on land size, will over the next seven years be completely phased out in England,[3] and in future financial payments from the government to farmers will be wholly related to public benefits, mainly environmental. The Act provides that financial assistance may be given in connection with a number of specified purposes, including managing land or water in a way that protects or improves the environment or the cultural heritage, supporting public access for the enjoyment of the countryside, managing land, water or livestock that mitigates or adapts to climate change, conserving native livestock, protecting and improving the health of plants, and preserving and improving the soil quality. Financial assistance may also be given for starting or improving the productivity of an agricultural activity, but in devising any support scheme the legislation provides that the Secretary of State must have regard to the need to encourage food production in an environmentally sustainable way. The underlying shift of approach to what has been termed 'public money for public goods' has been broadly supported by both environmental non-governmental organisations and, perhaps surprisingly, the farming community. Farmers, though, are concerned that political commitments to the level of financial support that will be available will be equivalent to the previous support from CAP and will be maintained for the long-term. Nevertheless, the enormous shift in the focus of financial support for the agriculture is likely to produce substantial environmental benefits. Within the European Union, there has been increasing proportion of support under CAP in recent years for environmental and other socio-economic schemes, but it seems unlikely that a 100% shift is ever likely to be achieved, and certainly not in the time-scales envisaged under the Agricultural Act.

Parallel to the Agriculture Act, a new Fisheries Act 2020 has been passed, providing a new framework for fisheries management now that the UK is no

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[3] The devolved administrations in Wales, Scotland and Northern Ireland are still developing their policies on agricultural support, though they are likely to move in the same direction as England.

longer part of the EU Common Fisheries Policy. Despite the progress since the reforms to the Common Fisheries Policy in 2013 in ensuring maximum sustainable yields across fish stocks, the European Commission has acknowledged the need for further efforts (European Commission 2017: 2). It remains to be seen whether the Fisheries Act will be more effective at ensuring that fishing is carried out in a truly sustainable way, though the Government has committed "to setting a gold standard for sustainable fishing around the world" (Department for Environment, Food and Rural Affairs 2018: 6). At the heart of the new legislation are the objectives of environmental sustainability and ensuring "the fishing capacity of fleets is such that fleets are economically viable but do not overexploit marine stocks" (s 1(2)).

5. Divergences and the future

As I have tried to illustrate, the environmental picture in a post Brexit United Kingdom is by no means all negative at present, and some of the recent important legal changes would not have occurred had the UK remained within the European Union. Much, though, depends on there being a government that is committed to progressive environmental policies. The EU environmental legislation has provided a powerful minimum and legally binding base-line throughout the European Union. Post Brexit, the key legal (as opposed to political) constraints on the freedom of a UK government to lower environmental standards will be those contained in international environmental treaties, and in relation to the EU, the provisions of the UK/EU trade and cooperation agreement. Here, though, one should note that the UK has adopted a dualist approach to international treaties meaning that they have no direct legal effect within the country in the absence of implementing legislation. The UK/EU trade and cooperation agreement contains environmental commitments, but equally affirms the right of the parties to determine their own environmental standards, with non-regression obligations limited to where a lowering of environmental standards would affect trade and investment. During the Parliamentary debates on the Environment Bill there was pressure on the government to introduce a general legal obligation of non-regression, but this has been consistently resisted to date.

At a micro-level some divergencies from the EU law are already beginning to emerge, and these could be seen by some as signalling a disturbing trend that is contrary to the overall aspirations of the government for substantive environment improvement in the future. Three recent examples can be given. In January 2021, the government decided not to follow the new EU legislation introducing a general ban on the export of plastic waste to non-OECD countries (Regulation 2020/2174), but instead opted for a system of prior informed

consent for non-hazardous plastic waste meaning that, provided the importer grants such a consent, the UK will be free to continue to export unsorted plastic waste to non-OECD countries. In the same month the UK government granted an emergency 120-day authorization for the use of an insecticide containing thiamethoxam for the treatment of sugar beets in response to a lower yield on beets in 2020. Thiamethoxam has been banned in the EU since 2018, and although the UK applied the same criteria for emergency authorisations under Art 53 of the EU Plant Protection Product Regulation (Regulation 1107/2009), post Brexit it is no longer obliged to inform Member States or the European Commission of the authorisation, nor does the Commission have the power to override the decision. As a third example, the Department of the Environment, Food and Rural Affairs has recently launched a consultation document seeking views on whether gene edited organisms containing genetic changes which could be achieved through traditional breeding should continue being regulated under the EU legislation on genetically modified organisms (Directive 2001/18) as rolled over into the UK (Department of Environment, Food and Rural Affairs 2021). Following Brexit, the UK is no longer bound by the 2018 decision of the Court of Justice of the European Union in *Confederation paysanne and others v Premier Ministre and de l'agriculture, de l'agroalimentaire et de la forêt* (C-528/16 ECLI:EU:C:2018:20) that such gene editing generally falls within the scope of the Directive, and the Consultation document notes that other countries such as Australia and Japan have concluded that gene edited organisms should not be regulated as GMOs. There are likely to be further divergences from EU environmental legislation in future years, though the environmental implications, positive or negative, are not yet possible to predict.

