

Planning for Climate and the Environment: the EU Green Deal

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Abstract

The green deal, a strategy programme by the European Commission, intends to “green” the EU activities and re-orient policies and laws for the years to come, in areas such as climate and energy, agriculture and fisheries, products and services, and trade and foreign policy, the most important announcement being the adoption of an EU climate law which will ensure EU climate neutrality by 2050. This contribution tries to place the different elements of the green deal strategy into their environmental context and also to assess the probability that the proposed measures will be agreed by the European Parliament and by the Council (the Member States’ governments).

Keywords

Green Deal – EU environmental policy – farm to fork strategy – circular economy – sustainability

1 Introduction

In December 2019, the Commission, presided now by Ursula Von der Leyen (Germany, presented “The European Green Deal” an ambitious programme of work for the newly appointed Commission.¹ The reception of this work

1 Commission Communication: The European Green Deal, COM (2019) 640 (in the following: Green Deal); the annex to this communication contains an indicative timetable for the different actions announced.

programme was overshadowed by the corona-crisis, which largely brought down economic, political, cultural and leisure activities in the European Union. Though Member States had decided, when adopting the Lisbon Treaty in 2009, to act principally on their own and at national level in public health matters and to give only very limited competences to the European Union in public health questions,² criticism on the lack of a strong EU intervention in organising medical instruments, protective clothing, sanitary staff availability and economic and financial support progressively turned against the EU as a whole. At the time of writing, the duration of the corona-crisis is unknown and the crisis may thus have a significant effects on the further development of the Green Deal and its implementation.

The title of the Green Deal which deliberately leaned on the reputation of the US “new deal” of the years 1933 to 1940, aims to significantly change the European governance, economy and environment. The following lines will try to look at the ten sections of the Commission programme³ from an environmental perspective and place the different measures that are announced in an environmental context. This approach appears to be all the more necessary, as the protection of the environment remained, in the past, despite lip-service statements, largely subordinated to economic interests. Economic growth was, for decades, the primary objective of EU policy which was considered to ensure income to farmers and fishermen, employment and the increase of wealth. Now, the Commission declared: “The European Green Deal is our new growth strategy”.⁴ It will be seen in five to seven years, whether the Green Deal has really started to bring together ecological and economic interests.

2 See TFEU Articles 4(2) (k), 6 (a) and 168.

3 See Commission, COM (2019) 640 (fn.1), annex: (1) Climate ambition (2) Clean, affordable and secure energy (3) Industrial strategy for a clean and circular economy (4) Sustainable and smart mobility (5) Greening the Common Agricultural Policy/ “Farm to Fork strategy” (6) Preserving and protecting biodiversity (7) Towards a zero-pollution ambition for a toxic free environment (8) Mainstreaming sustainability in all EU policies (9) The EU as a global leader (10) Working together- a European climate pact.

4 Commission, Work programme 2020: a Union that strives for more. COM (2020) 37, p. 2; repeated in Commission, A new industrial strategy for Europe, COM (2020) 102, p. 3.

2 Climate Ambition⁵

2.1 *Proposal on a European ‘Climate Law’ Enshrining the 2050 Climate Neutrality Objective*

The Commission indicated that it would propose the first European “climate law” which would “enshrine climate neutrality by 2050 and ensure that all EU policies contribute to that climate neutrality”. This was necessary, it declared, as “the present measures would only reach a reduction of climate gas emissions by 60 per cent in 2050”.⁶

The Commission’s objective of climate neutrality in 2050 was accepted by the European Council in its meeting of December 2019. However, the European Council, whose decisions are to be taken by consensus and are legally not binding,⁷ noted that “one State” – it did not name Poland – was not able to commit itself to that objective and decided to discuss the matter further.⁸

The Commission submitted a proposal for a European climate law in March 2020.⁹ It invoked the support of the European Council on its new approach and also referred to two European Parliament resolutions which had backed climate neutrality by 2050.¹⁰ The proposal was based on Article 192(1) TFEU, which provides for majority decisions. Article 2 no.1 of the proposal provided that “Union-wide emissions and removals of greenhouse gases regulated in Union law shall be balanced at the latest in 2050, thus reducing emissions to net zero by that date”. Furthermore, the Commission undertook to examine, whether the greenhouse gas emissions by 2030 should be reduced to 50 or 55 per cent and to make appropriate proposals. The other provisions of the proposal mainly concerned monitoring of greenhouse gas emissions and the delegation of powers to the Commission.

It is doubtful, whether Article 192(1) TFEU is the appropriate legal basis. Indeed, Article 192(2) TFEU requires unanimous Council decisions on “measures

5 The title of the headings and subheadings are taken from the annex to COM (2019) 640 (fn.1). The text of Document COM (2019) 640 is not always consistent with the precise commitments made in that annex.

6 Green Deal (fn.1), p. 4.

7 See Article 15 TEU.

8 European Council, conclusions of the meeting of 12 December 2019, document EUCO 29/19 of 12 December 2019.

9 Commission, proposal for a regulation establishing a framework for achieving climate neutrality and amending Regulation 2018/1999 (European Climate Law), COM (2020) 80.

10 European Parliament, Resolutions of 14 March 2019 on climate change (2019/2582(RSP)) and of 28 November 2019 on the 2019 UN Climate Change Conference in Madrid/Spain (COP25)(2019/2712(RSP)).

significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply". In view of the considerable effect which the change from coal, gas or other fossil fuels to renewable sources of energy will have on the national economies, the proposal is probably better based on Article 192(2) TFEU. The Commission's proposal did not discuss this issue.

2.2 *Comprehensive Plan to Increase the EU 2030 Climate Target to at Least 50% and Towards 55% in a Responsible Way*

The Green Deal took it for certain that the Commission would make a proposal to reduced greenhouse gas emissions by 50 to 55 per cent in 2030, compared to 1990. The proposal for a European climate law was more cautious and indicated that the Commission would examine the matter, though it repeated the Commission's conclusion that the measures which had been adopted at present, would only reach a reduction of greenhouse gas emissions by 60 per cent in 2050.¹¹

The combined effect of the present legislative measures – Regulation 2018/842,¹² Regulation 2018/841¹³ and the amended Directive 2003/87¹⁴ – aimed at reaching a reduction of greenhouse gas emissions of 40 per cent by 2030. The Commission's announcement that it would increase that reduction to 50 or 55 per cent clearly demonstrates that the present objectives are not in compliance with the Paris Agreement which requested each Contracting Party to adopt measures that "reflect its highest possible ambition", in order to reduce emissions.¹⁵ It will have to be seen, whether the Council is ready to adopt such an increase. The reductions between 1990 and 2019 amounted, according to the Commission, to 23 per cent, thus less than one per cent per year. The new Commission's objective will mean a reduction of greenhouse gas emissions by 2.7 to 3.2 per cent annually, which will ask a very considerable effort from Member States and economic operators.

11 Commission, COM (2020) 80, article 2, nos 3 and 4.

12 Regulation 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement, OJ 2018, L 156, p. 26.

13 Regulation 2018/841 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, OJ 2018, L 156, p. 1.

14 Directive 2018/410 amending directive 2003/87 to enhance cost-effective emission reductions and low-carbon investments, OJ 2018, L 76 p. 3.

15 Paris Agreement, Article 4 (3). The EU adhered to the Agreement, see Decision 2016/1841 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, OJ 2016, L 282, p. 1.

2.3 *Proposals for Revisions of Relevant Legislative Measures to Deliver on the Increased Climate Ambition*

The Green Deal indicated that the Commission would propose legislation to amend a number of legislative acts, in order to align them to the new 50/55 per cent targets for 2030. It refers to the directive on the greenhouse gas emissions trading scheme,¹⁶ the effort sharing regulation,¹⁷ the regulation on land use,¹⁸ the energy efficiency directive,¹⁹ the directive on renewable sources of energy,²⁰ and the CO₂ emission performance standards for cars and vans.²¹ Though these proposals for amendments were only announced for 2021 and the legislation process would certainly take two more years, the car industry already mounted a campaign, arguing that new legislative amendments were premature.

2.4 *Proposal for a Revision of the Energy Taxation Directive*

The Commission announced a revision of the energy taxation directive,²² “focusing on environmental issues”²³ and indicating that its proposal would be allowed to be adopted by qualified majority rather than by unanimity.

Tax legislation is practically all based on the present Article 113 TFEU which requires unanimous Council decisions and the consultation of the European Parliament. Of this, Article 192(2)(a) TFEU appears to allow an exception, as this provision requires a unanimous Council decision for “provisions primarily of a fiscal nature”. This means that environmental provisions which are not primarily of fiscal nature, may be adopted according to the environmental provisions of Article 192(1) TFEU which allows majority decisions.

Article 192(2) TFEU was never the subject of a decision by the Court of Justice (CJEU).²⁴ In normal understanding, a provision is primarily of fiscal nature, when it is meant to increase the income of the tax-raising authority. In contrast, when a provision aims at covering the cost of remedial action, of

16 Directive 2003/87 establishing a scheme for greenhouse gas emission allowance trading within the European Community, OJ 2003, L 275, p. 32.

17 Regulation 2018/842 (fn.12).

18 Regulation 2018/841 (fn.13).

19 Directive 2012/27 on energy efficiency, OJ 2012, L 315, p. 1.

20 Directive 2018/2001 on the promotion of the use of energy from renewable sources, OJ 2018, L 328, p. 82.

21 Regulation 2019/631 setting CO₂ performance standards for new passenger cars and for light commercial vehicles, OJ 2019, L 111, p. 13.

22 Directive 2003/96 restructuring the Community framework for the taxation of energy products and electricity, OJ 2003, L 283, p. 51.

23 Green Deal (fn.1), p. 5.

24 A proposal for a directive on a tax for CO₂ emissions and on energy, OJ 1992, C 196, p. 2, was never adopted.

being used to mitigate negative effects which stem from the activities of those who are subjected to the measure, and when the finances are ear-marked to mitigate such adverse effects, it is difficult to qualify such a measure as being primarily of fiscal nature. Supposed thus, the revenues of the tax would help to facilitate the transition to non-fossil energy sources, it might well be that the tax provisions could be adopted by majority voting. The issue will certainly raise controversies and it is therefore likely that at the end of the day, the CJEU will have to decide on the matter.

2.5 *Proposal for a Carbon Border Adjustment Mechanism for Selected Sectors*

The Green Deal raised the problem that the energy prices and thus those of the final products in third countries might not be as high as the future EU prices and that thus a “carbon leakage” – the relocation of EU industries in countries with less high energy prices – could occur. Should these differences materialise, it stated that the Commission would propose a carbon border adjustment mechanism for selected industries.²⁵ The objective of such a border tax would be to ensure that the price of import goods “reflect their carbon content”. The industrial sectors concerned were not mentioned; generally, the sectors which might be at risk of carbon leakage are well identified; they cover industrial, but also agricultural and food-processing sectors.²⁶ The Commission appears prepared for making a legislative proposal in 2021. The resistance from third countries – United States, but also Canada, Australia, United Kingdom, Latin American countries etc. – is likely to be considerable and retaliation measures – for example by the United States – are not excluded.