The other source of divergence resulting from Brexit will be within the United Kingdom itself. The environment is largely a devolved competence, but in the past the EU legislation has provided a common underpinning framework throughout the country, with the UK government having powers to override devolved administrations if they failed to implement the EU legislation. International environmental treaties which bind the whole country will still provide a degree of commonality but with far less intensity than EU law. Increasingly, therefore, there are likely to be differences in the approaches taken in England, Wales, Scotland and Northern Ireland (where EU law will still largely apply). The Scottish government, for example, has a general policy commitment to remain aligned with EU laws in the future (Scottish Government 2019), and recent Scottish legislation, the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2020, gives broad powers to Scottish Ministers to make regulations corresponding to future EU legislation, with environmental protection being expressly mentioned in the Act. Public health is also a devolved matter, and the implications of devolution during the coronavirus became especially

apparent to the wider public with the different administrations having distinct approaches to lock-down rules and dates. Devolution, undoubtedly, introduces legal complexity, and in relation to differing environmental standards there may well be tensions and possible legal disputes in some areas should these inhibit the UK Government's aspirations to develop a UK wide internal market for goods and services as envisaged under the United Kingdom Internal Market Act 2020. But at the same time devolution provides the space to develop innovative approaches, and future developments will be largely shaped by the political priorities of the different administrations concerning the environment. These emerging divergences provide opportunities for rigorous comparative analyses within one country of the effectiveness of different regional approaches to environmental policy and law – taking just one example, the enforcement powers of the new Office for Environmental Protection in England is not quite the same as those contained in the Scottish legislation relating to the powers of the equivalent watchdog body, Environmental Standards Scotland, and even the legislative definition of what amounts to a breach of environmental law is expressed in different terms. Whether useful lessons will be learnt from the effect of these divergencies in practice remains to be seen.

The challenges for the United Kingdom post Brexit are undoubtedly demanding, and debates will continue for many years as to the economic and social impacts of Brexit on both the UK and the EU. In the field of the environment, the international power of the EU on the global stage may be weakened, especially in the field of climate change, unless both the UK and the EU are able to pursue common and cooperative strategies. Within the UK there will now be greater though not complete legal freedom to lower environmental standards, but equally there are opportunities to be seized to enhance environmental protection, and there are already some promising developments taking place.

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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 overriding 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 (Jendrośka 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 21st 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 17th 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 20th 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 (Jendrośka 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_2 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_2, 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 grassroot 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[1] – 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 Greed 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

[1] According to the European Environment Agency (EEA 2018a) analysis, 23 of the 30 environmental goals contained in the 7th 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",[2] "sustainability risk",[3] and "sustainability factors"[4] 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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[2] 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;

[3] 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;

[4] 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-vide 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_2-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_2 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 region's 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. Siksnelyte-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 none-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 Stated 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.[5] 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).

[5] 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 formed 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.[29] 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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The concept of extended producer responsibility – the example of a deposit-return system

Koncepcja rozszerzonej odpowiedzialności producenta na przykładzie systemu kaucyjnego

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Abstract: In May 2018, the Directive of the European Parliament and of the Council amending Directive 2008/98/EC on waste (2018/851) was redrafted. These amendments constitute a direct cause of changes in the internal law of the European Union countries in terms of Extended Producer Responsibility (EPR). Poland also projects changes to the provisions of national law in order to manage waste in a better and more efficient manner. The packaging deposit-return system (with reference to plastic bottles, glass bottles, cans) currently operates in 10 European countries, covering 26% of the European population. In Poland, the planned date of launching the deposit-return system is January 2022. The aim of the article is to present the concept of EPR and an attempt to diagnose this system comprising the possibility of introducing a deposit-return system, made from the perspective of legal sciences.
Keywords: waste, recycling, deposit-return system (DRS)

Abstrakt: W maju 2018 roku została znowelizowana Dyrektywa Parlamentu Europejskiego i Rady zmieniająca dyrektywę 2008/98/WE w sprawie odpadów (2018/851). Zmiany te są bezpośrednio przyczynkiem zmian w prawie wewnętrznym krajów Unii Europejskiej w zakresie rozszerzonej odpowiedzialności producenta (ROP). Polska również prognozuje zmiany w przepisach krajowego prawa, w celu lepszego gospodarowania odpadami.
System kaucyjny dotyczący opakowań (butelki plastikowe, butelki szklane, puszki) działa obecnie w 10 krajach europejskich obejmując 26% populacji Europy. W Polsce planowany

termin wprowadzenia systemu kaucyjnego to styczeń 2022 r. Celem artykułu jest prezentacja koncepcji ROP oraz próba zdiagnozowania tego systemu obejmująca możliwość wprowadzenia systemu kaucyjnego podejmowana z perspektywy nauk prawnych.

Słowa kluczowe: system kaucyjny, odpady, recykling, system depozytowo-zwrotny

1. Preliminary remarks

From 2021, an EU charge (the so-called *Plastic Levy*) – which will be charged for every kilogram of non-recycled plastic – will enter into force. Poland and other EU countries will be obliged to pay EUR 800 per ton of plastics that have not been recycled. In practice, this can mean huge costs on a yearly basis. A solution may be the introduction of a deposit-return system combined with the Extended Producer Responsibility (EPR) to national schemes.

The charge would be of a retroactive nature, which means that even if individual member states delayed adopting the EU Decision, then, at the moment it comes into effect, the fee will be charged automatically from the beginning of 2021. The methods of calculating both charges (produced and recycled waste) are to be determined on the basis of Directive 94/62/EC of the Council Regulation laying down implementing measures for the Decision.

The target of the EU countries' policy on the municipal waste management, including plastics, is to gradually increase the recycling of this waste. An element that is particularly problematic today is the post-use phase, related to the formation of post-consumer waste. Nevertheless, the issue that has become controversial nowadays is the post-use stage, linked with the accumulation of post-consumer waste. Based on the assumption of the ecological life cycle analysis, product responsibility should cover all its phases – *from cradle to grave* – including post-consumer transformation or disposal of the resulting waste.

The data published by Eurostat show that in 2017, within the entire Community, 41.9% of plastic packaging waste was recycled. A year earlier it was 42.4%, in 2015 - 39.9%, and in 2014 - 38.9%. In 2006, 26.4% of such waste in the EU was recycled. The EU statistical office indicated that in 2017 the highest level of recycling of plastic packaging waste was achieved by Lithuania (74%). Next in the order were: Bulgaria (65%), Cyprus (62%) – data for 2016), Slovenia (60%), the Czech Republic (59%), Slovakia (52%) and the Netherlands (50%). Eurostat data show that in Poland 34.6 percent of plastic packaging waste was recycled. Every year the level of recycling increases, however, the level of consumption of packaging waste rises, too. (https://ec.europa.eu/eurostat/data/browse-statistics-by-theme).

Pursuant to Directive 2018/851 of 30 May 2018 amending Directive 2008/98/EC on waste, many Member States have not yet fully developed the necessary

waste management infrastructure. It is vital for the EU to define clear long-term policy objectives to target measures and investments, in particular by preventing the build-up of a structural production overcapacity to process residual waste and blocking the disposal of recyclable materials at lower levels in the waste handling hierarchy.

The above-mentioned directive sets out a number of measures to protect the environment and human health by preventing and reducing the amount and negative impact of waste generation and management, and by reducing the overall impact of resource use and improving the efficiency of such use, which is essential for the transition to a circular economy, as well as to ensure the Union's competitiveness in the long term. Pursuant to Article 8a of the aforementioned Directive, Member States ought to clearly define the roles and obligations of all relevant entities involved, including product manufacturers, placing products on the market in a Member State, organizations implementing – on their behalf – the extended producer responsibility obligations, private or public economic operators managing waste, local authorities and, where applicable – entities dealing with re-use and preparing waste for re-use, as well as social economy enterprises (Directive 2018/851).

The need for changes in the responsibility for waste based on the *from cradle to grave* concept and the producer responsibility increase was noticed by the EU when it amended the package of waste directives in 2018: 1. Waste Directive (2008/98/EC), 2. Directive on packaging and packaging waste (94/62/EC), 3. Landfill Directive (1999/31/EC), 4. Directive that specifies the requirements for EPR systems (2008/98/EC). The amendment package entered into force in July 2020. In the Amendment Directive, the EU has established a legal framework for waste processing. This framework aims to protect the environment and human health by emphasizing the importance of proper waste management, as well as recovery and recycling techniques applied to reduce the demand for resources and their better use. The Directive establishes a waste hierarchy which consists of prevention; reuse; recycling; other recovery methods, e.g. energy recovery; and neutralisation. Also, a "polluter pays" principle was established, based on which the original waste producer must cover the costs of waste management.

A significant legal act is also the latest directive on plastics – Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the environmental impact of certain plastic products (hereinafter referred to as the Single-Use Plastics Directive – (SUPD)), according to which, in order to achieve a closed loop throughout the entire life cycle of plastics, the problem of generating an increasing amount of plastic waste and its release into the environment, in particular into the marine environment, must be dealt with. The European plastics strategy is a step towards establishing a circular

economy. For this reason, many countries have introduced extended producer responsibility solutions.

It follows from the preamble to the SUPD Directive that it promotes circular economy approaches that give preference to sustainable and non-toxic reusable products and re-use systems over single-use products that are primarily aimed to reduce the amount of waste generated. Such waste prevention is at the top of the waste hierarchy provided for in Directive 2008/98/EC of the European Parliament and of the Council. This Directive constitutes a *lex specialis* in relation to Directives 94/62/EC and 2008/98/EC and supplements Directives 94/62/EC and 2008/98/EC, and Directive 2014/40/EU of the European Parliament and of the Council.

In the context of the EU action plan for the circular economy set out in the Commission Communication of 11 March 2020 entitled "A new EU Action Plan for the Circular Economy for a cleaner and more competitive Europe", we can read: "The amount of materials used to make packaging is constantly growing, and in 2017, the amount of packaging waste in Europe reached a record 173 kg per capita, i.e. the highest ever. To ensure that all packaging on the EU market is reusable or recyclable in a cost-effective manner by 2030." To this end, the Commission intends to carry out activities consisting in:

1. reducing the (excessive) use of packaging and packaging waste, e.g. by establishing targets and other waste prevention measures;

2. promoting planning activities with a view to the reuse and recyclability of packaging, including possible restrictions on the use of certain packaging materials for certain applications, in particular where alternative products or reusable systems are possible, or where consumer goods can be safely sold without packaging;

3. considering the reduction of the complexity of packaging materials, including the number of materials and polymers used (COM (2020) 98 final).

The Communication of 11 March 2020 was reinforced by the previous Commission Communication of 2 December 2015 Closing the cycle – An EU Action Plan for the Circular Economy (COM (2015) 614 final).

The implementation of the assumptions of the waste directives requires legislative action by the national legislator. The current organization and functioning of the waste management sector in Poland (including specific aspects related to the functioning of EPR systems in their current shape) is regulated by a number of key national law acts:

• the Act of 13 September 1996 on Maintaining Cleanliness and Order in Municipalities (i.e. Dz. U. of 2020, item 1439),

• Act of 11 May 2001 on Duties of Business Operators with respect to Managing Certain Types of Waste, Product Fee, and Deposit Fee (i.e. Dz. U. of 2020, item 1903),

• Act of 20 January 2005 on Recycling of End-of-Life Vehicles (i.e. Dz. U. of 2020, item 2056) and the Act of 24 April 2009 on Batteries and Accumulators (i.e. Dz. U. of 2020, item 1850).

• Act of 14 December 2012 on Waste (i.e. Dz. U. of 2020, item 797),

• Act of 13 June 2013 on the Management of Packaging and Packaging Waste (i.e. Dz. U. of 2020, item 1114),

• Act of 11 September 2015 on Waste Electrical and Electronic Equipment (i.e. Dz. U. of 2020, item 1893).

The waste directive has been implemented into the act on waste and to the act on maintaining cleanliness and order in municipalities, and the packaging directive into the management of packaging and packaging waste directive. First of all, they should reduce the amount of packaging waste, ensure its recycling at the level specified in the directive and encourage producers to produce packaging, taking into account the essential requirements related to environmental protection (Badowska-Domagała [ed.] 2016: 74).

The provisions of the EU framework directive on waste (Article 11) are crucial for Poland. In its content we can read that in order to comply with the objectives of this directive and to bring us closer to the goal of a European resource-efficient recycling society, Member States take all necessary measures to achieve the following objectives:

a) by 2020, preparation of waste materials for re-use and recycling; at least such materials as paper, metal, plastic and glass from households and possibly other origins, provided that these waste streams are similar to household waste, will be increased by weight to a minimum 50%;

b) by 2020, preparing for re-use, recycling and other recovery of materials, including backfilling where waste replaces other materials, for non-hazardous construction and demolition waste, with the exception of naturally occurring material as defined in Category 17 05 04 of the European Waste Catalogue will, be increased by weight to a minimum of 70%.