A border tax adjustment mechanism will have to be based on article 113 TFEU. Using article 192 (2) TFEU instead is hardly possible, as the tax means to protect some EU industrial and other activities against price competition and it is far-stretched to consider that such measures are not primarily of fiscal nature. This increases the risk that Member States which oppose in principle that the EU should be allowed to raise taxes, successfully oppose such a measure.

25 Green Deal (fn.1), p. 5.

26 See Commission delegated decision 2019/708 concerning the determination of sectors and subsectors deemed at risk of carbon leakage for the period 2021 to 2030, OJ 2019, L 120 p. 20. The decision enumerates 63 sectors and subsectors, a number which appears too high for a border tax adjustment mechanism which could be accepted under World Trade Organisation's provisions.

2.6 *New EU Strategy on Adaptation to Climate Change*

It was only in 2018 that the Commission adopted a long-term strategy on climate change.²⁷ The communication analyzed the impact of climate change on the EU economy.²⁸ The strategy proposed not to change the greenhouse gas emission reduction targets for 2030, but admitted that this would only lead to an overall reduction of 60 per cent in 2050. It then suggested to reach a “net zero greenhouse gas economy by 2050”, when 80 per cent of the energy supply would come from renewable sources and 15 per cent from nuclear energy. The rest would be handled by carbon capture and storage activities.²⁹

The new strategy on climate change was announced for 2020/2021. It is not clear, what changes to the existing strategy the Commission will suggest, except the revision of the targets for 2030. The Green Deal was rather vague in this regard and only indicated that the new strategy would be more ambitious and give investors, insurers, businesses, cities and citizens the possibility to integrate climate change into their risk management practices; this is already possible by now.

3 Clean, Affordable and Secure Energy

3.1 *Assessment of the Final National Energy and Climate Plans*

Regulation 2018/1899³⁰ provided that the Member States submit to the Commission by January 2019 and then every ten years an integrated energy and climate plan for the next ten years; the regulation contained, in Article 3 and the annexes, detailed requirements for the content of such plans. The report

27 Commission, A clean planet for all. A European strategic long-term vision for a prosperous, modern, competitive and climate neutral economy, COM (2018) 773.

28 By way of example, the impact on the Mediterranean region may be mentioned (*ibidem*, p. 3):- large increase in heat extremes; – decrease in precipitations and river flow;- increasing risk of droughts; – increasing risk of biodiversity loss; – increasing risk of forest fires; – increased competition between different water users; – increased water demand for agriculture; – decrease in crop yields; – increasing risk for livestock production; – increase in impacts of heat waves; – expansion of habitats for southern disease vectors; – decreasing potential for energy production; – increase in energy demand for cooling; – decrease in summer tourism and potential increase in other seasons; – increase in multiple climatic hazards; – most economic sectors negatively affected; -high vulnerability to spillover effects of climate change from outside Europe.

29 *Ibidem*, p. 9 and p. 15.

30 Regulation 2018/1999 on the governance of the energy union and climate action, OJ 2018, L 328, p. 1.

should also address the “five dimensions”³¹ of the energy union. The Commission should make recommendations, when it found, among other things, that the level of ambition of a Member State was not high enough. The Member State in question had to take “due account” of the recommendations; when it decided not to follow a specific recommendation, it had to make public its opinion and give reasons for its decision.³²

Member States had also to develop a long-term (30 years) strategy for climate change, publish it and submit it to the Commission; again, the Commission could make recommendations on the content of such strategies. It had to develop itself a long-term strategy for the EU and publish it by 2019.³³ The Commission had, furthermore, to publish annually a report on the state of the energy union, for the first time in 2019.³⁴

The Commission itself recognized that the long-term strategy which it published in 2019, will need to be significantly changed, in order to incorporate the new objectives of climate neutrality by 2050 and the higher targets for 2030.³⁵ Also the national energy and climate plans for the period 2021 to 2030 need to be rewritten, should the revised targets for 2030 be adopted by the EU as a whole. These national plans were, according to the Commission, all sent in time,³⁶ but based on a 40 per cent target. The Commission assessed the details of the national plans and made recommendations on all of them,³⁷ asking for an important number of national plans to raise the level of ambition. Also the 2020 reports will be based on the 40 per cent target, as the Commission has not yet formally proposed to increase the 2030 target of greenhouse gas emission reductions to 50/55 per cent.

The Commission was remarkably silent on two important aspects. First, it recognized that subsidies to fossil fuels did not decrease between 2008 and

31 These are, according to *ibidem*, Article 2(2), the “energy security, internal market, energy efficiency, decarbonisation and research, innovation and competitiveness”.

32 *Ibidem*, Articles 3 and 9.

33 *Ibidem*, Article 15.

34 *Ibidem*, Article 35. See Commission, Fourth report on the state of the energy union, COM (2019) 175.

35 See fn.34.

36 Commission COM (2019) 175 (fn.34), p. 12.

37 See Commission, C(2019) 4401 to 4428 and OJ 2019, C 297, p. 1 to 108. The reference to the assessment of the national plans is found in the recitals of each of the C-documents; see for example SWD (2019) 211 assessment of the Belgian plan; SWD (2019) 262 assessment of the Spanish plan.

2016 and that these amounted to 55 billion euro annually.³⁸ However, it did not indicate, what it intended to do to reduce these subventions.³⁹

Second, the Commission did not lose one word on nuclear energy, not even in its report on the state of the energy union. This is surprising, as nuclear energy produces at present about 25 percent of the electricity in the Union. The European Council indicated that some Member States had manifested their intention to have nuclear energy continue to play a role in their national energy production by 2050.⁴⁰

At present, there are 109 nuclear reactors in the EU in operation, four more are in construction and eight others are planned.⁴¹ These facts constantly change, due to dismantling operations of old reactors and the policy to increase the use of renewable sources of energy.

The principal environmental problems of nuclear energy are the safety aspects of the installation and the treatment and disposal of nuclear waste. The EU does not even have a uniform definition of nuclear waste.⁴² Export of such waste is possible, while the export of non-nuclear waste outside OECD countries is largely prohibited.⁴³ And there is no repository for the final disposal of nuclear waste within the EU (or elsewhere); such waste is at present stored at “interim” places.

38 Commission, COM (2019) 175 (fn.34), p. 22.

39 See also Decision 2002/1600 laying down the sixth environment action programme, OJ 2002, L 242 p. 1, Article 5 no.2 (ii)(a): “(The EU shall undertake) as soon as possible an inventory and review of subsidies that counteract an efficient and sustainable use of energy with a view of gradually phasing them out”: Not even the inventory has ever been undertaken.

40 European Council (fn.8), section 6.

41 World Nuclear Association. The reactors in operation are located in Belgium (7), Bulgaria(2), Finland (4), France (58), Netherlands (1), Romania (2), Sweden(7), Slovakia (4), Czechia (6), Hungary (4), Slovenia (1), Spain (7), Germany (6). Reactors are being constructed in Finland (1), Slovakia(2) and France (1). Reactors are planned in Bulgaria (1), Finland (1), Romania (2), Czechia (2) and Hungary (2).

42 See, for example, the title of Directive 2011/70/Euratom establishing a framework for the safe and responsible management of spent fuels and radioactive waste, OJ2011, L 199, p. 48. Some Member States treat recyclable nuclear waste as “products”.

43 Regulation 1013/2006 on the transfer of waste, OJ 2006, L 190, p. 1.

3.2 *Strategy for Smart Sector Integration*

The declaration in the Green Deal are very vague and limited to two short phrases.⁴⁴ The 2020 work programme was not more precise, but clarified that the initiative would be non-legislative.⁴⁵

3.3 *“Renovation Wave” Initiative for the Building Sector*

Also the “renovation wave” which is announced for 2020, is non-legislative.⁴⁶ Neither the Green Deal nor the work programme for 2020 explained, what the Commission intends to develop. It might be that the indication in the Green Deal according to which the risk of energy poverty must be addressed, refers to the building sector. A Commission document of 2016 had detailed that about 54 million persons in the EU were not able to properly heat their dwellings in winter.⁴⁷ However, the EU competence for dealing with building requirements is limited and it is therefore likely that the renovation wave will mainly consist in indicating, what kind of financial support from EU funds could be made available. Regulation 2018/1899 asked Member States to also address questions of energy poverty in their reports;⁴⁸ however, as only the first series of reports was sent to the Commission, it is too early to draw conclusions in this regard.

3.4 *Evaluation and Review of the Trans-European Network – Energy Regulation*

The Regulation on trans-European networks in the energy sector of 2013⁴⁹ was based on Article 172 TFEU. It provided for the establishment of a transnational infrastructure network of energy installations of common EU interest, such as oil and gas pipelines, electricity lines, plants for the storage of energy, hydro-electrical plants, ports for the reception of liquid natural gas etc. The realization of the different projects progressed slowly, as funds are not easily available

44 Green Deal (fn.1), p. 6: “The smart integration of renewables, energy efficiency and other sustainable solutions across sectors will help to achieve decarbonisation at the lowest possible cost. The Commission will present by mid-2020 measures to help achieve smart integration”.

45 Commission COM (2020) 37 (fn.4), annex.

46 *Ibidem*.

47 Commission, SWD (2016) 414, p. 25s and fn 48. In Commission COM (2019) 175 (fn.34), p. 17 the figure is given with “nearly 50 million”. The Member States which are most affected, are Bulgaria, Cyprus, Greece, Portugal and Lithuania (SWD(2016) 414, p. 26).

48 Regulation 2018/1999 (fn.30), Article 3(3)(d).

49 Regulation 347/2013 on guidelines for trans-European energy infrastructure, JO 2013, L 115, p. 39. Though the word “guidelines” is used in the title, the provisions of the Regulation are binding. See furthermore Commission Delegated Regulation 2018/540, OJ 2018, L 90 p. 38.

and the national authorization procedures take time. The Commission indicated that since 2014, 7.3 billion euro had been made available to co-finance such projects which led, overall, to investments of some 50 billion euro.⁵⁰ It now intends to revise the Regulation, in order to include projects such as smart grids, hydrogen networks, and carbon capture and storage installations.⁵¹

From the environmental point of view, the participation of the public in the planning process is one of the biggest problems of this Regulation.

3.5 *Strategy on Offshore Wind*

The new strategy on offshore wind will also be non-legislative.⁵² The Commission will try to promote offshore wind production, building on regional cooperation between Member States – which it cannot enforce, though. Wind parks are, until now, not regulated at EU level, except that they need an assessment of their effects on the environment, when such effects may be significant.⁵³ In 2008, the Commission vigorously called for more investments on offshore wind parks and made a sum of 565 million euro available for this purpose.⁵⁴ In 2018, four of these projects were finished, three still under construction and two abandoned.⁵⁵

It is likely that the new initiative of the Commission will mainly consist in making financial support for offshore wind parks available, without the Commission having competence to decide on the planning or execution of the projects, which remains in the hands of the Member States.

4 Industrial Strategy for a Clean and Circular Economy

4.1 *EU Industrial Strategy*

The Green Deal explained that a change was needed, as the EU industry accounts for 20 per cent of the EU's greenhouse gas emissions, while only 12 per cent of the materials it used came from recycling.⁵⁶ The industrial strategy was to address “the twin challenge of the green and digital transformation”.

50 Commission, COM (2019) 175 (fn.34), p. 14s.

51 Green Deal (n.1), p. 6.

52 Commission COM (2020) 37 (fn.4), annex.

53 Directive 2011/92 on the evaluation of the effects of certain public or private projects on the environment, OJ 2012, L 26 p. 1, Article 4 and annex II, no 3(g).

54 Commission COM (2018) 768 and Regulation 663/2009, OJ 2009, L 200, p. 31.

55 Commission, COM (2018) 86.

56 Green Deal (fn.1), p. 7.

The strategy was published in March 2020.⁵⁷ It concentrated on the position of industry within the European economy and at global level and addressed a number of macroeconomic aspects. Circular economy aspects were mentioned, but in a rather limited way. It was surprising that the communication mentioned the need “to revolutionise the way we design, make, use and get rid of things”, without elaborating in detail on this statement.⁵⁸ It only mentioned that there should be sustainable principles for all products and that consumers, in order to choose reusable, durable and repairable products, should receive trustworthy and relevant information on products. Presumably, the communication intended to leave details of the “revolution” to the circular economy action plan.

4.2 *Circular Economy Action Plan, Including a Sustainable Products Initiative and Particular Focus on Resource Intense Sectors such as Textiles, Construction, Electronics and Plastics*

This action plan was published at the same time as the industrial action plan,⁵⁹ though there are doubts that the two communications had been the subject of a detailed concertation between the different Commission administrations. The action plan implicitly took over the Commission’s definition of circular economy as an economy, “where the value of products, materials and resources is maintained in the economy for as long as possible, and the generation of waste is minimised”.⁶⁰ It announced a regenerative growth model and a “strong and coherent product policy”, which would lead to doubling the circular material – this is apparently recycled waste – use rate until 2030.⁶¹ It pleaded for a “sustainable product policy framework”, which would consist in particular of a sustainable product legislative initiative. This initiative would have the objective to broaden the principles of the eco-design directive – which until now only concerns energy-related products, without motor vehicles, though – “so as to make the eco-design framework applicable to the broadest possible range of products and make it deliver in circularity”.⁶² In the annex to its new action plan,⁶³ the Commission announced legislative initiatives on:

57 Commission, A new industrial strategy for Europe, COM (2020) 102.

58 *Ibidem*, p. 9.

59 Commission, A new circular economy action plan. For a cleaner and more competitive Europe, COM (2020) 98.

60 Commission communication: Closing the loop – an EU action plan for the circular economy, COM (2015) 614.

61 Commission COM (2020) 98 (fn.59), p. 2 and p. 3.

62 *Ibidem*, p. 4.

63 *Ibidem*, annex.

- a sustainable product policy (which would address questions of durability, reusability, upgradability, reparability, energy and resource efficiency);
- empowering consumers in the green transition. There is no indication what is meant by this issue;
- introducing a right to repair. This will be a complex issue. Should one give such a right against the producer (importer) or against the person who sold the product? How long should such a right exist? Shall there be a right to have the product repaired only once, or more frequently? What about cases, where the producer or the trader has disappeared from the market? What about anonymous products? What about online purchases? – National sales law is likely to answer such questions differently from one country to the other and EU-wide harmonization will not be easy.
- provisions on the substantiation of green claims.⁶⁴ Environmental claims may constitute an unfair commercial practice and thus come under Directive 2005/29.⁶⁵ The Commission issued guidance on environmental claims.⁶⁶ The legislative problem of such claims is that it is difficult to state that the use of a claim⁶⁷ is once and for all unfair, as much depends on the context in which the claim is made.
- mandatory green public procurement criteria. Until now, the green public procurement criteria which the Commission published for the benefit of national authorities,⁶⁸ are to be used on a voluntary basis. Making them compulsory will probably make their adoption more difficult;
- review of Directive 2010/75 on industrial emissions;⁶⁹

64 See also European Economic and Social Committee, Opinion on environmental, social and health claims in the single market, OJ 2015, C 383, p. 8.

65 Directive 2005/29 concerning unfair business-to-consumer commercial practices in the internal market, OJ 2005, L 149, p. 12.

66 Commission, Guidance on the implementation/application of directive 2005/29 on unfair commercial practices, SWD (2016) 163, section 5.1 (pp. 95–109).

67 Examples are “environmentally friendly”, “green”, “sustainable”, “ecological”, “compostable”, “degradable”, “recyclable”, etc.

68 At present, the Commission published 20 such criteria, for example on road design, construction and maintenance, SWD (2016) 203; computers and monitors, SWD (2016) 346; paints, varnishes and road marking, SWD (2017) 484; textiles, SWD (2017) 231; indoor cleaning services, SWD (2018) 443; data centres, server rooms and cloud services, SWD (2020) 55.

69 Directive 2010/75 on industrial emissions (integrated pollution prevention and control) OJ 2010, L 334, p. 17.

- amending several waste directives (on end-of life vehicles,⁷⁰ packaging,⁷¹ hazardous substances in electrical and electronic products,⁷² waste oils⁷³);
- imposing a recycled plastic content in packaging, vehicles and construction material;
- restricting micro-plastics in products. The term “micro-plastics” is not further explained. It may be that the Commission, which declared that it would focus “on measures to tackle intentionally added micro plastics”⁷⁴ refers to nanomaterials.⁷⁵ In the work programme 2020, this item does not appear as a separate initiative any more;⁷⁶
- creating a framework for the certification of carbon removals.

On other sustainable product principles, the Commission was less precise: This concerns for example measures to enable the remanufacturing and recycling, reduce the carbon and environmental footprint, restrict single-use products, fight planned obsolescence, ban the destruction of unsold durable products, incentivizing product-as-a-service practices and use digitilisation for product information.⁷⁷ The action plan does not either specify, what exactly is planned.

The Commission approach in its action plan indeed comes close to a revolution: most of the envisaged measures concerning products had, in the past, been at the discretion of the producer. The Commission and the EU legislature had carefully avoided to impose constraints on producers, as shown by the ecolabel regulation,⁷⁸ the initiatives on standardization, integrated product policy⁷⁹ or the management scheme of EMAS⁸⁰ which all refer to voluntary

70 Directive 2000/53 on end-of life vehicles, OJ 2000, L 269, p. 34.

71 Directive 94/62 on packaging and packaging waste, OJ 1994, L 365, p. 10.

72 Directive 2011/65 on the restriction of the use of certain hazardous substances in electrical and electronic equipment, OJ 2011, L 174, p. 88.

73 Directive 75/439 on the disposal of waste oils, OJ 1975, L 194, p. 23, regulated the recovery of used oils, imposing a priority of recycling over incineration or other forms of recovery. Due to successful lobby intervention, this directive was repealed by Directive 2008/98 on waste, OJ 2008, L 312, p. 3. Presumably, there are now some regrets on the deletion of the requirement to give priority to recycling.

74 Green Deal (fn.1), p. 7.

75 See Commission, Recommendation on the definition of nanomaterials, OJ 2011, L 275, p. 38. See also Commission, COM (2018) 28, p. 13.

76 Commission COM (2020) 37 (fn.4).

77 Green Deal (fn.1), p. 4.

78 Regulation 66/2010 on the EU ecolabel, OJ 2010, L 27, p. 1.

79 Commission, Integrated product policy. Building on environmental life-cycle thinking, COM (2003) 302.

80 Regulation 1221/2009 on the voluntary participation by organisations in a Community eco-management and audit scheme (EMAS), OJ 2009, L 342, p. 1.

participation of producers. The eco-design directive indicated clearly that self-regulation by industry should have priority over regulatory provisions on the eco-conception;⁸¹ it is true, though, that such self-regulation hardly ever occurred, so that the most frequent forms of action under that directive were binding Commission regulations. The action plan on circular economy which the Commission had adopted in 2015,⁸² contained overall 54 actions to be initiated. However, 47 of these actions referred to non-legislative measures, such as the installation of platforms, the drafting of guidance, the support of networks, the making of studies, the laying down of non-binding green public procurement criteria, etc; the legislative initiatives essentially concerned the revision of the waste legislation.⁸³

Past EU legislation sometimes dealt with the restriction of hazardous or undesirable substances in products, such as in cars, electrical or electronic equipment, batteries, pesticides, chemicals etc. However, the composition of products was not subject of regulation, though there were some discussions on a minimum content of recycled material in glass, packaging or paper. Thus, it would mean a big step, if EU legislation now imposed on producers – and probably also on importers! – such a minimum content, be it limited to plastic material; consensus among the 27 Member States does not seem self-evident.

The Commission's action plan of 2015 already contained promises to improve the durability, reparability and recyclability of products and to fight planned obsolescence, and these promises are repeated in the action plan 2020 on circular economy. A closer look at the regulations which were adopted by the Commission since 2016⁸⁴ shows, however, the limited result of these measures. Indeed, the regulations contained all provisions on energy-saving; seven

81 Directive 2009/125 establishing a framework for the setting of eco-design requirements for energy-related products, OJ 2009, L 285, p. 10, recital 18: "Priority should be given to alternative courses of action such as self-regulating by the industry, where such action is likely to deliver the policy objective faster or in a less costly manner than mandatory requirements". See also recital 19 and Article 17 of that directive.

82 Commission COM (2015) 614 (fn.60).

83 Commission Report on the implementation of the circular economy action plan, COM (2019) 190, and in particular SWD(2019) 90.

84 Commission Regulation 2016/2281 (air heating products, cooling products, fan coil units), OJ 2016, L 346, p. 1; Commission Regulation 2019/424 (servers and data storage products), OJ 2019, L 74, p. 46; Commission Regulation 2019/1781 (electrical motors and variable speed drives), OJ 2019, L 272, p. 74; Commission Regulation 2019/1782 (external power supplies), OJ 2019, L 272, p. 95; Commission Regulation 2019/1783 (transformers), OJ 2019, L 272, p. 107; Commission Regulation 2019/1784 (welding equipment), OJ 2019, L 272, p. 121; Commission Regulation 2019/2020 (light sources and separate control gears), OJ 2019, L 315, p. 209; Commission Regulation 2019/2019 (refrigerators), OJ 2019, L 315, p. 187; Commission Regulation 2019/2021 (electronic displays), OJ 2019, L 315, p. 241; Commission Regulation 2019/2022 (dishwashers), OJ 2019, L 315, p. 267, Commission Regulation

of the twelve regulations adopted contained provisions on repair pieces, which had to be available between seven and ten years and made accessible to professional repairers. Three regulations addressed water consumption or air emissions. In contrast, the durability and recyclability were not specifically addressed.

One may doubt, whether the availability of repair pieces really helps fighting the planned obsolescence⁸⁵ or prolong the durability of products, when the price of repair is not – and cannot be – regulated. Require repairers to register and contract insurance is likely to increase repair costs, and also other factors may influence consumers' decisions to have product either repaired or replaced. Regulation will have to be adapted to the different requirements for the specific products and will thus be complex and detailed and need a lot of technical and scientific support – and face the lobbying potential of European, national and international industrial associations. Also the fashion to prefer new to repaired products, promoted by the powerful marketing industry, will not easily be overcome.