Summing up, from the EU level, the most important thing is to implement a closed system into the national legal order. A suitable system seems to be the deposit-return system, which already functions in some EU countries. It covers beverage packaging products (plastic and glass bottles and cans).

2. Extended Producer Responsibility concept

The EPR concept is an environmental strategy in which the producer's responsibility for the product is extended to the end of the product life cycle. As defined in Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 amending Directive 2008/98/EC, this concept is understood as a set of activities obliging producers of products placed on the

market to bear financial or financial and organizational responsibility for their management throughout the entire life cycle of the product, i.e. both during its use period and when it becomes waste, including selective collection, sorting and processing. This obligation may also include organizational accountability and responsibility for contributing to waste prevention and improving the reusability and recyclability of products. Producers, under the extended producer responsibility scheme, may fulfil their obligations individually or collectively.

Extended Producer Responsibility is defined as a kind of a model approach in environmental protection that determines the manner of dealing with an item (product) that is a product of human activity. The essence of this concept is to make the manufacturing entity responsible for this product in all phases of its life cycle, and, in particular, in the phase when it becomes waste. As part of this concept, the product manufacturer, in the waste management phase, is responsible for the proper implementation of waste collection, recovery and disposal activities. (Karpus 2014: 239).

It should be noted that the EPR concept has been mentioned in EU acts as one of the basic legal institutions aimed at achieving the new objectives of the waste law or, more broadly, the environmental protection policy in the spirit of the principle of sustainable development (Ezroj 2009).

Legal responsibility for the management of things/waste concerns specific groups of entities (mainly entrepreneurs operating on the market) that the public authority is able to control and effectively cover with legal regulation – unlike entities operating by nature in a significant dispersion on the market, qualified as the so-called end consumers (Karpus 2014: 245).

Certain fixed elements form the EPR model that contribute to its smooth operation. They are also specified in Articles 8 and 8a of the Waste Directive published as part of the circular economy package. In accordance with its assumptions, an effective system should be based on the following elements: 1. a clear division of responsibilities; 2. ensuring adequate financial contribution; 3. fair competition between recovery organizations; 4. reporting and control.

The EPR system, in accordance with the Directive of 19 November 2008 on waste and repealing certain directives, applies to any natural or legal person who professionally develops, manufactures, processes, treats, sells or imports products (product manufacturer) (2008/98/EC).

Based on the current legal status in Poland, an entity introducing packaged products to the market may fulfil the requirements of the EPR system in the following way:

1. by recycling/recovering the packaging on its own,
2. by depositing the so-called product fee to the Marshal Office,
3. through the scheme called *Organizacja Odzysku Opakowań* [packaging recovery organization (OOO)].

A packaging, within the meaning of the Packaging Act, is a product, including a non-returnable product, made of any material, intended for storage, protection, transport, delivery or presentation of products, from raw materials to processed goods. The provisions of the above-mentioned act apply to all packaging, regardless of the material used for its production, and to packaging waste generated from it. The obligation to apply this act concerns entrepreneurs: 1. being packaging recovery organizations; 2. making intra-Community supplies of packaging waste, packaged products; 3. distributing packaged products; 4. exporting packaging waste, packaging, packaged products; 5. recycling or conducting other non-recycling packaging waste recovery process; 6. introducing packaging; 7. introducing packaged products.

Waste law has become one of the largest and most complex segments of environmental law in international law, European Union law and the domestic law of many countries in the world. It is no different in Poland (Danecka, Radecki 2020:25). Based on the freedom granted at the EU level in the implementation of the framework directive, the Polish legislator confined itself only to introducing Article 18 sec. 1, according to which: "Anyone who undertakes activities that cause or are likely to cause waste generation should plan, design and conduct such activities applying such production methods or forms of services, as well as raw materials and materials, so as to, in the first place, prevent waste generation or reduce the amount of waste and its negative impact on human life and health and the environment, also at the stage of manufacture of products, during and after their use. Additionally, Article 22 of the Waste Act can be indicated, according to which: "The costs of waste management are borne by the original waste producer, or by the current or previous waste holder. In the cases specified in separate regulations, the costs of waste management are borne by the product manufacturer or the entity introducing the product into the territory of the country, specified in these regulations" (Karpus 2014: 252).

3. Projected assumptions

As the data from the Central Statistical Office reveal, in Poland, the achieved recycling levels of PET bottles, packaging glass and aluminium cans comprise 43, 62, and 81 percent, respectively. The necessity to achieve the objectives of Directive 2018/851 makes it important to consider new instruments supporting the implementation of the EPR, including the deposit-return system.

The above-mentioned system is one of the EPR solutions. It is a packaging management system, based on which a deposit is introduced for the packaging at the time of purchase. The packaging that is most often covered by the system is: glass (glass bottles), aluminium (cans), and plastics (mainly PET). The system allows for the recovery of all beverage packaging that is placed

on the market, its reprocessing and use in the further production cycle. The purpose of the deposit is to encourage consumers to care about the packaging and return it to the right place. Then the deposit is returned to the consumer. This system is financially neutral for the consumer, it links the producer to the packaging that it places on the market. The SUPD directive on single use products explicitly recommends deposit-return systems as a way to meet the challenge of environmental pollution caused by plastics. The deposit collection mechanism effectively implements the primary objective of the EU directive, i.e. it reduces the environmental impact of single-use plastic products.

In the Polish legal order, we will not find a legal definition of the deposit-return system anywhere, and thus it has not been determined by law what packaging should be included in this system. In the current legal framework, there are still open questions about the shape and scope of the system in question, with particular emphasis on such issues as the rights and obligations of the system participants; the status, nature and tasks of the entity performing the functions of the system operator; the role of municipalities and other public entities in this system.

The end customer, from the point of view of the deposit-return system, is the core link.