Germany had legislation on circular economy since 1994, without it being possible to consider that German products are per se more durable, repairable or recyclable. The German act⁸⁶ mainly serves for an appropriate management of waste. It might, also in view of this experience, be doubtful, whether the concept of “circular economy” is really capable of being the basis for the entire product policy and the growth strategy of the EU.

4.2.1 Actions on Textiles, Construction, Electrical and Electronic Equipment and Plastics

There is at present no EU legislation on environmental aspects of *textiles*. From 2025 onwards, the separate collection of textiles will be mandatory.⁸⁷ The European Environment Agency produced, in 2019, a report on textiles in a circular economy, underlining in particular the high emissions of greenhouse gases during their production.⁸⁸ The circular action plan 2020 announced a new strategy for textile products which would promote their eco-conception and

2019/2023 (washer-dryers), OJ 2019, L 315, p. 289; Commission Regulation 2019/2024 (refrigerators with direct sales function), OJ 2019, L 315, p. 313.

85 In SWD (2016) 163 (fn.66), p. 75, the Commission considered planned obsolescence not to be unfair per se.

86 Gesetz zur Förderung der Kreislaufwirtschaft und zur umweltverträglichen Bewirtschaftung von Abfällen, of 24 February 2012, Bundesgesetzblatt 2012, Part I, p. 212.

87 Directive 2008/98 (fn.73), as amended by Directive 2018/851, OJ 2018, L 150, p. 109, Article 11.

88 European Environment Agency: Textiles and the environment in a circular economy. EIONET Report EC/WMGE – 2019/6. Mol (Belgium).

their reuse and recycling, ensure the increased use of secondary raw material and reduce the presence of hazardous substances.⁸⁹ Legislative measures targeting textiles do not appear to be planned.

Construction and demolition waste materials have to be collected by Member States and a collection rate of 70 per cent shall be achieved by 2020.⁹⁰ The Green Deal considered construction material to be particularly resource-intensive and showed itself concerned that construction or demolition waste was too often used as filling material for infrastructure projects, while it contained hazardous substances. The Commission announced a new strategy for a “sustainable built environment”⁹¹ and seems, moreover to think of prescribing a certain percentage of plastic materials in construction products, provided this is compatible with the safety and functionality of the products.⁹²

As regards *electrical and electronic products*, two directives deal with important details as regards the presence of hazardous substances, the waste treatment and disposal.⁹³ The Commission intends to further integrate eco-conception requirements from Directive 2009/125 into such equipment, facilitate the removal of the equipment, in order to obtain the precious metals or rare earths used for its manufacture, facilitate its repair, give consumers a right of repair, introduce a universal charger for all electrical and electronic products, consider the introduction of an electronic passport for such equipment and increase the separate collection quota.⁹⁴

On *plastic material*, the Commission adopted a strategy in 2013.⁹⁵ The strategy indicated figures on the production of plastics at global level and in the EU,⁹⁶ but then, as a characteristic approach of product policy of that time, it

89 Commission COM (2020) 98 (fn.59), p. 10.

90 Directive 2008/98 (fn.73), Article 11.

91 Commission COM (2020) 98 (fn.59), p. 11.

92 Green Deal (fn.1), p. 7; see for details Commission COM (2020) 98 (fn.59), p. 11.

93 Directive 2011/65 on the restriction of the use of certain hazardous substances in electrical and electronic equipment, OJ 2011, L 174, p. 88, Directive 2012/19 on waste electrical and electronic equipment (WEEE), OJ 2012, L 197, p. 38.

94 Green Deal (fn.1) p. 78 and Commission COM (2020) 98 (fn.59), p. 7. The present separate collection rate for each Member State for WEEE is at least 65 per cent of the weight of EEE placed on the market, see Article 7 of Directive 2012/19 (fn.93).

95 Commission, Green paper on plastic waste in the environment, COM (2013) 123.

96 *Ibidem*, p. 4: At global level, there were 245 megatons (Mt) of plastic produced in 2008 (one megaton equals one million tons), within the EU some 60 MTE. As the production grows by four per cent annually, it was expected that by 2020 66 MT were produced in the EU. In 2008, 49 per cent were landfilled, 21 per cent recycled and 30 per cent incinerated, with or without energy recovery. Packaging takes the greatest part of plastics (40 per cent), followed by building and construction (20 per cent). It is estimated that about 10 MT enter the oceans annually.

only dealt with the treatment of plastic waste. It “forgot” that the first priority in waste management is the prevention of waste generation.⁹⁷ This means that any serious waste management policy must be a product policy, as plastic material, before it becomes plastic waste, is a plastic product. The 2013 strategy raised questions, but did not announce concrete actions.

In 2018, the Commission presented a new strategy.⁹⁸ Though the title addressed plastic products, the measures announced mostly concerned plastic waste. The figures on plastics were made more precise⁹⁹ and the Commission committed itself, among other things, to have, by 2030, all plastic packaging “re-usable or easily recycled”¹⁰⁰, establish a market for recycled plastic; it also referred to existing EU legislation on plastics.¹⁰¹ The Commission did not consider reducing the number of different plastics materials on the market – estimations go up to 200 different compositions- or to prohibit all single use plastics.¹⁰² The Green Deal and the circular action plan 2020 did not suggest specific measures for plastic material, except the increase of recycled plastic materials in certain products and initiatives as regard micro-plastics.¹⁰³

The Commission indicated at the end of 2019 that there was a broad support among Member States to the introduction of an EU tax based on non recycled plastic waste.¹⁰⁴

97 See the hierarchy of waste management in Article 5 of Directive 2008/98 (fn.73).

98 Commission, A European strategy for plastics in a circular economy, COM (2018) 28. See European Parliament, Resolution of 13 September 2018 on this strategy, OJ 2019, C 433, p. 136; Opinion of the Committee of the Regions, OJ 2018, C 461 p. 30; Opinion of the European Economic and Social Committee, OJ 2018, C 283, p. 18.

99 Commission, *ibidem*: 31 per cent of plastics go to landfill; incineration of plastics has increased and accounts now for 39 per cent of all treatment. The EU discharges, one way or the other, annually between 150.000 and 500.000 tons of plastics into the oceans.

100 *Ibidem*, p. 7.

101 Directive 2015/720 amending Directive 94/62 as regards reducing the consumption of lightweight plastic carrier bags, OJ 2015, L 115, p. 11; Directive 2019/904 on the reduction of the impact of certain plastic products on the environment, OJ 2019, L 155, p. 1. Directive 2018/852 amending Directive 94/62, OJ 2018, L 150, p. 141, provided that by 2025 50 per cent of all plastic packaging have to be recycled and that this figure would be increased to 55 per cent by 2030.

102 See the Commission's reaction to a corresponding citizen initiative, Decision 2019/1268, OJ 2019, L 200, p. 33.

103 For details see Commission COM (2020) 98 (fn.59), p. 9.

104 Commission, Time to deliver on the Union's financial framework for 2021 to 2027, COM (2019) 456, p. 3.

4.3 *Initiatives to Stimulate Lead Markets for Climate Neutral and Circular Products in Energy Intensive Industrial Sectors*

The Green Deal mentioned that the decarbonisation of energy-intensive industries, such as steel, chemicals and cement is essential. It referred to the findings of an expert group which was published end of 2019¹⁰⁵ and examined eleven industrial sectors, such as aluminium, steel or cement. It recommended the creation of markets and the developing of pilot-projects for climate-neutral products, finance their industrial development, ensure a greater availability of secondary raw materials and maintain competitiveness with third country products. On some sectors – steel, fertilizer, cement, ceramics, paper, glass and non-ferrous metals –, the report even pointed to the innovative production methods that could be further developed.¹⁰⁶ The Commission measures are likely to consist of financial support, in particular also to promote the objective of zero emissions by 2030, which is announced as a separate action.¹⁰⁷

4.4 *Legislation on Batteries*

Environmental aspects of batteries were regulated by a directive since 1991 and updated in 2006.¹⁰⁸ The legislation restricted the presence of heavy metals (lead, cadmium) in batteries, introduced a separate collection obligation of waste batteries, asked Member States to establish a plan for the separate collection and provided for a quota of 45 per cent of separate collected batteries, to be reached by 2016. This objective was met by 14 Member States.¹⁰⁹

With the arrival of electrical cars, the Commission was concerned about the industrial development of batteries which mainly took place in Asia, which had an 85 per cent market share of batteries, against three per cent of the EU. The Commission adopted a strategy action plan on batteries¹¹⁰ and reported on its implementation.¹¹¹ The Green Deal announced a legislative initiative in 2020 to ensure a safe, circular and sustainable battery value chain for all batteries, in particular for those for electric vehicles. This legislative reform will deal

105 Publication Office of the EU: Masterplan for a competitive transformation of EU energy-intensive industries enabling a climate-neutral circular economy by 2050 – Report of the expert group on energy-intensive industries. Luxemburg 2019.

106 *Ibidem*, p. 26.

107 See Green Deal (fn.1), annex.

108 Directive 2006/66 on batteries and accumulators and waste batteries and accumulators, OJ 2006, L 266, p. 1.

109 Commission, Report on the implementation of Directive 2006/66, COM (2019) 166.

110 Commission COM (2018) 293.

111 Commission COM (2019) 176.

with a mandatory recycled content of batteries, the improvement of collection and recycling rates, the recovery of valuable materials, the phasing out of non-rechargeable batteries and measures on the sustainability and transparency, which are also intended to promote the production of batteries within the EU.¹¹² Such and other details of the future proposal may well be laid down in Directive 2006/66, as this legal instrument is, according to its Article 2, destined to cover all types of batteries, “regardless of their shape, volume, weight, material composition or use”.

4.5 *Legislative Waste Reforms*

Waste production within the EU increases; the EU or national legislation and management did not succeed in stopping this trend.¹¹³ The Green Deal announced measures to reduce waste generation and improve its recovery; this announcement was further detailed in the circular economy action plan.¹¹⁴ The plan is to provide for waste reduction targets – which would again mean to impose conditions on products and their use. Furthermore, it is planned to harmonize the separate collection systems and increase the obligation to recycle municipal waste which is at present 50 per cent.

Apart from the different sectors mentioned above, the Commission will propose amendments of the packaging directive¹¹⁵ and of the directive on end-of-life vehicles. Both directives do not only deal with waste issues, but also contain provisions on the product itself.

The packaging directive shall be reformed, as the amount of packaging continues to increase, also due to the online trade. The Commission considers to regulate the reduction of overpackaging, the design of packaging which should allow re-use and recycling, the reduction of the complexity of packaging material, better labelling of packaging – and the availability of drinkable tap water, in order to reduce bottles for water.¹¹⁶

It will be seen, what these ideas become in the reality of the EU legislative process. The most innovative step appears to be the reduction of the complexity of packaging material. The recyclability of material does not yet mean that the material will actually be recycled; to ensure recycling, other methods are necessary.

¹¹² Commission COM (2020) 98 (fn.59), p. 7.

¹¹³ See Commission, European environmental implementation review 2019; a Europe that protects its citizens and enhances their quality of life, COM (2019) 149, p. 3.

¹¹⁴ Commission COM (2020) 98 (fn.59), p. 12.

¹¹⁵ Directive 94/62 (fn.71).

¹¹⁶ Commission COM (2020) 98 (fn.59), p. 8.

The end-of life vehicles directive¹¹⁷ will probably be amended to provide that cars contain a specific percentage of secondary raw materials (recycled waste) which might not be too welcome by premium car manufacturers.

The Green Deal also intended to stop the export of waste¹¹⁸ which would be a very welcome environmental protection measure. At present, the export of waste for disposal is prohibited. Non-hazardous waste may be exported for recovery purposes, unless the importing State objects. Hazardous wastes are divided into two groups: for the first group, exports to countries outside the OECD is prohibited, for a second group the export for recovery purposes is possible, provided the importing State agrees.¹¹⁹ In practice, many exports of wastes end in authorized or non-authorized landfills or are incinerated without energy recovery. Also the export of materials as used products instead of wastes- electrical and electronic equipment and cars are mainly concerned- is used to bypass the existing legislation. Finally, the recycling practices in a number of third countries are, from a point of view of human health and environmental protection, appalling.

5 Sustainable and Smart Mobility

Overall, the Green Deal gives the impression that this section on mobility was hastily put together, without much concertation and consideration as regards a “new” strategy.

5.1 *Strategy for Sustainable and Smart Mobility*

The Commission stated that transport in the EU is responsible for about 25 per cent of all greenhouse gas emissions and that this percentage continues to increase. It wanted to have a reduction of these emissions by 90 percent in 2050. Its announced strategy will intend to cover emissions for air and road, rail and water transport.

Air emissions from airplanes are regulated – or not so much – by ICAO, the International Civil Aviation Organisation. Political pressure from USA, China, Japan and other countries made the EU put on hold its own attempts to submit air plane greenhouse gas emissions to Directive 2003/87.¹²⁰ In 2016, ICAO reached an agreement on CO² emissions from airplanes, which will start

117 Directive 2000/53 (fn.70).

118 Green Deal (fn.1), p. 8: “the EU should stop exporting its waste outside the EU”.

119 See for details Regulation 1013/2006 (fn.43).

120 Directive 2009/29, OJ 2009, L 140, p. 63; Decision 377/2013, OJ 2013, L 113, p. 1.

operating in 2023, but will only become mandatory for States as of 2027. Even after 2027, CO²-emissions from airplanes may grow, as long as emission rights are bought. The incentive to reduce CO² emissions is thus rather limited.

The International Maritime Organisation IMO is in charge of greenhouse gas emissions from ships. It adopted until now no binding agreements on limiting or reducing greenhouse gas emissions. The Green Deal announced that it would bring the emissions from maritime transport and from road transport under the scheme of Directive 2003/87.¹²¹ For rail and inland waterway transport, there are not yet provisions on limiting the greenhouse gas emissions. The new transport strategy will be presented during 2020. However, putting the Commission's intentions into binding legislation will take a good many years.

5.2 *Funding Call to Support the Deployment of Public Recharging and Refuelling Points*

The Green Deal indicated that by 2025 about 13 million electrical cars would circulate in the EU, and called for the financial means to construct one million recharging and refuelling stations for such cars. Apparently, the requirement of the directive on alternative fuel infrastructure,¹²² to build such stations in sufficient number by 2020, had a very limited success. Environmentally, this evolution towards electrical cars should contribute to lower air polluting emissions.

5.3 *Boost the Production and Supply of Alternative Fuels*

The Green Deal was rather laconic on this item, limiting its comments to one phrase: "The Commission will consider legislative options to boost the production and uptake of sustainable alternative fuels for the different transport modes".

5.4 *Revised Proposal for a Directive on Combined Transport*

At present, about 75 per cent of transport of goods is done by road. A directive of 1992 to improve the combined transport road/rail or road/ship,¹²³ had limited success and a proposal for improving its effectiveness¹²⁴ was not adopted, as the road transport sector opposed it. The Green Deal announced a new proposal by the Commission in 2021.

121 Green Deal (fn.1), p. 11.

122 Directive 2014/94 on the deployment of alternative fuel infrastructure, OJ 2014, L 303, p. 1.

123 Directive 92/106 on the establishment of common rules for certain types of combined transport of goods between Member States, OJ 1992, L 368, p. 38.

124 Commission COM (2017) 648.

5.5 *Review of the TEN-transport Regulation*

The Green Deal was also very short as regards the revision of the TEN-regulation on transport,¹²⁵ just stating that its revision should help to accelerate the use of zero- and low-emission vehicles and vessels.

5.6 *Proposal for More Stringent Air Pollutant Emission Standards for Vehicles*

The Green Deal was of the opinion that air pollution from vehicle could be “drastically” lower, in particular in cities. It announced new legislative measures to replace the present emission limit values of 2007/2008¹²⁶ and, as regards greenhouse gas emissions, an evolution “towards zero-emission mobility”. The CO₂ emissions from cars were planned to be regulated by the Commission in 1993, but delayed by successful car lobbying until 2009; at present, they are regulated by Regulation 2019/631.¹²⁷ For trucks, Regulation 2019/1242¹²⁸ introduced for the first time some reductions which are expressed in a certain percentage with regard to previous emissions – a rather weak regulation. However, the vehicle and truck manufacturer associations are already up at arms to oppose new restrictions.

6 *Greening the Common Agricultural Policy/ ‘Farm to Fork’ Strategy*

6.1 *Examination of the Draft National Strategic Plans*

In 2018, the Commission proposed a regulation which would oblige Member States to draw up CAP strategic plans,¹²⁹ which also cover the climate change and environmental aspects of the Common Agricultural Policy. This proposal was intensively discussed in Council, but has not yet been adopted.¹³⁰ Its

125 Regulation 1315/2013 on Union guidelines for the development of the trans-European transport network, OJ 2013, L 348, p. 1.

126 Regulation 715/2007 on the type-approval of motor vehicles with respect to emissions for light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance, OJ 2007, L 171, p. 1. Commission Regulation 692/2008, OJ 2008, L 129 p. 1. This Commission Regulation contains in annex XVII emission limit values for carbon monoxide (CO), hydrocarbons (THC and NMHC), nitrogen oxides (NOx) and particulates (PM₁₀ and PM_{2.5}, mass and quantity).

127 Regulation 2019/631 (fn.21). It should be noted that these standards only apply to new vehicles; a regular emission control of vehicles in use is not foreseen.

128 Regulation 1242/2019 setting CO₂ emission performance standards for new heavy duty vehicles, OJ 2019, L 198, p. 202.

129 Commission COM (2018) 392.

130 See Council working document on the progress of discussions, Document 14983/19 of 10 December 2019.

adoption is probably linked to the agreement on the financing of the EU policy in the years 2021 to 2027, for which the Commission also made proposals.¹³¹

It is thus not clear, what the national strategic plans- if ever their drawing up is required- will have to contain.¹³² The Commission's considerations take up some earlier reflections,¹³³ but it is also clear that Member States will try to avoid too much interference of the Commission in the drawing up and implementation of their plans. A general re-orientation of the Common Agricultural Policy to integrate environmental and climate concerns is not in view.

6.2 *'Farm to Fork' Strategy*

The Green Deal announced a 'Farm to Fork' strategy to be proposed in spring 2020. The term 'farm to fork' apparently appeared for the first time in a Commission communication of 2019.¹³⁴ The Green Deal indicated that the new strategy would

- strengthen the efforts of farmers and fishermen to tackle climate change;
- provide for the managing and storage of CO² in the soil;¹³⁵
- reflect the ambition to significantly reduce, also by way of legislative measures, the use and risk of pesticides, fertilizers and antibiotics;
- promote the circular economy by improving transport, storage and packaging of food and reduce food waste;
- better inform consumers on food issues and ensure affordable healthy food for all.

In May 2020, the Commission presented its new strategy.¹³⁶ It contained overall 27 proposals for action and a timetable, among others the reduction of the use of chemical pesticides by 50 per cent and of fertilizers by 20 per cent until 2030, the increase of organic farming from eight per cent at present until 25 per cent

¹³¹ Commission COM (2018) 322.

¹³² See, however, Green Deal (fn.1), p. 12: "These plans should lead to the use of sustainable practices, such as precision agriculture, organic farming, agro-ecology, agro-forestry and stricter animal welfare standards". This is thus for the moment wishful thinking.

¹³³ Commission, A sustainable bioeconomy for Europe: strengthening the connection between economy, society and the environment, COM (2018) 673; Towards a sustainable Europe by 2030, COM (2019) 22.

¹³⁴ Commission, Reflection paper. Towards a sustainable Europe by 2030, COM (2019) 22, p. 19.

¹³⁵ It is not clear, why CO² capture and storage is mentioned here. This industrial technique is regulated by Directive 2009/31, OJ 2009, L 140 p. 114. CO² storage was unsuccessful in the EU, mainly due to high investment costs, risks of CO² leaks and the liability linked to that, and strong opposition from environmental groups. See Commission progress reports, COM (2014) 99, COM (2017) 37 and COM (2019) 566.

¹³⁶ Commission Communication: "A farm to fork strategy: for a fair, healthy and environmentally-friendly food system. COM (2020) 381.

by 2030 and proposals for compulsory nutritional labelling of food. The overarching idea of the new strategy appears to be that “all farmers receiving area and animal-based payments will have to comply with a range of requirements related to climate change, water, soil, biodiversity and landscape as well as to public health, plant and animal health and welfare”.¹³⁷ The details of the strategy will largely depend on Member States agreeing to the drawing up of CAP strategic plans and their content; the new strategy announced that the Commission will make detailed recommendations to each Member State as regards the content of these strategic plans.

The Green Deal declared that agricultural products from third countries could only be imported in future, when they respected existing EU provisions. Such a policy will create difficulties with the trading partners of the EU. For example, numerous pesticides which are prohibited in the EU, continue to be in use in the USA, Canada, Latin America or by other trading partners of the EU, and residues of these chemicals are frequently present on or in imported agricultural products.¹³⁸ Though under WTO rules and also the bilateral trade agreements which the EU concluded, the EU is entitled in law to apply its sanitary and phytosanitary provisions also on imports,¹³⁹ there will be political pressure on the EU to (continue to) allow the import of such agricultural products

7 Preserving and Protecting Biodiversity

7.1 *EU Biodiversity Strategy for 2030*

The EU adopted a strategy to halt biodiversity loss by 2010.¹⁴⁰ When it turned out that the objective would not be reached, a new strategy was adopted to stop biodiversity loss by 2020.¹⁴¹ A mid-term review in 2015 showed that the objective would not either be reached in 2020, unless efforts were considerably

137 Commission, COM (2019) 22 (fn.134), annex, p. 11.

138 See Regulation 396/2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin, OJ 2005, 70, p. 1. Until end of 2019, this Regulation was amended 150 times.

139 See for example the Comprehensive Economic and Commercial Agreement concluded with Canada (CETA), OJ 2017, L 11, p. 3, Articles 5, 21 and 24(5).