In September 2020, the Ministry of Environment and Climate presented a proposal for assumptions related to this system. In accordance with them, statutory obligations with regard to packaging and packaging waste will be accounted separately for the packaging of products intended for use in households and for other packaging (e.g. transport, industrial packaging, etc.). The Ministry's scheme includes an assumption that the entities introducing packaged products will be obliged to pay two fees:

1) P1 fee to the commune through the Marshal Office, intended to co-finance the selective collection of municipal waste

2) P2 fee for the EPR organization, intended for the implementation of statutory obligations, including collection, transport and recycling of packaging waste, as well as financing the deposit-return system.

The first fee, called P1, should cover the costs of collecting packaging waste from its producers in packages. P2 fee is to be calculated based on the procedure regulated in Article 17 of the Act on the management of packaging and packaging waste (i.e. Dz. U. of 2020, item 1114), i.e. by the so-called Voluntary Agreements or Packaging Recovery Organizations. It is assumed that a minimum rate will be introduced; a regulator will be responsible for the rates, i.e. a special entity that will control them. In summary, the introducing entity will pay a certain amount, some of which will flow through P1 (to the municipality) and some to P2 (to finance recycling).

As the draft amendment to the act on waste says, to prevent waste formation measures will be applied, which at least encourage the re-use of products and the creation of systems that promote repair and reuse, especially in relation to packaging. The costs of waste management, including costs related to the necessary infrastructure and its operation, are borne by the original waste producer, or by the current or previous waste holder.

In March this year, 3 parliamentary bills concerning management of packaging and packaging waste were submitted to the Sejm. The first one (EW-020-425/21) assumes the introduction of additional marking on the packaging. This obligation would apply to traders introducing products in packaging, manufacturing packaging and importing or acquiring intra-Community packaging, by affixing a label indicating "the fraction of waste to which packaging will belong as packaging waste." The second project (EW-020-426/21) concerns the introduction of a mandatory deposit "for each unit packet constituting a bottle or can in which a beverage is sold" in retail units with an area of 2000 m2. In addition, this project obliges entrepreneurs to allow the return of packaging waste "using an automatic device". Such a device will have to be purchased within 6 months of the entry into force of the Act, and the cost of its acquisition could be 80% co-financed by the NFOŚiGW [National Fund for Environmental Protection and Water Management]. The last project (EW-020-427/21) aims to reduce the number of plastic bags introduced into the environment. It assumes, among others, a 50% share of shopping bags suitable for recovery by composting and biodegradation (on 1 July 2021), as well as a total ban on offering plastic bags (other than biodegradable) from 1 January 2022. In the case of stores with an area of less than 250 m2, the above dates would be postponed to: 1 July 2023 and 1 January 2024, respectively. [sejm.gov.pl].

4. Final remarks

The development of the EPR system, in conjunction with the deposit-return system, may give a positive image effect for the regulator of the EPR system and public administration bodies.

It can be concluded that changes to the national EPR system are a necessity. The main premises are the EU regulations that we must implement in terms of the assumed limits, EPR and liquidation of disposable packaging. In the present legal circumstances, apart from maintaining the existing solutions that already exist in the Polish legal system, something new is needed. Boundary conditions ought to include the provisions of the revised Waste Directive and penetrate the provisions of national legislation. In this space, such conditions may be satisfied by the deposit-return system.

The Ministry of Environment and Climate points out that: "The possibility of introducing a deposit-return system in Poland is being analysed as part of work on the transposition of the so-called waste package, i.e. the amended waste directives. This system is considered as one of the most effective instruments to achieve high levels of collection of packaging and packaging waste, including plastic waste" (press release).

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COMMENTARY
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The new situation of posted workers in the framework of provision of services in the internal market of the European Union. Gloss to the Judgment of the Court of Justice of 8 December 2020 in Case C-626/18 *Republic of Poland v Parliament and the Council of the European Union*

Nowa sytuacja pracowników delegowanych w ramach świadczenia usług na rynku wewnętrznym Unii Europejskiej. Glosa do wyroku TS z dnia 8 grudnia 2020 r. w sprawie C-626/18 *Rzeczpospolita Polska przeciwko Parlamentowi i Radzie Unii Europejskiej*

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Abstract: Although the institution of posting workers to provide services in another Member State does not constitute a significant share in the internal market of the European Union, it has become a thorny issue among its Member States in recent years. For some of them, it meant the possibility of rendering competitive services on the markets of other countries, whereas others perceived it as a threat to gaining access to the labour market. This is especially visible in the recent amendment to the rules on the posting of workers laid out in Directive 2018/957. The split between Member States resulted in action brought to the Court of Justice of the European Union by Poland, representing one of the sides to the abovementioned division. The doubts expressed in the complaint mainly concerned the

application of the concept of full remuneration rather than minimum rate of pay and the introduction of the new category of long-term posting.

Keywords: posted workers, long-term posting, remuneration, minimum rate of pay

Abstrakt: Instytucja delegowania pracowników w celu świadczenia usług w innym państwie członkowskim, choć nie stanowiąca znaczącego udziału w rynku wewnętrznym Unii Europejskiej, w ostatnich latach wzbudziła wiele emocji wśród jej państw członkowskich. Dla jednych oznaczając możliwość konkurencyjnej aktywności na rynkach innych państw, dla innych zagrożenie w dostępie do rynku pracy, dość skutecznie te państwa podzieliła. Jest to zwłaszcza widoczne w świetle ostatniej nowelizacji reguł delegowania pracowników przewidzianej postanowieniami dyrektywy 2018/957. Realnym tego wyrazem są określone wątpliwości przedstawione w skardze do Trybunału Sprawiedliwości Unii Europejskiej przez Polskę, reprezentującą jedną ze stron wspomnianego wyżej podziału. Wątpliwości te dotyczą przede wszystkim stosowania wobec pracowników delegowanych pełnego wynagrodzenia w zamian za minimalne stawki płacy oraz nowej kategorii delegowania długoterminowego.