140 Commission COM (98) 42. This commitment was repeated in 2002, see Decision 2002/1600, OJ 2002, L 242, p. 1, Article 6.

141 Commission COM (2011) 244, approved by the European Parliament and the Council by Decision 1386/2013 on a general Union environment action programme to 2020 ‘Living well, within the limits of our planet’, OJ 2013, L 354, p. 171, annex, paragraph 28(a) in the following terms: “by 2020, the loss of biodiversity and the degradation of ecosystem services,

stepped up.¹⁴² In 2019, the Commission concluded that “only 23 per cent of species and 16 per cent of habitat are in good health”¹⁴³ and that “(S)ignificant gaps in implementation, enforcement, financing and policy are affecting efforts to protect European ecosystems. Biodiversity loss continues in the EU, even if some progress has been achieved at local level”.¹⁴⁴

The Green Deal mentioned that the EU is not meeting the Aichi targets for 2020. These 20 targets were adopted in 2010 in Aichi (Japan) under the UN Convention on Biodiversity, to which also the EU is a party.¹⁴⁵ The majority of them are qualitative targets, but some require measurable results.¹⁴⁶ The EU has largely ignored the obligations of the Aichi targets and left it to Member States to eventually act in this regard.

The past biodiversity strategies as well as the commitment to respect the Aichi targets suffer from the same problem: they mainly provide for Member States to take action.¹⁴⁷ However, normally Member States have their own agenda and do not care too much about plans or programmes that were adopted by EU institutions. As long as the EU is not able to provide for direct or indirect financial or other sanctions for non-compliance, this situation is not likely to change with a new biodiversity strategy.

The new biodiversity strategy until 2030 was adopted in May 2020.¹⁴⁸ It used strong words as regards the omission to properly protect biodiversity, within the EU and globally. It proclaimed among other measures, that by 2030, 30 per cent of the EU territory and 30 per cent of the EU seas should be classified as protected areas (at present 26 per cent of land – 18 per cent by Natura 2000 and

including pollination, are halted, ecosystems and their services are maintained and at least 15 % of degraded ecosystems have been restored”.

142 Commission COM (2015) 478.

143 Commission COM (2019) 22 (fn.134), p. 10.

144 Commission COM (2019) 149 (fn.113), p. 6.

145 See Decision 93/626, OJ 1993, L 309, p. 1.

146 See for example Aichi *target* (extracts) 1 : by 2020 all subsidies harmful to biodiversity are eliminated, phased out or reformed (this would indeed require a reform of the EU Common Agricultural Policy!); *target* 3: draw up or implement plans for sustainable production and consumption; *target* 5: fisheries have no significant adverse impact on threatened species or vulnerable ecosystems; *target* 7: areas under agriculture are managed sustainably; *target* 11: 10% of coastal and marine areas are conserved; *target* 15: 15% of degraded ecosystems are restored.

147 See also European Economic and Social Committee, OJ 2016, C 487, p. 14, n.11: “The EU’s biodiversity policy is a classical example of a policy of unkept promises at European and national level, despite the fact that the policy has correctly identified the problems and put in place the necessary tools”.

148 Commission, EU biodiversity strategy for 2030. Bringing nature back into our lives. COM (2020) 380. The annex contained some 40 actions with a timetable, which were to be undertaken in the coming months and years.

eight per cent by national measures, and 11 per cent of these (eight per cent by Natura 2000 and three per cent by national measures); soil should be better protected, without, though, the announcement of any legislative action; nature restoration plans would be developed and three billion additional trees would be planted by 2030. The strategy was quite outspoken in estimating the economic benefits for and financial needs of nature protection measures.¹⁴⁹

7.2 *Measures to Address the Main Drivers of Biodiversity Loss*

The Green Deal did not identify the main drivers of biodiversity loss, but referred generally to changes in the uses of land and sea, direct exploitation of natural resources and climate change. It is not either clear, what kind of measures the new biodiversity strategy is intended to suggest. Apart from the fundamental gap that there is no general EU legislation on the protection of biodiversity, the EU does not closely follow the implementation of existing provisions¹⁵⁰ and the Common Agricultural Policy remains first of all an instrument that ensures subsidies for farmers. To take the example of the commitment of the Aichi target no.15, to restore 15 per cent of degraded ecosystems: the EU should have made an inventory of degraded ecosystems in the EU and then steer EU funding to those areas which were identified as priorities for restoration. But no steps were undertaken in this direction.

In the same way, the Commission satisfied itself with the designation, by Member States, of habitats which were then integrated into the Natura 2000 network.¹⁵¹ But the Commission did not insist on measures to bring the Natura 2000 habitat and its species into a favourable conservation status, as requested by Directive 92/43. In the 25 years of existence of Directive 92/43, it only brought about ten cases on specific habitats or species before the Court of Justice. And it is symbolic that its reflection paper on a sustainable Europe in 2030¹⁵² does not spend one single paragraph on biodiversity. It ignores the

149 *Ibidem*. It estimated the benefits of Natura 2000 at 200 to 300 billion euro per year (p. 4); one euro invested in marine protected areas would bring a return of at least three euro (p. 4); the lack of implementing existing nature protection legislation was estimated at 50 billion euro/year (p. 15). And it would be necessary to spend about 20 billion euro per year on nature (p. 179).

150 See also EU Court of Auditors, Special Report 12/2014: Is the ERDF effective in funding projects that directly promote biodiversity under the EU biodiversity strategy to 2020? Special Report 1/2017: More efforts are needed to implement the Natura 2000 network to its full potential.

151 This is the network of habitats of Union interest, established by Directive 92/43 concerning the conservation of natural habitats and of wild fauna and flora, OJ 1992, L 206, p. 7. The network comprises about 28.000 habitats.

152 Commission COM (2019) 22 (fn.134).

inconvenient truth that the environment (biodiversity, nature) can well survive without humans, but humans cannot survive without the environment.

In conclusion, the Commission is very far from applying a policy of “zero tolerance” on the impairment of biodiversity – and thus accepts the slow, but progressive degradation of biodiversity and ecosystems through urban sprawl, infrastructure and leisure projects, intensive agriculture, pollution, excessive water abstraction and other legal or illegal measures.

7.3 *New EU Forest Strategy*

Forests cover about 40 per cent of the territory of the EU. Due to afforestation and natural succession, forest areas grew within the EU, though globally deforestation increases. About 60 per cent of EU forests are owned by private owners which limits public management provisions. Some 42 per cent of forest outputs are used for energy production.

The Commission adopted a forest strategy in 2013¹⁵³ which promoted in particular sustainable forest management and served as the basis to financially support forestry through the Common Agricultural Policy, which amounted to 8.2 billion euro between 2014 and 2020. As the EU will have to decide on its financial planning 2021 to 2027, it appeared appropriate to adopt a new forest strategy. The Green Deal announced that it would concentrate on afforestation, preservation and restoration of EU forests, in order to absorb CO₂, reduce the incidence of forest fires and promote bioeconomy.¹⁵⁴ apart from the announcement to plant at least three billion additional trees, made in the biodiversity strategy 2030, further details of the new strategy are not yet known.

7.4 *Measures to Support Deforestation-free Value Chains*

Measures to stop deforestation concern the global level, where the forest area decreased, between 1990 and 2015, by 129 million hectares.¹⁵⁵ A Commission study found that between 1990 and 2008, the EU imported wood and wood products in quantities that translated into deforested land of 7.3 million hectares per year.¹⁵⁶ Also in view of these figures, the Commission suggested in 2019 a series of non-binding measures to be agreed with wood-producing

153 Commission COM (2013) 659; Report on its implementation COM (2018) 811.

154 Green Deal (fn.1), p. 13.

155 Food and Agricultural Organization FAO: Evaluation of the global forest resources 2015. Rome 2016, p. 11.

156 Commission SWD (2019) 307, p. 1. The figures are not compatible with those of FAO (fn.155).

countries,¹⁵⁷ such as the strengthening of partnership agreements, a reorientation of financial investments and improved access to information on imported wood and its provenance. It explicitly pointed to the adoption also of binding measures.¹⁵⁸

8 Towards a Zero-pollution Ambition for a Toxic Free Environment

8.1 *Chemicals Strategy for Sustainability*

At present, chemicals are mainly addressed by Regulation 1907/2006 which provided that each chemical had to be registered with the European Chemical Agency ECHA by 2018 at the latest.¹⁵⁹ This means that the evaluation of the different chemical substances by ECHA cannot yet be finished, so that the setting of new priorities will be overlapping.

The Green Deal indicated that the new strategy would encourage the development of safe and sustainable alternatives to dangerous chemicals, address the risks posed by endocrine disruptors, hazardous chemicals in products, the cumulative effects of different chemicals and by persistent chemicals, furthermore the effects of micro plastics and pharmaceuticals in the (aquatic) environment.¹⁶⁰

Endocrine disruptors – substances that alter the hormonal system – were subject of a Commission strategy in 1998,¹⁶¹ which mainly dealt with research issues. Subsequently, they were mentioned in several legislative acts, such as on pesticides and biocides, without being the subject of a general strategic approach. Decision 1386/2013 requested a list of endocrine disruptors to be drawn up until 2020, in order to make the substances subject to specific authorizations.¹⁶² This list has not yet been established. Twenty years after its first strategy (!), the Commission announced a global approach on endocrine disruptors in 2018, which again concentrated on research.¹⁶³ In view of the very strong

157 Commission, Stepping up EU action to protect and restore the world's forests, COM (2019) 352.

158 Green Deal (fn.1), p. 14.

159 Regulation 1907/2006 concerning the registration, evaluation, authorisation and restriction of chemicals (REACH), establishing a European Chemicals Agency, OJ 2006, L 396, p. 1. This Regulation was, until the end of 2019, amended 54 times.

160 Green Deal (fn.1), p. 15.

161 Commission COM (1999) 706.

162 Decision 1386/2013 (fn.141), annex, paragraph 50.

163 Commission, Towards a comprehensive European Union framework on endocrine disruptors, COM (2018) 734.

opposition of industry to regulate endocrine disruptors,¹⁶⁴ it is not to be expected that the new strategy will go significantly beyond the Commission's strategy of 2018.

8.2 *Zero Pollution Action Plan for Water, Air and Soil*

The Green Deal promised a zero pollution action plan by 2021. As regards water, a framework directive of 2000 is the most important EU legislative act.¹⁶⁵ It applied to surface and groundwater. It abandoned the previous EU approach to restrict the emissions from industries, agglomerations and other point sources¹⁶⁶ and opted for quality objectives: surface water should reach, by 2015, a good chemical and ecological status, groundwater a good chemical and quantitative status; for heavily altered waters – some 17 per cent of all surface waters- only a “good potential” had to be reached. By 2015, a good chemical status was achieved for 38 per cent and a good ecological status for 40 per cent of surface waters; 74 per cent of groundwater had, by 2015, a good chemical status, and 89 per cent a good quantitative status. In conformity with the directive, the delays of 2015 were prolonged until 2027, but the Commission doubts now that the directive's objectives will be able to be reached even by 2027.¹⁶⁷

The objectives of a directive of 1991 to reduce the nitrate content of waters from agricultural spill-offs to 50 mg per liter¹⁶⁸ or, alternatively reduce the number of livestock per hectare, were not reached, in 2019, by 21 Member States, due, among others, to a refusal to reduce livestock, to generous derogations granted by the Commission and to a deliberate looking aside by national public authorities and the Commission. The Green Deal believes that the strategy ‘from farm to fork’, mentioned above, would “reduce” pollution,¹⁶⁹ but does not explain how this would happen.

164 As an example for such opposition, the reasoning of the applicants in cases General Court, case T-185/17 *Plastics Europe v. ECHA*, ECLI:EU:T:2019:492, and T-636/17 *Plastics Europe v.ECHA*, ECLI:EU:T:2019:639, should be read. The cases concerned Bisphenol A, which the authorities considered to be an endocrine disruptor.

165 Directive 2000/60 establishing a framework for Community action in the field of water policy, OJ 2000, L 327, p. 1.

166 See Directive 2000/60 (fn.165), Article 16, which was inserted at the insistence of the European Parliament. However, that provision was never implemented. Instead, the EU opted for an approach concerning quality objectives, see Directive 2008/105, on environmental quality standards in the field of water policy, OJ 2008, L 348, p. 84.

167 Commission COM (2019) 149 (fn.113), p. 11.

168 Directive 91/676 concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ 1991, L 375, p. 1.

169 Green Deal (fn.1), p. 14.

Urban waste water from agglomerations of more than 2000 persons is also regulated since 1991,¹⁷⁰ and the collection of waste water and its treatment had to be ensured by 2005. In 2019, 21 Member States did still not comply with the directive's requirements.¹⁷¹

Air pollution is mainly regulated by a directive of 2008 which fixed concentration levels of certain pollutants in the air, which were not to be exceeded as of 2010.¹⁷² The directive's application is bad in numerous agglomerations, in particular due to emissions from transport. The Commission did not seriously monitor the application of the directive¹⁷³ and is well aware that the EU is not able to respect, in a foreseeable time, the World Health Organisation's (WHO) recommendations for air quality. The Commission accepts that air pollution causes about 400.000 premature deaths and an economic damage of some 23 billion euro per year,¹⁷⁴ but appeared, in the past, incapable of imposing stricter emission standards on the car industry. Air quality might improve in future with the arrival of electric cars; however, this will take time. And air pollution from other sources – households, offices, industrial installations – will also have to be addressed, but nothing is foreseen in this regard in the Green Deal.

There is no specific EU legislation on soil. A proposal for a directive¹⁷⁵ was not adopted by the Council. The landfill of waste is gradually reduced,¹⁷⁶ but takes time to be realized at local level. The use of soil for infrastructure and leisure projects, urban agglomerations, tourism, military uses or agriculture continues within the Union, which constitutes, legally, a clear case of soil pollution.

170 Directive 91/271 on urban waste water, OJ 1991, L 135, p. 40.

171 Commission COM (2019) 149 (fn.113), p. 10.

172 Directive 2008/50 on ambient air quality and a clear air for Europe, OJ 2008, L 152, p. 1. The directive fixed quality objectives for sulphur dioxide, nitrogen oxide, carbon monoxide, benzene, ozone, lead and particulates (PM 10 and PM 2.5). PM 2.5 objectives had to be complied with by 2015.

173 A general report on the directive's implementation lacks. See however, the Commission's communication on air pollution in general, COM (2018) 330. In 2019, the Commission reported that 18 Member States did not yet respect the requirements for nitrogen oxides (NOx) and 15 Member States did not respect the requirements for PM 10, ten years after the entry into force of these requirements, COM (2019) 149 (fn.113), p. 7s.

174 Commission COM (2013) 918; COM (2018) 330; COM (2018) 446; COM (2019) 22, annex.

175 Commission COM (2006) 232. The proposal identified eight main risks for the EU soils, which remain of actuality: erosion, organic matter decline, contamination, salinisation, compaction, soil biodiversity loss, sealing, landslides and flooding.

176 According to Article 5 of Directive 1999/31 on the landfill of waste, OJ 1999, L 182, p. 1, as amended by Directive 2018/850, OJ 2018, L 150, p. 1, waste that is "suitable for... recovery" shall, by 2030, not be landfilled – an invitation to further increase the incineration of waste. Furthermore, by 2035, only 10 per cent of municipal waste shall be landfilled, etc.

In view of this state of affairs of water, air and soil, the zero-pollution of the Green Deal remains utopian. Much would already be achieved, if the air pollution values of the EU were in conformity with those stricter values of the WHO, if the emission standards for cars were controlled and applied not only for new cars, but also for cars that circulate, if the quality requirements for water of Directive 2008/105 were effectively applied and if at last EU legislation for the protection of soil were adopted and applied. The Green Deal does not give much hope that things in water, air and soil protection will not continue as until now.

8.3 *Revision of Measures to Address Pollution from Large Industrial Installations*

The Commission estimated that large industrial installations – these are some 50.000 installations which are covered by Directive 2010/75¹⁷⁷ – are responsible for 40 per cent of air pollution and 20 per cent of water pollution. Directive 2010/75 does not fix emission limits for installations. It rather requests them to apply the “best available technique”. These techniques are elaborated for each industrial sector in great detail and under very active participation of industry by a working group. Its conclusions are adopted by the Commission and then serve as the basis for national public authorities which have to grant permits to the installations.¹⁷⁸ As the conclusions are themselves rather general, national authorities have a large amount of discretion, what kind of conditions they put into the individual permit.

Until now, the practical application of the directive and in particular of the binding conclusions of the best available techniques for a specific sector, were not monitored by the Commission. There is not either a general report on the directive’s application; this application is thus largely a secret.

The Green Deal did not reveal, how the Commission would reduce pollution from large industrial installations to zero. It just indicated that it would make the directive consistent with climate, energy and circular economy policies – though this does not lead to zero pollution.

There are other sources of pollution. Emissions from medium-sized combustion plants – some 140.000 in the EU – were regulated by a directive of 2015, which followed the model of Directive 2010/75, but these installations are not mentioned in the Green Deal. Other sources of pollution – small and

¹⁷⁷ Directive 2010/75 (fn.69).

¹⁷⁸ See for example Commission Executive Decision 2017/1442 on the best available techniques for large combustion plants, OJ 2017, L 212, p. 1.

medium-sized industrial and craft installations, agricultural activities, ships and airplanes, public and private buildings, tourism and leisure activities – are regulated by Member States (if they are regulated), and an action plan of the Commission will not be able to deal with pollution from such sources. The zero-pollution action plan remains thus an objective which cannot be reached.

9 Mainstreaming Sustainability in All EU Policies

The Green Deal was proposed by the Commission, before the corona-virus pandemic broke out. This pandemic caused considerable economic recession. The EU and individual Member States made huge sums available, in order to avoid an economic backlash. The consequence is that the whole EU multiannual financial framework and other financial instruments will have to be reconsidered. Whether the financial proposals made under the Green Deal will be maintained, amended, adopted or refused, is at present completely uncertain. The following lines are written under this proviso, though the general title of this section (“mainstreaming sustainability in all EU policies”) is not dependant on financial measures. Indeed, Article 11 TFEU contains a clear and precise obligation for all EU institutions and administrations: “Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development”.

9.1 *Proposal for a Just Transition Mechanism Including a Just Transition Fund and a Sustainable Europe Investment Plan*

The Commission calculated that reaching the present 40 per cent reduction targets for climate and energy would require additional investment of 260 billion euro until 2030.¹⁷⁹ In order to “leave no one behind”, it intended to create a Just Transition Mechanism. A Just Transition Fund was proposed in early 2020.¹⁸⁰ Its objective is to support territories which face serious socio-economic difficulties due to the transition to a climate-neutral EU economy by 2050. It shall support the investments for jobs and growth in all Member States and be equipped with 7.5 billion euro for the period 2021 to 2027; an increase of this budget might be possible, should the EU receive further financial resources to its budget. Article 4 of the proposal lists activities which may be financed by

179 Green Deal (fn.1), p. 15, referring to Commission COM (2019) 285.

180 Commission, Proposal for a regulation establishing the Just Transition Fund, COM (2020) 22.

the Fund, on the basis of territorial just investment plans which the Member States shall draw up.

In view of the basic concept that the transition shall be just and socially acceptable by all, the proposed available sums appear very modest and insufficient to reach the Fund's objectives.

With its communication on a European Union Investment Plan,¹⁸¹ though, the Commission embedded the Just Transition Fund into a broader context. The suggested EU investment plan, "will mobilise through the EU budget and the associate instruments, at least one trillion euro over the upcoming decade".¹⁸² 503 billion euro would come from the EU budget, 143 billion of the Just Transition Fund, 114 billion euro from national investments, and 279 billion from private and public investments, to which also sums would have to be added which would be made available by the European Investment Bank.¹⁸³ For environmental expenditure alone, expenses of 39 billion euro are foreseen.

9.2 *Renewed Sustainable Finance Strategy*

The Green Deal suggested to develop a new sustainable finance strategy with three parts.¹⁸⁴ The first part would strengthen sustainable investments. Such investments would have to be defined by an EU act. Also, undertakings would have to better inform on the impact of their activities on climate change, in order to allow investors to orient their investments. In order to increase this transparency, the Commission intends to revise the directive on non-financial information, which requires undertakings with more than 500 employees to regularly inform on "environmental matters", which means a description of the policies pursued by the undertaking in relation to the environment, the risk of adverse effects and the outcome of the policies.¹⁸⁵

The second part of the new strategy should try to facilitate the selection of sustainable investments. The Commission thinks of labels for retail investment products or the development of EU green bond standards – whatever that is. The third part is even more vague and states that "climate and environmental risks will be managed and integrated into the financial system",¹⁸⁶ without being more precise.

181 Commission, Sustainable Europe Investment Plan- European Green Deal Investment Plan, COM (2020) 21.

182 *Ibidem*, p. 1.

183 See for details, *ibidem*, pp. 4 to 6.

184 Green Deal (fn.1), p. 16s.

185 Directive 2014/95 amending directive 2013/34 as regards disclosure of non-financial and diversity information by certain large undertakings and groups, OJ 2014, L 330, p. 1.

186 Green Deal (fn.1), p. 17.

9.3 *Review of the Non-financial Reporting Directive*

The objective of Directive 2014/94 was already mentioned above. The Commission should have reported on the implementation and application of that directive by 6 December 2018, but has not yet done so. It can thus only be guessed, what kind of amendments of Directive 2014/95 the Commission has in mind. An amendment might usefully increase the number of undertakings which have to report on their environmental policies. Furthermore, the undertakings should be obliged to report on their greenhouse gas emissions, other emissions into the air and the water, the handling of their waste, the type of energy used and the respect of relevant existing environmental legislation; all this information should also concern the undertakings' activities in non-EU countries

9.4 *Initiatives to Screen and to Benchmark Green Budgeting Practices of the Member States and of the EU*

Apparently, the Green Deal considered to screen and compare the national budgets of Member States, in order to find out, to what extent sufficient financial means are earmarked for climate change and other activities. A complete comparison would, however, require to also consider the budgets of the regions and of the municipalities and it seems that this would exceed the comparative capacity of the Commission, independently of the question, whether the Member States really would accept such a screening- which would necessarily be accompanied by the publication of the results and thus, in one way or the other, constitute a "name and shame" exercise. If ever such comparisons are made, they will most likely remain confidential – which is not in the interest of an EU which is close to the citizen.