Słowa kluczowe: pracownicy delegowani, delegowanie długoterminowe, wynagrodzenie, minimalne stawki płacy

1. Introduction

The institution of transnational posting of workers was introduced into the EU legal order under Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996, concerning the posting of workers in the framework of the provision of services. On the one hand, it was intended to remove impediments and uncertainties regarding the freedom to provide services, among others by making it easier to identify the terms and conditions of employment applicable to workers temporarily employed in the Member State where they provided services. On the other hand, it aimed at guaranteeing posted workers the same scope of protection that is generally applicable in the State of destination (Evju 2009: 21-22). Therefore, its provisions were intended to ensure a balance between fair competition in the internal market and respect for workers' rights (De Wispelaere and Pacolet 2020: 31-49).

In order to overcome numerous practical problems connected with the insufficient implementation of Directive 96/71/EC, Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC was adopted. Its provisions also pursued a dual purpose, i.e. protecting posted workers while ensuring that all legal measures introduced by this Directive should not create burdens and restrictions on the free provision of services (recitals 4 and 16 of Directive 2014/67/EU and Article 1(1) of Directive 2014/67/EU). However, these changes also turned out to be insufficient, which is why the European Commission announced a review of Directive

96/71/EC, among others in the area of long-term posting and remuneration of posted workers at a level equal to that of local workers (COM(2016) 128 final and Van Nuffel and Afansajeva 2020: 271-302). This idea was generally supported by other EU institutions (Opinion of the Committee of the Regions 2017, Opinion of the Economic and Social Committee 2017, Report of the European Parliament 2016), although it quite clearly divided the Member States. Austria, Belgium, France, Germany, Luxembourg, the Kingdom of the Netherlands and Sweden supported the introduction of this principle, while Bulgaria, the Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania were against it (Letters to the European Commission 2015; Fruåker and Larsson 2020). This division became somewhat less pronounced during the vote on the new Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018, amending Directive 96/71/EC. Only Poland and Hungary voted against its final adoption, while Latvia, Lithuania, Croatia and the United Kingdom abstained from voting.

Therefore, Poland decided to bring action to the Court of Justice of the European Union (CJEU) against the European Parliament and the Council regarding the annulment of selected provisions of Directive 2018/957, which it did on 3 October 2018. A day before, on 2 October, Hungary also lodged a complaint with the CJEU (Judgment of the CJEU in Case C-620/18). Germany, France, the Netherlands, Sweden and the Commission participated in the proceedings as interveners, which in a way reflected the abovementioned division of EU Member States regarding the new understanding of the institution of posted worker in the framework of the provision of services. In its complaint, the Polish Government essentially raised the problem of choosing the legal basis of Directive 2018/957 in the context of striking the right balance between fair competition and the guarantee of respect for workers' rights, replacing the concept of "minimum rate of pay" with the concept of "remuneration" for posted workers, and introducing a special system of posting exceeding 12 months, the so-called long-term posting. These issues will be analysed in the second, third and fourth parts of this study, respectively.

2. Fair competition and the guarantee of respect for employee rights

In its complaint, the Polish Government questioned the application of Article 53(1) and Article 62 of the TFEU as the legal basis of Directive 2018/957, emphasising that the main purpose of the latter is to protect posted workers. Therefore, it should be based on those provisions of the TFEU that pertain to social policy. Since they were not specified, one is tempted to point to the

provisions of Article 153 of the TFEU, which regulate employee rights, among other issues. However, if we were to agree with Advocate General Campos Sánchez-Bordona that Directive 2018/957 merely stipulates which provisions of the host State are applicable to posted workers, thus resembling a conflict rule of a kind, one may doubt whether the legal basis in the form of Article 153 of the TFEU would be appropriate here (Advocate *General's* Opinion in Case C-620/18, paragraph 84). In its judgment, however, the CJEU focused on proving the legitimacy of maintaining the current legal basis of the contested directive rather than on a broader analysis of other potential "candidates".

Drawing on its previous jurisprudence, the CJEU emphasised that an amending act usually has the same legal basis as the earlier legal act (Judgment of the CJEU in Case C-482/17, paragraph 42). Undoubtedly, Directive 2018/957 shows such a relationship with Directive 96/71, whose provisions it amended, in particular by inserting new provisions (Judgment of the CJEU in Case 626/18, paragraph 54). This is confirmed by recitals 1 and 4 in particular, which concern the need to assess whether the basic principles of the functioning of the internal market guarantee a level playing field for businesses and respect for the rights of workers. Therefore, the basic assumption of the Directive is to strike the right balance between the interests of these two parties. According to the CJEU, this is to be expressed primarily by ensuring free competition, based on the application of substantially similar employment terms and conditions in each Member State, regardless of whether the employer is established in that Member State or not. The guarantee of greater protection for posted workers is expressed in the attempt to equalise the terms and conditions of employment of these workers with the terms of employment of workers employed by enterprises established in the host Member State (Judgment of the CJEU in Case 626/18, paragraph 58). A question arises here whether such attempts will ultimately lead to the equalisation of the institutions of posted workers with migrant workers, which are by definition different from each other. This is expressed primarily in their different rooting within the freedoms of the internal market, i.e. the freedom to provide services and the free movement of workers, respectively.

According to the CJEU, taking into account the aim pursued by Directive 96/71, i.e. ensuring the freedom to provide transnational services within the internal market in conditions of fair competition and to guarantee respect for the rights of workers, Directive 2018/957, which amended it, could be adopted on the same legal basis. The Court pointed to a change in the circumstances caused by successive enlargements of the European Union in 2004, 2007 and 2013, which resulted in the entrance in the internal market of undertakings from Member States whose employment conditions were different from those in force in other Member States (Houwerzijl and Berntsen 2020: 147-166; Rocca 2020: 167-184). In the opinion of the CJEU, it was these undertakings

that caused the need to adjust the balance on which Directive 96/71 was based by strengthening the rights of posted workers in such a way that competition between undertakings posting workers to that Member State and undertakings established in that State should develop in conditions of fairer competition (Judgment of the CJEU in Case 626/18, paragraph 69). However, such a connection between strengthening the protection of posted workers and ensuring free competition between undertakings seems to indicate that this protection is of a secondary nature here. The position of C. Barnard, expressed in this regard in relation to Directive 96/71/EC, seems to remain valid (Barnard 2013: 381). This was essentially indicated by the choice of the legal basis of the abovementioned directive, i.e. Article 62 of the TFEU concerning the freedom to provide services. This option was confirmed by the CJEU in case C-341/05 *Laval*, in which it first quoted the need to ensure fair competition between domestic undertakings and undertakings providing transnational services as the aim of Article 3(1) of Directive 96/71/EC, and only after that did it indicate the need to ensure that posted workers will have the rules of the Member States for minimum protection (Judgment of the CJEU in Case C-341/05, paragraphs 74-76).