9.5 *Review of Relevant State Aid Guidelines, Including the Environment and Energy State Aid Guidelines*

The Green Deal suggested to review the State aid guidelines on the environment, on energy and for other sectors which are not mentioned. The present guidelines for energy and the environment¹⁸⁷ are based on Article 107(3)(c) TFEU.¹⁸⁸ The objective of the revision is in particular to facilitate the transition

187 Commission: Guidelines on State aid for environmental protection and energy 2014–2020, OJ 2014, C 200 p. 1. The communication laid down, in 254 paragraphs, the details for the possibility of Member States to grant State aid. Any such decision must be cleared with the Commission.

188 Article 107(3) TFEU: "The following may be considered to be compatible with the internal market: (c) aid to facilitate the development of certain economic activities or of certain economic areas, when such aid does not adversely affect trading conditions to an extent contrary to the common interest".

towards climate neutrality, and the phasing out of fossil fuels. A general prohibition of environmentally damaging State aids, often requested, is apparently not in the mind of the Commission.

For other State aids, the Commission suggested to give greater flexibility to Member States, in particular in order to improve the energy efficiency of buildings, district heating, the closure of coal fired power plants and the promotion of the circular economy.¹⁸⁹

9.6 *Align All New Commission Initiatives in Line with the Objectives of the Green Deal and Promote Innovation*

Article 11 TFEU was already mentioned above. If only that provision were applied by the Commission! The Green Deal suggests that in future, the explanatory memorandum “accompanying all legislative proposals and delegated acts will include a specific section explaining how each initiative upholds this principle” (‘a green oath: do no harm’).¹⁹⁰

9.7 *Integration of Sustainable Development Goals in the European Semester*

The Green Deal mentioned the European Semester only with one word.¹⁹¹ The European Semester was installed in 2010/2011. It is a non-binding system to coordinate the economic and budgetary policies of the Member States. Every year, the Commission examines the budgetary actions of the Member States as well as the macro-economic and structural evolution. It then issues recommendations which it transmits in particular to the European Parliament and the Council. The Council may then address a (non-binding) recommendation to a Member State.

The Commission’s communication of 2020 on the European Semester mentioned the Green Deal, the environment and the sustainable development goals of the United Nations. However, the specific recommendations of the Commission are not yet made public and may be further delayed by the corona-crisis; it is thus too early to know, whether the commitments of the Green Deal -for example the move towards zero pollution of water, air and soil – are mentioned, or whether the Commission will limit itself to comments as regards climate change.

189 Commission COM (2020) 21 (fn.181), pp. 13ss.

190 Green Deal (fn.1), p. 19.

191 *Ibidem*, p. 20.

10 The EU as a Global Leader

10.1 *The EU to Lead the International Climate and Biodiversity Negotiations Strengthen the EU's Green Deal Diplomacy Bilateral Efforts to Induce Partners to Act and to Ensure Comparability of Actions and Policies*

These three subsections can be discussed together, as they concern the day-to-day activity of EU diplomacy, without indicating new actions to be undertaken. They mainly aim at mentioning that climate change has a very strong global dimension and needs to be tackled jointly by all States. The Green Deal is aware that the level of ambition of Contracting Parties to the Paris Agreement – including that of the EU! – is insufficient at present, and commits itself to try to improve the present state of international commitments.¹⁹²

One of the problems of the EU negotiation position in international discussion lies in the fact that the EU, in order to make a new proposal, first needs to have agreed, in Council, a common position how to act. When there is existing EU environmental legislation, the position of that legislation can be promoted or defended in international negotiations. However, the EU cannot easily take significant new initiatives at international level, before having agreed its own internal position.

An example of this is the indication in the Green Deal that the EU would try to reach a global agreement on plastics.¹⁹³ At present, there is agreement in the EU that some single use plastics should be forbidden, though even there, some exceptions should apply.¹⁹⁴ The EU could thus not suggest an international agreement to ban all single-use plastics or certain plastics which cannot be easily recycled, or that certain substances in plastics, such as phthalates, be banned. It would have to leave any such further-going initiative to other countries or organization.

Another example is the EU's commitment of reducing greenhouse gases by 2030. At present, the EU agreed to reduce them by 40 per cent, compared to 1990. The further-going proposal of the Von Der Leyen-Commission, to reach a 50 to 55 per cent reduction, cannot be promoted at international level as an *acquis communautaire*, as there is not yet agreement on this. A third example is the statement in the Green Deal that “the EU should stop exporting its waste outside the EU”.¹⁹⁵ Until there is a corresponding conclusion in the European Parliament and the Council to amend the existing, less far-reaching EU legislation, the EU cannot promote such a general export ban at international level.

192 *Ibidem*.

193 Commission COM (2020) 98 (fn.59), p. 20.

194 See directive 2019/904 (fn.101).

195 Green Deal (fn.1), p. 8.

What the Green Deal promises in this section is thus, to deploy best efforts to promote measures on climate change and environmental degradation at international level. This is better than nothing, as for example the trade agreements which the EU concluded until now, promoted in first line free trade and in second line again free trade. Environmental concerns ranked low and were limited to the conclusions that the parties to the agreement agreed that environmental protection was a matter of national (or EU) competence.

10.2 *Green Agenda for the Western Balkans*

The Green Deal mentions with half a phrase that work “is under way for a green agenda for the Western Balkans”,¹⁹⁶ without further detailing the Commission’s plans. From what was said earlier, it is clear that any such agenda will at best try to achieve the more or less full application of existing EU environmental protection provisions in the Western Balkans, and making available some financial means for that. Such initiatives are already working since at least fifteen years and concern the whole Balkan, not only the West. They aim at aligning the legislation of potential accession countries to the requirements of EU law.

11 Working Together – a European Climate Pact

11.1 *Launch of the European Climate Pact*

The Green Deal announced that the Commission would launch, in March 2020, the European climate pact. This timetable became obsolete with the arrival of the corona-crisis. The pact is intended to promote understanding of the challenge of climate change and environmental degradation, incite citizens to come up with own suggestions and ideas, and invite grass-root initiatives.¹⁹⁷ New dates for the launching of the pact are not yet known.

11.2 *Proposal for an 8th Environmental Action Programme*

EU environmental policy was based, since 1973, on action programmes which fixed objectives, principles and priorities and managed largely to obtain a consensus among Member States on the orientation of national and EU environmental policies. In many areas, the EU was able to use such programmes in order to initiate progressive environmental legislation throughout the EU. Since 1993, such programmes had to be adopted by binding decisions (Article 192(3) TFEU).

¹⁹⁶ *Ibidem*, p. 20.

¹⁹⁷ *Ibidem*, p. 22.

The 7th environmental action programme will end in 2020.¹⁹⁸ The Commission concluded that it was implemented by about 60 per cent,¹⁹⁹ while I estimated that it was implemented by 20 per cent only.²⁰⁰ The reason for such discrepancy also lies in the fact that the programme betrayed its title: it hardly contained “actions” to be undertaken, but rather pointed at problems which should be addressed.

The Green Deal did not comment in detail on the proposal to adopt an 8th environmental action programme.²⁰¹ However, it contained a number of actions which would fit well into such a programme, such as:

- a strategy for biodiversity (p. 13)..... reduce adverse impacts by fishery (p. 13)
- effective restoration of forests (p. 14) a toxic-free environment (p. 14)
- zero pollution for water, air and soil (p. 14)restrict the risk from endocrine disruptors (p. 15)
- stop exporting waste (p. 8)..... revise waste legislation (p. 8)
- implement circular economy plan (p. 7).....introduce a right to repair (p. 8)
- reduce false green claims (p. 8)..... reduce air pollution in cities (p. 11)
- reduce chemicals in agriculture (p. 12)restrict fossil fuels subsidies (p. 17)
- shift tax burden from labour to pollution (p. 17)..... make Article 11 TFEU a reality (pp. 4ss)
- improve national access to justice (p. 23) improve EU access to internal review (p. 23)
- review the Aarhus Regulation (p. 23)ensure effective application of EU env.law (p. 23)

These examples do not consider climate-related measures, because the climate change policy has become, this last decade, autonomous to an extent that it is advisable to treat it, administratively, separate from environmental policy, when future actions are planned.

The last example – ensure effective application of EU environmental law – shows quite clearly that the Commission is good in identifying Member States’ deficiencies in the full legal and practical application of EU environmental law.²⁰² However, its policy and instruments to remedy this situation are poor.

The review of the Aarhus Regulation 1367/2006,²⁰³ should start with the Commission itself: indeed, Article 9 of that regulation provides that EU

198 Decision 1386/2013 (fn.141).

199 Commission SWD (2019) 181, p. 12.

200 L.Krämer, *Un autre pacte vert – un 8e programme d’action de l’UE*, *Revue du Droit de l’Union Européenne* 4–2019, p. 85.

201 Green Deal (fn.1), p. 23.

202 See in particular Commission COM (2017) 63 and COM (2019) 149 (fn.113).

203 Regulation 1367/2006 on applying the Aarhus Convention to EU institutions and bodies, OJ 2006, L 264, p. 13.

institutions shall ensure early and effective public participation, when plans or programmes relating to the environment are prepared. It then continues that “where the Commission prepares a proposal for such a plan [a plan relating to the environment] or programme, which is submitted to other Community institutions or bodies for decision, it shall provide for public participation at the preparatory stage”.

The Commission should thus have prepared early and effective public participation, when preparing the Green Deal, the circular economy action plan²⁰⁴ and probably also the Just Transition Fund²⁰⁵ and the Sustainable Europe Investment Fund.²⁰⁶ It did not do so. No sanction exists. These facts should warn the reader that promises and commitments are made easily, but that action speaks louder than words.

12 Final Remark

The Commission adopted the Green Deal and the subsequent implementation documents prior to the outbreak of the corona-virus pandemic. While public health issues fall in the competence of Member States and the EU is limited to some coordination tasks, the economic consequences of the pandemic are very important and require a very strong reaction from the EU (Marshall Plan, Eurobonds etc) – with the risk of the whole EU being shattered, if this reaction is insufficient. It is impossible to state at this moment, to what extent these developments will influence the Green Deal and its implementation.

The Green Deal contains a huge agenda for environmental law and policy. My very subjective suggestions for priorities in research are:

- make Europe an environmental model for the world;
- protect biodiversity, within the EU and outside;
- protect European fresh and marine waters;
- reduce the negative impact of agricultural activities on the environment, in the EU and outside
- transform open-society principles – transparency and openness, participation, access to judicial systems – from largely theoretical slogans to rights for civil society representatives;
- give priority in the EU trade and development policy to the approaching of the UN sustainable development goals, in particular with Cotonou-agreement and other developing countries.

²⁰⁴ Commission COM (2020) 98 (fn.59).

²⁰⁵ Commission COM (2020) 22 (fn.180).

²⁰⁶ Commission COM (2020) 21 (fn.181).