The position expressed in this matter by the Polish Government was not supported by Advocate General Campos Sánchez-Bordona either, who insisted that the legal basis of Directive 2018/957 should continue to be the provisions of the TFEU on the freedom to provide services. He indicated that the response to the increasingly widespread phenomenon of transnational posting of workers should take the form of increased focus on the protection of posted workers' terms and conditions of employment, which was to be ensured by the changes introduced by the provisions of Directive 2018/957 and which was later confirmed by the CJEU itself (Advocate *General's* Opinion in Case C-626/18, paragraphs 24-25). Without specifying exactly what the new situation was, Advocate General Campos Sánchez-Bordona stressed the need to strike the right balance between the competing interests of posted workers and employers providing transnational services on the basis of their work. He repeated that guaranteeing such a balance was the primary aim of Directive 96/71, although the centre of gravity and the point of balance between the two sides had shifted towards greater protection of the rights of posted workers. However, in the opinion of the Advocate General, this was not sufficient to change the legal basis towards the TFEU provisions concerning social policy, which, as indicated above, was subsequently confirmed in the judgment of the CJEU (Advocate *General's* Opinion in Case C-620/18, paragraphs 60-72). We can thus notice the shift from the right balance between the competing interests of posted workers and employers providing transnational services towards greater protection of the rights of posted workers, but we still do not know where the border is to apply here the TFEU provisions concerning social policy.

3. Remuneration of posted workers

The amended Article 3(1) of Directive 96/71 replaces "minimum rate of pay" with "remuneration" as one of the terms and conditions of employment in the host State that should apply to posted workers. According to the Polish Government, the obligation to equalise the remuneration of posted and local workers restricts the freedom to provide services by companies posting workers for this purpose. Thus, it eliminates the competitive advantage associated with the existence of lower pay rates in the country in which these companies are established. Therefore, the Polish Government considers the obligation of equal treatment in terms of remuneration to be discriminatory, mainly because local companies are in a different situation than those that post their workers.

The understanding of the provisions of Directive 2018/957 presented by Advocate General Campos Sánchez-Bordona is completely different. According to him, the replacement of "minimum rates of pay" with "remuneration" does not mean that posted workers and local workers are treated fully equally because social security contributions and taxes applicable to posted workers are regulated by the rules of the country of origin (Advocate *General's* Opinion in Case C-626/18, paragraph 45; Judgment of the CJEU in Case C626/16, paragraph 112). Neither is it about "the same remuneration" as local workers are entitled to, because the third paragraph of Article 3(1) of Directive 96/71 only mentions its mandatory elements (Commission Staff Working Document SWD(2016) 52 final, p. 27). In practice, however, this may raise problems regarding, for example, whether it will be justified to pay such elements of remuneration that result from the very status of the worker and are not in fact applicable to the posted worker due to the temporary nature of his work (Benio 2018: 12-21). When posting workers to the host State, the service provider will therefore first have to accurately determine, name and calculate all terms and conditions of employment that are considered mandatory in a given profession or industry. This information should be available on a single national website that Member States were required to set up under Directive 2014/67/EU, whose basic assumption was to foster the application, compliance and enforcement of the rules regarding the posting of workers within the framework of the provision of services (Mitrus 2018: 4-11). In practice, finding the necessary information will not pose a problem to the employer, providing that individual Member States duly fulfil their obligations in this regard.

What is noteworthy is that the very interpretation of the concept of "minimum rate of pay" brings many practical difficulties. It is the Member States that have been tasked with defining this concept, with the proviso that they must do so in a sufficiently clear manner (Peijpe ven 2009: 98). The CJEU responded

to these difficulties in its jurisprudence by adopting a broad interpretation. The Court considered that the minimum rate of pay includes benefits such a daily allowance (under the same conditions as the inclusion of this allowance in the minimum rate of pay paid to local workers in the event of their posting within a given Member State), compensation for travelling time (paid to local workers, provided that daily travel to and from their workplace takes more than one hour a day) and a holiday allowance (granted to posted workers for a minimum period of paid annual leave). The minimum rate of pay includes neither accommodation and supplements in the form of meal vouchers, nor payment for overtime, contributions to supplementary occupational retirement pension schemes, the amounts paid in respect of reimbursement of expenses actually incurred by reason of the posting and, finally, flat-rate sums calculated on a basis other than that of the hourly rate. It is the gross wage which should be taken into account (Judgment of the CJEU in Case C-341/02, paragraph 29; Judgment of the CJEU in Case C-396/13, paragraph 38). If the employer requests the employee to perform an additional job or work under special conditions, compensation must be provided to the employee for that additional work, without taking it into account the purpose of calculating the minimum wage (Judgment of the CJEU in Case C-341/02, paragraphs 39-40).

Admittedly, the interpretation adopted by the CJEU significantly influenced the amendment of Directive 91/76 by introducing the concept of "remuneration" into its Article 3(1) and Article 3(7). Recital 18 of Directive 2018/957 states that allowances such as expenditure on travel, board and lodging travel should be considered part of the posted worker's remuneration, unless they are connected with expenditures actually incurred in connection with the posting. One of the reasons for the introduction of the concept of "remuneration" was insufficient transparency and significant heterogeneity of national laws and practices regarding the calculation of the minimum rate of pay. Some undertakings' practice of paying the minimum rate of pay to posted workers, regardless of their functions, professional qualifications or length of service also caused concern because it often led to a pay gap between posted and local workers (Commission working document SWD(2016) 52 final, pp. 10-14). In this case, however, it should be possible to verify whether the situation could not be improved on the basis of the provisions of Directive 2014/67/EU, adopted for this purpose.

By referring to the replacement of the concept of "minimum rate of pay" with the concept of "remuneration," the CJEU directly indicates that Directive 2018/957 extends the scope of employment terms and conditions applicable to posted workers, which, however, does not have the effect of proscribing any competition based on costs (Judgment of the CJEU in Case 626/18, paragraph 121). Thus, the Court confirmed the opinion of Advocate General Campos

Sánchez-Bordona, according to whom such a solution may reduce the competitive advantage of companies from EU Member States with lower labour costs that post workers to other Member States with higher labour costs, but it will not eliminate this advantage (Advocate *General's* Opinion in Case 626/18, paragraph 72). The justification that this is intended to change the balance underlying Directive 96/71 in favour of a greater emphasis on the protection of posted workers without sacrificing the objectives of fair competition does not seem convincing. Although not eliminated, this competition has in many cases been severely reduced

4. Long-term posted workers

Article 3(1)(a) of Directive 2018/957 introduces a new category of long-term posted workers, different from "normal" posted workers. Namely, if the actual posting exceeds 12 months (in exceptional situations – 18 months), a "normal" posting becomes a "long-term" posting. According to the Polish Government, this new status of long-term posted workers causes unjustified and disproportionate restrictions on the freedom to provide services, equalising long-term posted workers with local workers and migrant workers covered by Article 45 of the TFEU (Advocate *General's* Opinion in Case C-626/18, paragraph 74). These arguments, however, were shared neither by Advocate General Sánchez-Bordona nor by the CJEU itself. According to their position, although a Member State is to guarantee the applicability of all terms and conditions of working in the host country to a posted worker in addition to the terms and conditions of employment specified in Article 3(1)(a), this does not equalise posted and local workers. This is because it does not include the procedures, formalities and conditions of the conclusion and termination of employment contracts, including non-competition clauses, as well as supplementary occupational retirement pension schemes (Advocate *General's* Opinion in Case C-626/18, paragraph 79; Judgment of the CJEU in Case C-626/18, paragraph 124).

Advocate General Campos Sánchez-Bordona also raised another argument in favour of introducing the institution of long-term posting. In his opinion, setting a period of twelve (exceptionally eighteen) months when determining the posting eliminates the uncertainty existing in the original version of Directive 96/71 (Advocate *General's* Opinion in Case C-626/18, paragraph 82). According to Article 2(1) of the directive, "posted worker" was defined as a worker who carries out his work in the territory of a Member State other than the State in which he normally works "for a limited period." According to the Advocate General, the status of "long-term posted worker" is reasonable because it reflects the situation of workers staying in the host Member State for a long period, whose share in that country's labour market is therefore greater.

This position was confirmed by the CJEU judgment (Judgment of the CJEU in Case C-626/18, paragraph 125). However, the question arises as to how this "long term" is to be understood, i.e. why this should be a period of twelve (or possibly eighteen) months, and not, for example, twenty-four months, as provided for by the provisions on establishing social security legislation. This would undoubtedly ensure greater coherence of EU law in the field of labour law and coordination of social security systems (Rennuy 2020: 16; Verschueren 2020: 484-502).

The Polish Government's complaint also raised the disproportionate nature of the mechanism for the adding together of periods of postings introduced by Directive 2018/957, arguing that it takes into account the work undertaken and not the situation of the worker. Moreover, no time limits are specified to calculate this period. Advocate General Campos Sánchez-Bordona emphasised that such a solution is aimed at preventing the circumvention and abuse of the status of the long-term posted worker by replacing posted workers with other workers posted to do the same job (Advocate *General's* Opinion in Case C-626/18, paragraph 86). At the same time, he agreed with the Polish Government that this provision failed to actually set a time limit on adding together the periods in which posted workers perform the work undertaken. This situation neither deserves approval nor gives satisfaction. Similar feelings are evoked by the argument used by the CJEU to reject the Polish Government's complaint regarding the fact that it is the work undertaken that is used for calculating the posting period, and not the situation of the posted worker. The legality of this provision cannot therefore be challenged solely on the grounds that "the Republic of Poland has failed, in that regard, to specify which provision of the FEU Treaty or which general principle of EU law has thereby been infringed" (Judgment of the CJEU in Case C-626/18, paragraph 138). Moreover, the CJEU did not refer at all to the Polish Government's argument regarding the existence of a legal measure for the prevention of abuse and circumvention in the form of Article 4 of Directive 2014/67, although this issue was raised by Advocate General Campos Sánchez-Bordona. Apart from the questionable accusation that the Polish side did not show less restrictive possibilities for the prevention of abuse, the Advocate General pointed out that the purpose of the provision of Directive 2014/67 quoted above is to prevent fraud in the case of a single posting, and not in the case of a chain of workers posted to do the same work.

5. Conclusion

Doubtlessly, it is necessary to react to any practices connected with the abuse of workers, unlawful lowering of rates of payment or horrendous working conditions. However, these do not apply to the situation of legally posted

workers, to which currently apply the new rules concerning the payment of all elements of remuneration, the obligation to apply the entire body of host State's labour law in the event of long-term posting, or the cumulative mechanism for calculating the duration of the posting period. Such solutions should apply when it is certain that the enforcement provisions laid out in Directive 2014/67/EU are ineffective. Both the idea of equalising the terms and conditions of employment of posted and local workers, as well as the adding together of the periods of posting, which results in the treatment of subsequent posted workers as migrant workers, may raise doubts. This may ultimately lead to the identification of these two categories of workers, which by definition differ from each other due to being regulated under different freedoms of the internal market. Such fears and doubts were rightly expressed by the Polish side by filing a relevant complaint with the CJEU. Although none of the accusations presented in it was accepted, it highlighted the shortcomings of the new legal solutions, thus confirming the different approach to this problem in the western and eastern parts of the European Union.

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